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Application of Mutual Agreement Procedure Article under the Multilateral Instrument to Covered Tax Agreements

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The author traces the development of the mutual agreement procedure article and the reservations for the MAP article under the multilateral instrument. With examples drawn from some selected contracting jurisdictions holding different positions on the MLI, he illustrates how the MAP article is applied to the respective covered tax agreements and offers his comments accordingly.

1. Introduction

Globalization of the economic activities and the proliferation of tax treaty networks have converged to bring the number of mutual agreement procedure (MAP) cases to a record high. It is anticipated that the number of MAP cases will keep on the increasing,[1]with the implementation of the Multilateral Convention to Implement Treaty-Related Measures to Prevent Base Erosion and Profit Shifting.[2]This article aims to examine the legal logic of the reservations under article 16 of the MLI. It analyses, from a technical perspective, how the compatibility clauses interact with the operative clauses. Moreover, concerning the notification clauses in the MLI, which are subject to the reservations made, how does article 16 work in practice with respect to the reservations made by some selected Signatories[3]and Parties[4]to the MLI? Finally, it comments on the shortcomings of the MAP and the synthesized text of the MLI and relevant covered tax agreements (CTAs).

2. Mutual Agreement Procedure

2.1. Scope

The scope of the MAP covers the following issues:

– the determination of a person's residence under article 4 of the Convention;[5]

– the existence of a permanent establishment under article 5 of the Convention;

– the attribution of profits to a permanent establishment under article 7(2) of the Convention;

– the inclusion of profits of associated enterprises and the corresponding adjustments to be made under article 9 of the Convention; and

– the interpretation of non-discrimination under article 24 of the Convention.

2.2. Background

Articles 16(1) of the MLI gives effect to the minimum standard as provided under paragraph 3.1 of the Action 14: 2015 Final Report (making dispute resolution mechanism more effective),[6]which reads as follows:

> Both competent authorities should be made aware of MAP requests being submitted and should be able to give their views on whether the request is accepted or rejected. In order to achieve this, countries should either:

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1. *See* the Mutual Agreement Procedure Statistics for 2017 at: http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm .
2. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (24 Nov. 2016), Treaties IBFD [hereinafter: the Multilateral Instrument, or the MLI]. The signing ceremony for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS took place during the annual OECD Week on 7 June 2017.
3. The term "Signatory" means a state or jurisdiction which has signed this Convention but for which the Convention is not yet in force, art. 2(1)(d) MLI.
4. The term "Party" means (i) A state for which this Convention is in force pursuant to article 34 (Entry into Force); or (ii) a jurisdiction which has signed this Convention pursuant to subparagraph b) or c) of paragraph 1 of article 27 (Signature and Ratification, Acceptance or Approval) and for which this Convention is in force pursuant to article 34 (Entry into Force), art. 2(1)(b) MLI.
5. *Infra* n. 8 .
6. OECD/G20 Base Erosion and Profit Shifting Project, *Making Dispute Resolution Mechanisms More Effective, Action 14: 2015 Final Report* p. 22 (OECD 2015), International Organizations' Documentation IBFD.

– amend paragraph 1 of article 25 of the Convention to permit a request for MAP assistance to be made to the competent authority of either Contracting State,[7] or

– where a treaty does not permit a MAP request to be made to either Contracting State, implement a bilateral notification or consultation process for cases in which the competent authority to which the MAP case was presented does not consider the taxpayer's objection to be justified (such consultation shall not be interpreted as consultation as to how to resolve the case).

On 18 December 2017, the OECD released an updated version of the 2014 version of the Model Tax Convention (the Convention).[8]

Article 25(1) of the Convention replaced "the Contracting State of which he is a resident or, if his case comes under paragraph 1 of article 24, to that of the Contracting State of which he is a national" with "either Contracting State".

Paragraph 1 of article 16 (Improving Dispute Resolution) of the MLI incorporated the provisions of article 25(1) of the Convention in whole. It provides that:

> 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 Agreement, he may, irrespective of the remedies provided by the domestic law of those contacting jurisdictions, present his case to the competent authority of either contracting jurisdiction.[9] 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 Agreement.

2.3. Wider access

Article 25(1) of the Convention makes available to taxpayers affected, regardless of whether they have exhausted all the remedies available under the domestic law, an MAP aimed at resolving the dispute by agreement between competent authorities.

The proceedings commence with the presentation of the taxpayer's objections, which takes place exclusively at the level of dealings between the taxpayer and the competent authority (the CA) of the state to which the case was presented. The provisions of article 25(1) give the taxpayer concerned the right to apply to the CA of either state. The CA is under an obligation to endeavour to resolve the dispute by mutual agreement between the two CAs "if the objection appears to be justified and if it is not itself able to arrive at a satisfactory solution on its own" as provided in paragraph 2 of article 25, as incorporated in article 16(2) of the MLI.

As paragraph 17 of the Commentary on article 25 clarifies, the option provided to the taxpayer to present his case to the CA of either contracting state is intended to reinforce the general principle that access to the MAP should be as widely available as possible; further, it must provide flexibility. This option also ensures that the decision whether to proceed to the subsequent stage of the MAP is open to consideration by *both* CAs.

3. Reservations under Article 16 of the MLI

According to article 28(1) of the MLI, paragraph 5 of article 16 permits a Party to make reservations for the following paragraphs not to apply to the corresponding provisions of the CTA:

– the first sentence of paragraph 1of article 16 (article 16(5)(a));

– the second sentence of paragraph 1 of article 16 (article 16(5)(b)); and

– the second sentence of paragraph 2 of article 16 (article 16(5)(c)).

Article 28(1) expressly prohibits a Party from making additional reservations for the provisions of article 16, other than that as mentioned above.[10]

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

The CTAs concluded on the basis of the 2014 or earlier versions of the Convention do not permit a person to present his MAP request to the CA of either contracting jurisdiction. For the reason of practical administration, article 16(5)(a) permits a Party to the MLI to make reservations not to apply the first sentence of article 16(1) to its CTAs by adopting the alternative rules for the first sentence of article 16(1). It reads:

> A Party can only opt out of the first sentence in Article 16(1) on the basis that
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> i. 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

7. The term "Contracting State" is used in the Model Tax Convention while the term Contracting Jurisdiction is used in the MLI, which, as defined under para. 1(c) of art. 2 of the MLI, means a party to the Covered Tax Agreement.
8. *OECD Model Tax Convention on Income and on Capital: Condensed Version* (2017), Models IBFD.
9. *See* para. 15, Bullet 1, *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (OECD), Treaties IBFD [hereinafter: *Explanatory Statement*].
10. A contracting jurisdiction is allowed to ring fence the extent to which the MLI would modify its CTAs in accordance with the provisions of art. 28(1) only.

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*

ii. *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.* [Emphasis added.]

As mentioned above at section 2.2. , article 16(5)(a) is an alternative to the first sentence of article 16(1) that provides that a taxpayer can request an MAP if the taxpayer believes that he is not taxed in accordance with the terms of the CTA. Where a contracting jurisdiction considers the taxpayers should not have the option of "presenting the case to either contracting jurisdiction", it may reserve its right for the first sentence of article 16(1) to not apply to the provisions of the CTA on the basis that the CA should as an administrative measure implement a bilateral notification process under article 16(5)(a)(ii).

3.2. Article 16(5)(b): Reservation for the second sentence of paragraph 1 – Three-year time limit to present a case

Paragraph 5(b) of article 16 of the MLI provides that:

> A Party may reserve that right for the second sentence of paragraph 1 not to apply to its Covered Tax Agreements that do not provide that the case referred to in the first sentence of paragraph 1 must be presented within a specific time period on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS package by ensuring that for the purposes of all such Covered Tax Agreements the taxpayer referred to in paragraph 1 is allowed to present the case within a period of at least three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement;

This reservation would only be made by a contracting jurisdiction to a CTA if its domestic regulations apply automatically and are more favourable in their effects to the taxpayer, either because they allow a longer time for presenting objections or because they do not set any time limits for such purpose.[11]

Paragraph 2 of article 16 of the MLI provides that:

> 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. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions.

In respect of the first sentence of article 16(2), the case must satisfy two requirements: "the objection appears... justified" and "the CA is not itself able to arrive at a satisfactory solution" before it can proceed to the MAP stage.

Paragraph 2 of article 16 consists of two sentences. For the first sentence, a contracting jurisdiction is not permitted to make reservation. For the second sentence, a contracting jurisdiction is permitted to make reservation, in the manner under articles 7(2) and 9(1) of the Convention and for the reasons, as set out in what follows.

3.3. Article 16(5)(c): Reservation for the second sentence of paragraph 2 – Disregarding time limit when implementing a resulting mutual agreement

> A Party may reserve its right for the second sentence of paragraph 2 not to apply to its Covered Tax Agreements on the basis that for the purposes of all of its Covered Tax Agreements:

i) any agreement reached via the mutual agreement procedure shall be implemented notwithstanding any time limits in the domestic laws of the Contracting Jurisdictions; or

ii) it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS package by accepting, in its bilateral treaty negotiations, a treaty provision providing that:

A) the Contracting Jurisdictions shall make no adjustment to the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting Jurisdictions after a period that is mutually agreed between both Contracting Jurisdictions from the end of the taxable year in which the profits would have been attributable to

11. *See* para. 201 *Explanatory Statement* .

the permanent establishment (this provision shall not apply in the case of fraud, gross negligence or wilful default); and

B) the Contracting Jurisdictions shall not include in the profits of an enterprise, and tax accordingly, profits that would have accrued to the enterprise but that by reason of the conditions referred to in a provision in the Covered Tax Agreement relating to associated enterprises have not so accrued, after a period that is mutually agreed between both Contracting Jurisdictions from the end of the taxable year in which the profits would have accrued to the enterprise (this provision shall not apply in the case of fraud, gross negligence or wilful default).

The explanation "any agreement reached shall be implemented notwithstanding any time limit in the domestic law of the contracting jurisdictions" suggests an open-ended commitment. In other words, regardless of the number of years the contracting jurisdiction making the initial adjustment has gone back to, the taxpayer should be assured of an appropriate adjustment in the other contracting jurisdiction. Some contracting jurisdictions might consider that such an open-ended commitment is unreasonable a matter of practical administration.[12]The domestic law of some of the Parties to the MLI may be at odds with the time limit as provided in the second sentence of paragraph 2. In certain extreme cases, a contracting jurisdiction may prefer not to enter into an MAP, the implementation of which would require the domestic statute of limitation had to be disregarded.[13]

To give flexibility to the application of the second sentence of article 16(2) to the CTA, element 3.3 of the Action 14 minimum standard in the 2015 Final Report provides that:

> Countries should include in their tax treaties the second sentence of paragraph 2 of Article 25 of the Model Tax Convention ("Any agreement reached shall be implemented notwithstanding any time limit in the domestic law of the Contracting State"). Countries that cannot include the second sentence of paragraph 2 of Article 25 in their tax treaties should be willing to accept alternative treaty provisions that limit the time during which a Contracting State may make an adjustment pursuant to Article 9(1) – Associated Entity or Article 7(2) – Business Profits attributable to a permanent establishment, in order to avoid the late adjustments with respect to which MAP relief will not be available.

As paragraph 39 of the Action 14: 2015 Final Report (Making Dispute Resolution Mechanisms More Effective) clarifies, such a country (contracting jurisdiction) that reserves its right not to apply the second sentence of article 16(2) should accept the alternative provision that limits the time during which a contracting jurisdiction may make adjustments in the manner pursuant to article 9(1) or article 7(2) of the Convention. That country would satisfy the requirement of the minimum standard where these alternative treaty provisions are drafted to reflect the time limits for adjustments provided for in that country's domestic law.

4. Structure of the MLI

The structure of the MLI consists of an operative clause, a compatibility clause, a reservation clause, and a notification clause. This structure is also replicated to article 16, as tabulated below:

	Article 16		
Operative clauses 16(1), (2), and (3)	16(1) If not taxed in accordance with CTA, the person to present case to CA of either contracting jurisdiction, regardless of remedy under domestic law; Case must be presented within 3 years of first notification of such action	16(2) If case appears to be justified and cannot be resolved unilaterally, CA to endeavour to resolve case by MAP; Agreement reached shall be implemented regardless time limit under domestic laws	16(3) CA to endeavour to resolve by MAP difficulties and doubts arising as to interpretation and application of CTA; CA to consult each other on double taxation not provided for under CTA
Compatibility clause (4)	16(4)(a)(i) first sentence of 16(1) shall *apply in place or in absence of* [1]provisions in a CTA; 16(4)(a)(ii) second sentence of 16(1) shall *apply in place or in absence of* [1]provisions of a CTA	16(4)(b)(i) first sentence of 16(2) *shall apply in absence of* [1]provisions of a CTA; 16(4)(b)(ii) second sentence of 16(2) *shall apply in absence of* [1]provisions of a CTA	16(4)(c)(i) first sentence of 16(3) *shall apply in absence of* [1]provisions of a CTA; 16(4)(c)(ii) second sentence of 16(3) shall apply *in absence of* [1]provisions of a CTA
Reservation clause (5)	16(5)(a) for first sentence not to apply; 16(5)(b) for second sentence not to apply	16(5)(c) for second sentence of 16(2) not to apply	
Notification (6)	Effective if Parties making no reservation under 16(5)(a) notify Depositary under 16(6)(a); Effective if Parties making no reservation under 16(5)(b) notify Depositary under 16(6)(b)(i) or (ii)	Effective if Parties notify Depositary under 16(6)(c)(i); Effective If Parties making no reservation under 16(5)(c) notify Depositary under 16(6)(c)(ii)	Effective if Parties notify Depositary under 16(6)(d)(i); Effective if Parties notify Depositary under 16(6)(d)(ii)

1 The compatibility clause does not directly modify the covered tax agreements. Instead, it modifies the application of the CTAs by using the following designated phrases: "shall apply in place of", "shall apply to", "shall apply in the absence of", or "shall apply in place of or in the absence of" an existing provision in a CTA. Note that if any one of the aforesaid phrases appears in other place of the MLI, it is not used with the same meaning as that described under the compatibility clause.

Sections 4.1. and 4.2. deal with the interaction between the compatibility clause 16(4)(a) and the operative clause article 16(1), between compatibility clause 16(4)(a) and the notification clauses article 16(6)(a) and (b).

12. OECD/G20, *Making Dispute Resolution Mechanisms More Effective, Action 14: 2015 Final Report* p. 27, para. 40 (OECD 2015), International Organizations' Documentation IBFD.
13. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 25* para. 39 (2017), Models IBFD.

Sections 4.3. and 4.4. deal with the interaction between the compatibility clause article 16(4)(b) and the operative clause article 16(2), between the compatibility clause article 16(4)(b) and the notification clause article 16(6)(c).

Sections 4.5. and 4.6. deal with the interaction between the compatibility clause article 16(4)(c) and the operative clause article 16(3), between the compatibility clause article 16(4)(c) and the notification clause article 16(6)(d).

4.1. First sentence of article 16(1) – Presenting a case to CA of either contracting jurisdiction

Article 16(4)(a)(i) provides that the first sentence of article 16(1) shall in place of, or in the absence of, provisions of a CTA that provides that where a person considers that the actions of one or both of the CAs result or will result for that person in taxation not in accordance with the provisions of the CTA, that person may, irrespective of the remedies provided by the domestic law of those contracting jurisdictions, present the case to the CA of the contracting jurisdiction of which that person is a resident, including provisions under which, if the case presented by that person comes under the provisions of a CTA relating to non-discrimination based on nationality, the case may be presented to the CA of the contracting jurisdiction of which that person is a national.

Pursuant to article 16(6)(a), each Party that has not made reservation under article 16(5)(a), shall notify the Depositary of whether each of its CTAs contains a provision described in article 16(4)(a)(i) (presenting a case to either CA), and if so, the article and paragraph number of each such provision. Where all Parties make a matched notification, the first sentence of article 16(1) shall replace that CTA provision. In other cases, the first sentence of article 16(1) shall supersede the provision of the CTA only to the extent of incompatibility with that sentence.

4.2. Second sentence of article 16(1) – Three-year limit to request MAP

Article 16(4)(a)(ii) provides that the second sentence of article 16(1) shall apply in place of provisions of a CTA that provide that a case referred to in the first sentence of paragraph 1 must be presented within a specific time period that is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the CTA, or in the absence of a provision of a CTA describing the time period within which such a case must be presented.

Pursuant to article 16(6)(b), each Party that has not made a reservation under 16(5)(b) shall notify the Depositary of:

(1) the list of its CTAs which contain a provision that provides that a case referred to in the first sentence of paragraph 1 must be presented within a specific time period that is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the CTA, as well as the article and paragraph number of each such provision; a provision of a CTA shall be replaced by the second sentence of paragraph 1 where all contracting jurisdictions have made such a notification with respect to that provision; in other cases, subject to clause (2), the second sentence of paragraph 1 shall supersede the provisions of the CTA only to the extent that those provisions are incompatible with the second sentence of paragraph 1;

(2) the list of its CTAs which contain a provision that provides that a case referred to in the first sentence of paragraph 1 must be presented within a specific time period that is at least three years from the first notification of the action resulting in taxation not in accordance with the provisions of the CTA, as well as the article and paragraph number of each such provision; the second sentence of paragraph 1 [three-year time limit] shall not apply to a CTA where any contracting jurisdiction has made such a notification with respect to that CTA.

4.3. First sentence of article 16(2) – CA obligated to endeavour to resolve an objection

Article 16(4)(b)(i) provides that the first sentence of article 16(2) shall apply in the absence of a provision that provides that a CA to which the case has been presented shall endeavour to resolve that case by mutual agreement with the CA of the other contracting jurisdiction where the receiving CA considers the case to be justified and is unable to arrive at a satisfactory solution itself.

Pursuant to article 16(6)(c)(i), the first sentence of article 16(2) will be added to a CTA if both Parties to the CTA make a matched notification to the Depositary of the affected CTAs.

4.4. Second sentence of article 16(2) – Disregarding time limit when implementing a resulting mutual agreement

Article 16(4)(b)(ii) provides that the second sentence of article 16(2) shall apply in the absence of a provision in a CTA providing that any mutual agreement reached shall be implemented regardless of any domestic law time limits that might otherwise apply to such tax disputes.

Pursuant to article 16(6)(c)(ii), the addition of the second sentence of article 16(2) to the relevant provision of a CTA only takes effect if both Parties to the CTA do not make the reservation contained in article 16(5)(c) (to not apply the second sentence of article 16(2) to its CTAs) and make a matched notification to the Depositary of the affected CTAs.

4.5. First sentence of article 16(3) – CA obligated to endeavour to resolve interpretation or application of a CTA

Article 16(4)(c)(i) provides that the first sentence of article 16(3) obligates the CAs to endeavour to mutually resolve any difficulties or doubts regarding the interpretation or application of the relevant CTA. That first sentence will be added to the CTA that does not contain corresponding provisions. Pursuant to article 16(6)(d)(i), the addition of such a provision will only take effect if both the Parties to the CTA make a matched notification to the Depositary of the affected CTA.

4.6. Second sentence of article 16(3) – CA to consult each other in cases of double taxation not provided for in a CTA

Article 16(4)(c)(ii) provides that the second sentence of article 16(3) obligates the CA to consult together in order to eliminate double taxation in cases not provided for by the relevant CTA. That second sentence will be added to CTAs that do not contain a corresponding provision. Pursuant to article 16(6)(d)(ii), the addition of such a provision is only effective if both Parties to the CTA make a matched notification to the Depositary of the affected CTA.

5. Application of Article 16 of MLI to CTAs

5.1. Practical aspects

The table below shows the reservations, as denoted by letter "Y", on article 16 made under article 16(5) by some selected Signatories and Parties as permitted under article 28 – Reservations, as of 29 January 2019, using information from the MLI database's matrix of options and reservations, which is provided by the contracting jurisdictions to the OECD Depositary.

In respect of Australia, Japan, Singapore and the United Kingdom, the positions on the reservation, if made under article 16(5), became definitive on the date of deposit by the respective contracting jurisdiction to the Depositary of the instrument of ratification, acceptance or approval.[14]

In respect of Canada, China (PRC) and Hong Kong, the positions on reservation are provisional, subject to confirmation on the date of deposit of the Instrument of ratification, acceptance or approval,[15]as tabulated below:

Jurisdiction	Status	16(5) (a)	16(5) (b)	16(5) (c)(i)	16(5) (c)(ii)
Australia	Definitive	[1]			
Canada	Provisional	Y			Y
China (PRC)	Provisional	Y			
Hong Kong	Provisional				
Japan	Definitive				
Singapore	Definitive	Y			
United Kingdom	Definitive				

1 The blanks are as per MLI positions of each selected contracting jurisdiction.

The following discussion illustrates how article 16 works in practice from the United Kingdom's perspective.

5.2. Article 16(5)(a): Reservation for first sentence of article 16(1) – Access to MAP

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. This means that a person requesting a 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). In contrast, Australia, Hong Kong, Japan and the United Kingdom have not made such a reservation. In respect of the application of the first sentence of article 16(1) to the Australia-United Kingdom CTA,[16]a person who requests an MAP can present his case to the CA of *either* contracting jurisdiction.[17]The same holds for the Hong Kong-United Kingdom CTA[18]and Japan-United Kingdom CTA[19]with respect to the first sentence of article 16(1).

14. Para. 2 of art. 34 provides that "[f]or each Signatory ratifying, accepting, or approving this Convention ..., the Convention shall enter into force on the first day of the month following the expiration of a period of three calendar months beginning on the date of the deposit by such Signatory of its instrument of ratification, acceptance or approval".
15. Canada, China (PRC), and Hong Kong did not provide the OECD Depositary with a list of reservation at the time of signature. They provided a provisional list of expected reservations as required under art. 28(7) of the MLI.
16. *Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains* (21 Aug. 2003), Treaties IBFD.
17. *See* HM Revenue & Customs website: https://www.gov.uk/government/collections/tax-treaties .

It appears that in respect of the application of first sentence of article 16(1) to the CTAs, the United Kingdom and Singapore have adopted different positions. The same holds for the application of the first sentence of article 16(1) to the Canada-United Kingdom CTA[20]and the China (PRC)-United Kingdom CTA;[21]and similarly to the Australia-Canada CTA,[22]the Australia-China (PRC) CTA[23]and Australia-Singapore CTA,[24]to the Japan-Canada CTA,[25]the Japan-China CTA,[26]and Japan-Singapore CTA,[27]and to the Hong Kong-Canada CTAs.[28]

It is observed that Hong Kong and Singapore have not signed any tax treaty.[29]

China (PRC) and Hong Kong have signed an arrangement for the avoidance of double taxation, but it is not a CTA as defined. Politically Hong Kong is part of China. China includes Hong Kong as a signatory of the Multilateral Convention on 7 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) shall:
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> 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
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> 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 principles. First, a reservation is made on a unilateral basis.[30]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 to existing CTAs. That is, it does not work only one way, but works both ways. In general, a reservation shall apply symmetrically.

Since one of the Parties to the bilateral CTAs between the United Kingdom and Singapore reserves its right not to apply the first sentence of article 16(1) to all of its CTAs including the Singapore-United Kingdom CTA,[31]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 Singapore has adopted. However, the same person can present his MAP request to the CA of either contracting jurisdiction if Singapore 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 the United Kingdom is not permitted to make additional reservation to bring it in line with Singapore, except for the situation described under paragraph 5 of article 29 – Notifications.[32]Article 28 of the MLI only works in one direction in making changes to the scope of

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18. *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains* (21 June 2010), Treaties IBFD.
19. *Convention between the United Kingdom of Great Britain and Northern Ireland and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains* (2 Feb. 2006) (as amended through 2013), Treaties IBFD.
20. *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains* (8 Sept. 1978), Treaties IBFD.
21. *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains* (27 June 2011) (as amended through 2013), Treaties IBFD.
22. *Convention between Canada and Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (21 May 1980) (as amended through 2002), Treaties IBFD
23. *Agreement between the Government of Australia and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (17 Nov. 1988), Treaties IBFD.
24. *Agreement between the Government of the Republic of Singapore and the Government of the Commonwealth of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (11 Feb. 1969) (as amended through 1989), Treaties IBFD.
25. *Convention between the Government of Canada and the Government of Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (7 May 1986) (as amended through 1999), Treaties IBFD.
26. *Agreement between the Government of Japan and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (6 Sept. 1983), Treaties IBFD.
27. *Agreement between the Government of Japan and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (9 Apr. 1994) (as amended through 2010), Treaties IBFD.
28. *Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (11 Nov. 2012), Treaties IBFD.
29. Hong Kong and Singapore concluded an Airline and Shipping Income Tax Treaty on 28 Nov 2003. *See* *Agreement between the Republic of Singapore and the Hong Kong Special Administrative Region of the People's Republic of China for the Avoidance of Double Taxation on Income of an Enterprise Operating Ships or Aircraft in International Traffic* (28 Nov. 2003), Treaties IBFD, also available at https://www.ird.gov.hk/eng/tax/dta_air_ship.htm .
30. Reservation does not require acceptance, but reservation for the arbitration Articles under Part VI of the Convention require acceptance under para. 2 of art. 28 of the MLI.
31. *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains* (12 Feb. 1997) (as amended through 2012), Treaties IBFD.
32. Art. 29(5) provides that "A Party may extend at any time the list of agreements notified under clause ii) of subparagraph a) of paragraph 1 of article 2 (Interpretation of Terms) by means of a notification addressed to the Depositary. The Party shall specify in this notification whether the agreement falls within the scope of any of the reservations made by the Party which are listed in paragraph 8 of article 28 (Reservations). The Party may also make a new reservation described in paragraph 8 of article 28 (Reservations) if the additional agreement would be the first to fall within the scope of such a reservation."

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.

5.3. Article 16(5)(b): Reservation for second sentence of article 16(1) – Three-year time limit to present MAP request

In respect of the Singapore-United Kingdom CTA, article 26(1) does not provide for a time period during which a person must present his case within three years from the first notification that he is not taxed in accordance with the terms of the CTA. In the absence of such provision, article 16(4)(a)(ii) of the MLI provides that the sentence "[t]he 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" shall be added to the end of article 26(1) of the Singapore-United Kingdom CTA. The second sentence of article 16(1) shall apply to the relevant provision of the CTA where both Parties make a matched notification. The same holds for Australia-United Kingdom CTA and the China (PRC)-United Kingdom CTA.[33]

Pursuant to the compatibility clause 16(4)(a)(ii), the modified text of article 26(1) of the Singapore-United Kingdom CTA will provide that:

> (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 agreement, he may, irrespective of the remedies provided by the domestic law of those states, present his case to the competent authority of the contracting state of which he is a resident or, if his case comes under paragraph (1) of Article 25 of this agreement, to that of the contracting state of which he is a national. *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 [added to the end of the first sentence]* [[34]]

In respect of the CTAs that contain a provision that provides that a case referred in the first sentence of article 16(1) must be presented with a specific time period that is at least three years from the first notification that the person affected is not taxed in accordance with the provisions of the CTA, the second sentence of article 16(1) shall not apply accordingly. Pursuant to article 16(6)(b)(ii) of the MLI, the United Kingdom has notified the Depositary that the Canada-United Kingdom CTA, the Hong Kong-United Kingdom CTA and the Japan-United Kingdom CTA contain such a provision.[35]

5.4. Article 16(5)(c)(ii): Reservation for second sentence of article 16(2) – Disregarding time limit when implementing a resulting mutual agreement

The Australia-United Kingdom CTA, the Japan-United Kingdom CTA, and the Singapore-United Kingdom CTA do not contain a provision that provides that any 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 provision of the three aforesaid CTAs. Australia, Japan and Singapore have not made reservation pursuant to article 16(5)(c). Therefore the United Kingdom has included Australia, Japan and Singapore in the list of notification to the Depositary that the respective CTAs do 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 Australia-United Kingdom CTA where both Parties make a matched notification to the Depositary. The same holds for the Japan-United Kingdom CTA, and the Singapore-United Kingdom CTA.

On the other hand, the Canada-United Kingdom CTA, the China (PRC)-United Kingdom CTA and the Hong Kong-United Kingdom 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). However, it is noted that Canada unilaterally reserves its right for the second sentence of article 16(2) not to apply to its CTAs, pursuant to article 16(5)(c).[36]Therefore, the second sentence of article 16(2) shall not apply to the Canada-United Kingdom CTA, and any agreement reached shall be implemented subject to the domestic statute of limitation.

6. Conclusion

On the one hand, any mutual agreement reached under paragraph 2 of the MAP article is not binding on the taxpayer if not accepted, and the taxpayer can continue with the remedies as provided under the domestic law. On the other hand, the MAP article only requires the CAs to use their best endeavours to resolve by mutual agreement the case that the affected taxpayer has presented to them but they are not obligated to achieve a result. Consequently, any issues of the case over which the CAs cannot reach an agreement will remain unresolved for an unlimited period of time. In this regard, paragraph 5 of article 25 of the Convention provides that where the CAs are unable to reach an agreement to resolve the case pursuant to paragraph 2 within two years from the date when all the required

33. *See* the Australia-United Kingdom CTA and the China (PRC)-United Kingdom CTA at HMRC website: https://www.gov.uk/government/collections/tax-treaties .
34. The combination of the first sentence of art. 26(1) of the Singapore-United Kingdom CTA and the second sentence of art. 16(1) produces a synthesised text, which meets the requirement of the element 3.1 of the Action 14 minimum standard. This synthesized texts shall take effect in each contracting jurisdiction with respect to the Singapore-United Kingdom CTA, pursuant to art. 35 – Entry in Effect.
35. *See* the documents listing the reservations and notifications made by the United Kingdom of Great Britain and Northern Ireland upon deposit of the Instrument of ratification, acceptance or approval, 29th June 2018.
36. It is also noted that Monaco also reserves its right for the second sentence of art. 16(2). *See* MLI positions released by the OECD Depositary: http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf .

information has been provided, any unresolved issue arising from the MAP case shall be submitted to arbitration if the person so requests in writing. Due to different domestic laws and policy consideration, the arbitration article is only included in Part VI of the MLI as an opt-in provision. If the contracting jurisdictions do not choose to adopt the arbitration article, both the affected taxpayer and the CAs are left without such a remedy for the unresolved issues of the MAP case in question, independently of the question whether any legal remedies have been exhausted.

To overcome the difficulty in understanding the technicalities of the MLI, some countries (including Japan, Poland and the United Kingdom) have been preparing the synthesized texts of the MLI and the individual CTAs. However, synthesized texts are no substitute for the comprehension of the reasoning that provides the base for the logic of the MLI rules. Legal texts in most cases require us to or not to do something. They do not necessarily provide the reason for that, which the author thinks is the tasks for those who do legal analysis.