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Multilateral Instrument: Analysis of Options and Notifications with Reference to the Prevention of Treaty Abuse Article

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This article analyses the technical rules of the options and notifications in the Multilateral Instrument, the legal structure and the game-tree structure of the MLI, and the legal principle underlying the reservations entered into by selected contracting jurisdictions with respect to article 7 – Prevention of Treaty Abuse. With the aid of the game-tree structure, it also considers how the selected contracting jurisdictions apply the provisions in article 7 to the Covered Tax Agreements and the policy choices available to the policy makers. The author pays attention to specific bilateral relations, especially those involving China, Hong Kong and Singapore.

1. Introduction

The BEPS Action Plan has identified treaty abuse as one of the most important sources of BEPS concerns. OECD and non-OECD government tax treaty experts agree that changes to the model tax conventions, as well as the bilateral tax treaties based on the OECD model tax conventions, are required to stop or significantly reduce the treaty abuses.[1]In October 2015, the OECD published 15 final reports that documented a total of 15 action plans, including the Final Report "Preventing the Granting of Treaty Benefits in Inappropriate Circumstances" under Action 6,[2]and the Final Report "Developing a Multilateral Instrument to Modify Bilateral Tax Treaties" under Action 15.[3]The output of the Action 15 Final Report is a piece of public international law, titled "the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting".[4]

The Action 15 Final Report recognized that the sheer number of bilateral treaties makes updates to the treaty network burdensome and time consuming, limiting the efficiency of multilateral efforts. As a result, the current network is not well-synchronized with the model tax conventions. Since the actual treaties are many years behind the models on which they are based, any multilaterally agreed changes to the models take a generation to implement.[5]This problem would become more severe if varied anti-BEPS measures were included in thousands of new bilateral protocols to the current tax treaties that exceed 3,000. The MLI has brought about a step change to produce synchronized results that would save resources and improve the clarity of BEPS-related international tax treaty rules. The MLI operates to modify tax treaties between two or more parties to the MLI. It will not function in the same way as an amending protocol to a single existing treaty, which would directly amend the text of the Covered Tax Agreement (CTA); instead, it will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures.[6]

The objectives of the MLI are threefold, namely:

(1) to implement the treaty-related measures in order to close the loopholes of the tax treaties which, having been developed in use for almost a century, cannot cope with the challenges of globalization of the economy;

(2) to provide the appropriate flexibility in the level of commitment by the contracting jurisdictions in order to enable effective coordination to tackle BEPS while preserving state sovereignty in tax matters; and

(3) to ensure transparency and clarity for all stakeholders.

In this regard, the MLI can be examined from two perspectives, namely:

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1. OECD/G20, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: 2015 Final Report* p. 15, para. 4 (OECD 2015), Primary Sources IBFD [hereinafter Action 15 Final Report].
2. OECD/G20, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Action 6: Final Report* (OECD 2015), Primary Sources IBFD [hereinafter Action 6 Final Report].
3. *Supra* n. 1 .
4. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (24 Nov. 2016), Treaties & Models IBFD [hereinafter the Multilateral Instrument, or the MLI].
5. OECD/G20, *supra* n. 1 , p. 15, para. 5.
6. OECD, *Explanatory statement to the multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting* para. 13, Treaties & Models IBFD [hereinafter *Explanatory Statement*].

– the legal doctrine based on the Vienna Convention on the Law of Treaties[7] as well as existing precedents in various fields of public international law; and

– the technicalities of the option and notification mechanisms to fulfil each of those objectives.

Article 7 of the MLI replicates article 29 of the Model Tax Convention – Entitlement of Benefits.[8] A contracting jurisdiction that adopts the prevention of treaty abuse article can satisfy one of the four minimum standards developed in the course of the OECD/G20 BEPS Project.[9] Article 7 contains three opt-in provisions and four reservations, and it could best be used as an example to shed light on the underlying legal principles, the technical rules and structures of the MLI. The knowledge gained from the analysis of the MLI will lead to a better understanding of the crux of the prevention of treaty abuse article and the mechanism by which the options and notifications work to modify the application of MLI provisions to the CTAs with respect to article 7 in particular, and the other articles of the MLI in general.

In this article:

– Section 2. studies the opt-in provisions available in article 7 for the parties to the MLI to make commitment in addition to the BEPS minimum standard with respect to the prevention of treaty abuse.

– Section 3. presents the overview of article 7 and policy considerations.

– Section 4. examines the legal structure of article 7, and the technical rules governing the interaction between the operative and the compatibility clauses.

– Section 5. covers notifications and reservations (opt-out provisions).

– Sections 6. and 7. appraise how the option rules and game-tree structure in article 7 are used to achieve the objective of preventing treaty abuse, and uses examples to show how the selected contracting jurisdictions apply the principal purpose test and simplified limitation of benefit provisions in article 7 to the CTAs, subject to the reservations made.

The author offers his concluding remarks in section 8.

2. Anti-Treaty Abuse Rules in the MLI

2.1. Action 6 – 2015 Final Report[10]

Action 6 of the OECD/G20 BEPS Project identifies treaty abuse, and in particular treaty shopping, as one of the most important sources of BEPS concerns. Taxpayers engaged in treaty shopping and other treaty abuse strategies obtain treaty benefits in situations where these benefits are not intended to be granted, and it results in the erosion of revenue bases for the respective countries. Therefore, countries around the globe have agreed to include anti-abuse provisions in their tax treaties, which include a minimum standard to counter treaty shopping, and allow certain flexibility in the implementation of the minimum standard taking into account that those anti-abuse provisions need to be adapted to each country's specificities and to the circumstances of the negotiation of bilateral tax treaties.

The Action 6 Final Report includes three options to address the situations of treaty abuse,[11] which are replicated in article 7 of the MLI.

The first of these alternatives is a general anti-abuse rule based on the principal purpose of transactions or arrangements.

In addition to this principal purpose test (the PPT), the 2015 Final Report provides two versions (a simplified and detailed version) of a specific anti-abuse rule, the limitation on benefits (LOB) provision, which limits the availability of treaty benefits to persons that meet certain conditions.[12] The 2015 Final Report states that countries, at a minimum, should implement:

– a PPT only;

– a PPT and either a simplified or detailed LOB provision (the PPT-SLOB or PPT-DLOB, denoted as "PPT-plus"); or

– a detailed LOB provision, supplemented by a mechanism either that would deal with conduit arrangements not already dealt with in tax treaties or a PPT (the DLOB-conduit-structure or DLOB-and-PPT, denoted as "DLOB-plus").

2.2. Changes to OECD Model

After the publication of the Action 6 Final Report, the OECD has incorporated the minimum standard with respect to the prevention of treaty abuse in article 29 – "Entitlement to Benefits" – of the 2017 update of the OECD Model.[13] The footnote to article 29 elaborates that:

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7. *Vienna Convention on the Law of Treaties* (23 May 1969), Treaties & Models IBFD, also available at https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (accessed 6 Aug. 2019).
8. *OECD Model Tax Convention on Income and on Capital: Condensed Version* (2017), Treaties & Models IBFD [hereinafter OECD Model].
9. The four minimum standards are: Action 5, Harmful tax practice; Action 6, Preventing the granting of treaty benefits in inappropriate circumstances; Action 13, Transfer pricing documentation; Action 14, Improving dispute resolution mechanism.
10. *Supra* n. 2.
11. *See Explanatory Statement*, *supra* n. 6, paras. 88 and 89.
12. These conditions are replicated by art. 7 under one or more categorized tests listed in paras. 9 to 13.
13. *Supra* n. 8.

> [t]he drafting of this Article [article 29 of the OECD Model] will depend on how the Contracting States decide to implement their common intention, reflected in the preamble of the Convention and incorporated in the minimum standard agreed to as part of the OECD/G20 Base Erosion and Profit Shifting Project, to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty-shopping arrangements. This may be done either through the adoption of paragraph 9 (the PPT provision) only, through the adoption of the detailed version of paragraphs 1 to 7 (the simplified limitation of benefit, or SLOB, provision) that is described in the Commentary on Article 29 together with the implementation of an anti-conduit mechanism as described in paragraph 187 of that Commentary, or through the adoption of paragraph 9 (the PPT provision) together with any variation of the SLOB provision described in the Commentary on Article 29.[14]
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> [Parentheses added.]

2.3. Articles 6 and 7 in the MLI

Article 6 of the MLI, titled "Purpose of a Covered Tax Agreement", replicates the preamble language of the OECD Model, and article 7 of the MLI, titled "Prevention of Treaty Abuse", replicates article 29 of the OECD Model. Both article 6 and article 7, taken together, fall under the scope of one of the minimum standards as documented in the Action 6 Final Report entitled "Preventing the Granting of Tax Benefits in Inappropriate Circumstances".

The parties to the MLI must adopt all the minimum standards to the CTAs including article 6 and article 7, and the implementation of the minimum standards is subject to a monitoring mechanism of peer reviews, as provided under the Inclusive Framework on BEPS.[15]

The articles of the MLI that are not subject to peer review do not come under the scope of the minimum standards.

Paragraph 1 of article 6 – Purpose of a Covered Tax Agreement – of the MLI states that:

> A Covered Tax Agreement shall be modified to include the following preamble text: "Intending to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions),".

The texts of article 7 are reproduced and analysed in sections 3. to 7. below.

3. Options

The MLI has three types of options: opt-out provisions (reservations), opt-in provisions and alternative provisions. Article 7 of the MLI contains the first and the second type of options.

3.1. Analysis of opt-in provisions

3.1.1. Opt-in provisions under article 7(4)

Opt-in provisions supplement the application of a primary operative clause. The first example is article 7(4) of the MLI. Article 7(3) provides that a party that has not made the reservation for article 7(1) (i.e. the party has not opted out of the PPT) may choose to apply paragraph 4 of article 7 to supplement its application of paragraph 1 to its CTAs.[16] A party to the MLI could adopt the PPT in article 7(1) alone if it does not wish to opt in for article 7(4). If a party opts in for article 7(4), article 7(1), as modified by article 7(4), shall apply in circumstances if, upon request from the taxpayer and after considering the relevant facts, the competent authority (CA) determines that the benefit could have been granted in the absence of the transaction or arrangement resulting in the denial of benefit.

Article 7(1) and article 7(4) provide, respectively, as follows:

> 1. Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.
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> 4. Where a benefit under a Covered Tax Agreement is denied to a person under provisions of the Covered Tax Agreement (as it may be modified by this Convention) that deny all or part of the benefits that would otherwise be provided under the Covered Tax Agreement where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits, the competent authority of the Contracting Jurisdiction that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different

14. *See* http://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf (accessed 6 Aug. 2019).
15. Members of the Inclusive Framework will develop a monitoring process for the four minimum standards as well as put in place the review mechanisms for other elements of the BEPS Package. The monitoring of the four minimum standards will ensure that all members, as well as jurisdictions of relevance, will comply with the standards in order to ensure a level playing field. For details, *see* https://www.oecd.org/tax/beps/beps-about.htm (accessed 6 Aug. 2019).
16. A party is the signatory to the MLI that has deposited to the OECD Depositary the instrument of ratification, acceptance or approval. Before a jurisdiction becomes a party (contracting jurisdiction) to the MLI, the jurisdiction can submit a provisional list of reservation and notification at the time of signature, pursuant to art. 28(7) MLI.

benefits with respect to a specific item of income or capital, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person in the absence of the transaction or arrangement.

3.1.2. Request for tax benefits under articles 7(4) and 16(1)

Both paragraph 4 of article 7 (prevention of treaty abuse) and paragraph 1 of article 16 (mutual agreement procedure) are taxpayer-friendly provisions, and both contain the provision providing a remedy that the taxpayer can request the CA of the contracting jurisdiction of which he is a resident, to reconsider his case after the tax benefits have been denied.

However, the provisions in the articles 7(4) and 16(1) differ in the following key areas:

(1) If the contracting jurisdiction does not choose to adopt article 7(4), the taxpayer cannot proceed to make such a request. In contrast, the taxpayer's access to MAP under article 16(1) is not optional and is provided by the MLI article that the contracting jurisdictions must adopt.[17]

(2) Article 16(1) provides that the taxpayer must present his case within a period not exceeding three years from the first notification of the action resulting in taxation not in terms of the CTA provisions. Article 7(4) does not provide such a time period. Instead, it is determined by the domestic rules of the contracting jurisdiction that grants the discretionary benefit.[18]

(3) Article 16(1) grants the taxpayer a benefit conditioned upon an agreement reached between the CAs of two contracting jurisdictions while article 7(4) is a discretionary benefit conditioned upon the unilateral action of one single CA.[19]

(4) The taxpayer can only present his case to the tax authority of the contracting jurisdiction of which he is a resident under article 7(4) while the taxpayer may present his case to the tax authorities of either contracting jurisdiction under article 16(1), unless one of the contracting jurisdictions chooses the alternative rule that does not allow the taxpayer to do so.

(5) The request for tax benefit under article 16(1), if not settled within a period of two years beginning from the start date, shall be submitted to arbitration provided that both the contracting jurisdictions choose to adopt arbitration under Part VI of the MLI, while article 7(4) does not provide for such arrangements.

3.1.3. Instance of granting discretionary benefit under article 7(4)

The CA of the contracting jurisdiction that chooses to adopt the SLOB option will grant tax exemptions to a retirement fund if it satisfies the requirement of a "qualified person" under paragraphs 9(d) and (e) of article 7.[20]In contrast, the CA of the contracting jurisdiction that only adopts the PPT option may deny the tax benefit on the grounds that the retirement fund is an arrangement that does not have a residence status even though all of the beneficial owners of the fund could be the residents of either contracting jurisdiction to the CTA. To address any possible mismatches, a party that adopts the PPT-only option may choose to adopt the opt-in provision under article 7(4), which provides that the CA may grant the tax benefit to the retirement fund if, upon request from the retirement fund and after considering the relevant facts, it makes an administrative determination that the tax benefits could have been granted if the beneficial owners had made direct investment in the assets instead of doing so through the retirement fund.

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17. *See* para. 1 of art. 16 – Improving Dispute Resolution.
18. Id.
19. *See* para. 2 of art. 16 – Improving Dispute Resolution.
20. Para. 9 of art. 7 provides that:

> A resident of a Contracting Jurisdiction to a Covered Tax Agreement shall be a qualified person at a time when a benefit would otherwise be accorded by the Covered Tax Agreement if, at that time, the resident is:
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> a) an individual;
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> b) that Contracting Jurisdiction, or a political subdivision or local authority thereof, or an agency or instrumentality of any such Contracting Jurisdiction, political subdivision or local authority;
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> c) a company or other entity, if the principal class of its shares is regularly traded on one or more recognised stock exchanges;
>
> d) a person, other than an individual, that:
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> i) is a non-profit organisation of a type that is agreed to by the Contracting Jurisdictions through an exchange of diplomatic notes; or
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> ii) is an entity or arrangement established in that Contracting Jurisdiction that is treated as a separate person under the taxation laws of that Contracting Jurisdiction and:
>
> A) that is established and operated exclusively or almost exclusively to administer or provide retirement benefits and ancillary or incidental benefits to individuals and that is regulated as such by that Contracting Jurisdiction or one of its political subdivisions or local authorities; or
>
> B) that is established and operated exclusively or almost exclusively to invest funds for the benefit of entities or arrangements referred to in subdivision A);
>
> e) a person other than an individual, if, on at least half the days of a twelve-month period that includes the time when the benefit would otherwise be accorded, persons who are residents of that Contracting Jurisdiction and that are entitled to benefits of the Covered Tax Agreement under subparagraphs a) to d) own, directly or indirectly, at least 50 per cent of the shares of the person.

3.1.4. Opt-in provisions under article 7(6) and 7(7)

The second and third examples of opt-in provisions are article 7(6) and article 7(7). Where a contracting jurisdiction chooses to adopt the SLOB provision in addition to the PPT provision in article 7(1), it may opt-in for articles 7(6) or 7(7); the texts are reproduced below:

> 6. A Party may also choose to apply the provisions contained in paragraphs 8 through 13 (hereinafter referred to as the "Simplified Limitation on Benefits Provision") to its Covered Tax Agreements by making the notification described in subparagraph c) of paragraph 17 (Article 7(17)(c)). The Simplified Limitation on Benefits Provision shall apply with respect to a Covered Tax Agreement *only where* all Contracting Jurisdictions have chosen to apply it.
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> 7. In cases where some but not all of the Contracting Jurisdictions to a Covered Tax Agreement choose to apply the Simplified Limitation on Benefits Provision pursuant to paragraph 6, then, notwithstanding the provisions of that paragraph, the Simplified Limitation on Benefits Provision shall apply with respect to the granting of benefits under the Covered Tax Agreement:
>
> a) *by all Contracting Jurisdictions*, if all of the Contracting Jurisdictions that do not choose pursuant to paragraph 6 to apply the Simplified Limitation on Benefits Provision agree to such application by choosing to apply this subparagraph and notifying the Depositary accordingly; or
>
> b) *only by the Contracting Jurisdictions that choose to apply the Simplified Limitation on Benefits Provision*, if all of the Contracting Jurisdictions that do not choose pursuant to paragraph 6 to apply the Simplified Limitation on Benefits Provision agree to such application by choosing to apply this subparagraph and notifying the Depositary accordingly.
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> [Emphasis added.]

3.1.5. Asymmetry resulting from choosing the SLOB provision

It is noted that some of the contracting jurisdictions may not adopt the SLOB option because choosing the PPT alone is sufficient to meet the BEPS minimum standard. The asymmetry in the choice of options, if article 7(6) is chosen, will be at odds with the principle of reciprocity and may result in the SLOB provision, or the entire article 7 under certain conditions, not being applicable to the CTAs for those contracting jurisdictions.

Article 7(7) provides an option to address the asymmetry if all of the parties not choosing the SLOB agree that either (i) all parties adopt the SLOB when granting the tax benefit under the CTA, pursuant to article 7(7)(a) or (ii) only the parties choosing SLOB adopt the SLOB when granting the tax benefit, pursuant to article 7(7)(b). In the absence of any agreement reached pursuant to article 7(7)(a) or 7(7)(b), a party who chooses to adopt the SLOB can opt out of the entire article 7. In that case, the parties shall endeavour to reach a mutually satisfactory solution that meets the BEPS minimum standard as mentioned above, pursuant to article 7(16).

3.2. Comparing PPT and SLOB provisions

3.2.1. Policy considerations

As explained above, a party to the MLI may opt-in for the SLOB provision under article 7(6). A SLOB provision is effective as a specific anti-abuse rule aimed at treaty shopping situations that can be identified on the basis of criteria based on legal nature, ownership in and general activities of, certain entities. However, the SLOB rule only focuses on treaty shopping and does not address other forms of treaty abuse, including conduit financing arrangement. The PPT provision, which is wider in scope than the LOB rule, has been introduced to counter treaty shopping in respect of a conduit structure, but due to its arbitrary nature it is less objective in application than the SLOB provision and it might cause injustice under certain circumstances. In view of the above shortcomings, contracting jurisdictions are free to decide whether they can opt-in for the SLOB provision under article 7(4) to address the injustice resulting from the application of the PPT provision under article 7(1).

The Explanatory Statement to the MLI further provides that, as the default option,[21] the PPT in article 7(1) is the only approach that can satisfy the minimum standard on its own. Parties are then permitted pursuant to article 7(6) to supplement the PPT by choosing to apply a SLOB provision. As noted, the MLI does not provide the details of the detailed limitation of benefits, or DLOB, provision, and the contracting jurisdictions that adopt the DLOB should endeavour to reach a mutually satisfactory solution that meets the minimum standard.[22] Note also that the situation of asymmetry in choice of options may arise in which a party only adopts the PPT provision while the other party chooses to adopt the SLOB provisions in addition to the PPT default option. The issue about the asymmetry in the choice of options will be dealt with in what follows in this article.

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21. Art. 23 – Types of Arbitration Process also provides for the "final offer" approach as the default option, as compared to the independent opinion approach. *See Explanatory Statement*, *supra* n. 6, para. 241.
22. The DLOB rules are contained in the Commentary on Article 29 of the update of the OECD Model, and the implementation of an anti-conduit mechanism is included in para. 187 of that Commentary.

3.2.2. Gaps in SLOB provision

The fact that a person is entitled to benefits under the SLOB provision does not mean that these benefits cannot be denied under the PPT rules. SLOB provisions are rules that focus primarily on the legal nature, ownership in, and general activities of, residents of a contracting state.

Assume, for instance, that a public company whose shares are regularly traded on a recognized stock exchange in the contracting state of which the company is a resident derives income from the other contracting state. As long as that company is a "qualified person" as defined in SLOB rules, it is clear that the benefits of the OECD Model should not be denied solely on the basis of the ownership structure of that company, e.g. because a majority of the shareholders in that company are not residents of the same state. Admittedly, such a company is a qualified person.

It does not follow that the benefits could not be denied under the PPT provision for reasons that are unrelated to the ownership of the shares of that company.

Assume, for instance, that such a public company is a bank that enters into a conduit financing arrangement intended to provide indirectly to a resident of a third state the benefit of lower source taxation under a tax treaty.[23]

3.2.3. Preference for PPT option

It appears that most contracting jurisdictions opt-in for the PPT provision.[24]Policy makers choose the PPT option because the scope of tax benefits granted under the PPT option in article 7(1) is larger than that under article 7(6), which does not deal with the benefits under article 4(3) – dual residence, article 9(2) – a corresponding adjustment following an initial adjustment by the other contracting jurisdiction, and article 24 – non-discrimination.[25]

3.2.4. Policy choices

The LOB rule limits the availability of treaty benefits to entities that meet certain conditions, which are based on the legal nature, ownership in, and general activities of the entity.

As a specific anti-abuse rule, the SLOB seeks to ensure that there is a link between the entity and its state of residence. SLOB provisions are found in treaties concluded by a few contracting jurisdictions and have proven to be effective in preventing many forms of treaty shopping strategies.[26]

However, the LOB rules may not be effective in preventing other forms of treaty shopping. In view of the fact that each of the LOB and PPT rules has strengths and weaknesses, it may not be appropriate for, or accord with the treaty policy of, all countries. Also, the domestic law of some contracting jurisdictions may include provisions that make it unnecessary to combine those two rules to prevent treaty shopping. What is needed is not only a choice of effective tools for preventing treaty abuse, but also a policy choice of the individual contracting jurisdiction the policy goal of which can be meeting the BEPS minimum standards for the prevention of treaty abuse and/or in furtherance of its commitment to the BEPS recommendations and best practices.

4. Legal Structure and Technical Rules

4.1. Legal structure of article 7

Articles 3 to 17 under Part II to V of the MLI, signed by over 70 countries or jurisdictions on 7 June 2017[27]and by 89 countries or jurisdictions as of 28 June 2019,[28]are substantive provisions addressing the BEPS issues. The substantive provisions have the following common structure:

– operative clauses;

– compatibility clauses;

– reservation clauses; and

– notification clauses.

This MLI structure is also replicable to article 7, as tabulated below:

23. *See* paras. 4 and 5 under the heading of Commentary in pp. 55-56 of Action 6 Final Report.
24. As of 28 June 2019, out of a total of 29 contracting jurisdictions that had confirmed the MLI position, only three of them, India, Russia and Slovak Republic, opted for the SLOB option, according to the information of the OECD Depositary. *See* http://www.oecd.org/tax/treaties/mli-database-matrix-options-and-reservations.htm (accessed 6 Aug. 2019).
25. *See* art. 7(8)(a) to (8)(c) MLI.
26. *See* Bullet 2 of p. 9, Action 6 Final Report.
27. *See* http://www.oecd.org/ctp/treaties/ground-breaking-multilateral-beps-convention-will-close-tax-treaty-loopholes.htm (accessed 6 Aug. 2019).
28. *See* http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (accessed 6 Aug. 2019).

Table 1 – MLI structure

	Article 7			
	7(1) Default option	**7(4) Opt-in provision**	**7(6) Opt-in provision**	**7(7) Opt-in provision by agreement**
Operative clauses:7(1); 7(4); 7(6) covering 7(8) to 7(13), and 7(7)	Tax benefit not granted if one of principal purposes of transaction or arrangement is to obtain tax benefit	Given that benefit denied under paragraph 1, upon request and after considering relevant facts, the CA shall grant discretionary benefit if it determines benefit should have been granted in absence of transaction or arrangement in 7(1)	A party may choose to apply the SLOB provision, containing in paragraphs 8-13, to its CTAs	In case where only some parties choose SLOB under 7(6), all parties not adopting SLOB, when granting benefit under CTA, agree to adopt SLOB to all parties under 7(7)(a), or agree to adopt SLOB to parties adopting SLOB only under 7(7)(b)
Compatibility clauses:7(2); 7(5);7(14)	7(2) paragraph 1 shall apply in place of or in absence of provision denying benefit if one of principal purposes of transaction or arrangement is to obtain tax benefit	7(5) paragraph 4 shall apply to a CTA provision denying tax benefit because the principal purpose is to obtain benefit	7(14) SLOB provision shall apply in place of or in absence of CTA provisions that limit benefits to a resident qualifying for such benefit by meeting conditions under paragraph 7(9) to 7(13)	
Reservation for article 7(1), article 7(6), and entire article 7	7(15)(a): reservation for 7(1), subject to certain requirement met; 7(15)(b): reservation for 7(1) as compatible provision exists		7(15)(c): reservation for 7(6) as compatible provision exists; 7(16): reservation of entire article 7, subject to certain requirement met	
Notifications:7(17)(a) to (17)(d), 17(e)	7(17)(a) notify whether each of the CTAs contains a provision to which the compatibility clause shall apply	7(17)(b) notify if a party chooses to grant discretionary benefit under 7(4)	7(17)(c) notify if a party chooses to adopt SLOB under 7(6)	7(17)(d) notify if a party not adopting SLOB agree to adopt 7(7)(a) or (b)

4.2. Relation between operative and compatibility clauses

Article 7(1) provides for the PPT, which stands alone as the default option. Article 7(4) contains an optional provision, which is used to modify the application of article 7(1) to the relevant CTA provisions. Articles 8 to 13 provide for the SLOB, which parties to the MLI are free to choose.

Article 7(1), 7(4) and 7(8) to 7(13) are the operative clauses. They replicate the contexts in the 2017 update of the OECD Model that has incorporated the counter-BEPS measures with respect to the prevention of treaty abuse. The operative clauses do not directly modify the CTAs. Instead, by the operation of the compatibility clauses, a contracting jurisdiction adapts the provision in operative clauses to the CTAs, subject to any reservations entered by that contracting jurisdiction. Article 7(2), article 7(5) and article 7(14) are the compatibility clauses, which modify the application of the operative clauses to the CTAs in the following manner:

> [2] Paragraph 1 [of Article 7] *shall apply in place of or in the absence of* provisions of a Covered Tax Agreement that deny all or part of the benefits that would otherwise be provided under the Covered Tax Agreement where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits.
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> [5] Paragraph 4 [of Article 7] *shall apply* to provisions of a Covered Tax Agreement (as it may be modified by this Convention) that deny all or part of the benefits that would otherwise be provided under the Covered Tax Agreement where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits.
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> [14] The Simplified Limitation on Benefits Provision [Article 8 to 13] *shall apply in place of or in the absence of provisions of* a Covered Tax Agreement that would limit the benefits of the Covered Tax Agreement [...] only to a resident that qualifies for such benefits by meeting one or more categorical tests.
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> [Emphasis added.]

5. Notification and Reservation Provisions

5.1. Notifications

5.1.1. Notification of reservations

Notifications are required if a contracting jurisdiction makes a reservation for an article, or a provision of an article, of the MLI to not apply to the relevant provision of the CTA.

It is also required even if the CTA already has a provision that addresses the same issue as the provision of the MLI, where the existing provision is a provision compatible to the corresponding MLI provision.

5.1.2. Notification to give legal relevance

Notifications are also required to give legal effect to the opt-in provision that a contracting jurisdiction has chosen. The modification by the compatibility clause of the provisions of the CTA articles shall come into force on the first day of the month following the expiration of a period of three calendar months beginning on the date of deposit by the signatory of Instrument of Ratification, Acceptance, or Approval by the MLI parties.[29]

Table 2 shows the notifications, as denoted by the letter "Y", given under article 7(17) by some selected contracting jurisdictions pursuant to article 29 – Notifications, as per the information from the MLI database's matrix of options and reservations, which the OECD Depositary received, as of 28 June 2019.[30]

Table 2 – Notification matrix for opt-in provisions under article 7(17)(b), (c), and (d)

Jurisdictions	Status	Opt-in for article 7(4) to supplement the application of the PPT under article 7(1)	Opt-in for the SLOB under article 7(6) in addition to the PPT	A party that adopts the PPT, agrees to adopt SLOB symmetrically under article 7(7)(a) or asymmetrically under 7(7)(b)
Notifications given		**pursuant to article 7(17)(b)**	**pursuant to article 7(17)(c)**	**pursuant to article 7(17)(d)**
Argentina	P		Y	
Denmark	P			Y
Hong Kong	P			
India			Y	
Ireland		Y		
Japan				
Mauritius	P	Y		
New Zealand		Y		
Norway	P			Y
Russia			Y	
Singapore		Y		
Slovak Republic			Y	
United Kingdom		Y		

P = provisional list pending deposit of Instrument of Ratification

5.1.3. Matching of notifications

Note that if article 7(4) is chosen, it will modify article 7(1). Article 7(17)(b) of the MLI clarifies that each party that chooses to apply paragraph 4, which modifies paragraph 1, shall notify the Depositary of its choice. Paragraph 4 shall apply to a CTA only where "*all Contracting Jurisdictions* have made such a notification" [emphasis added]. If notification is not given by all the parties, the choice shall not apply with respect to the CTAs. Articles 7(17)(c) and (d) also impose such a condition that provides that only where all contracting jurisdictions have given notifications, the provision of the MLI shall apply to the CTAs. The term "all contracting jurisdictions" not only covers both parties of a bilateral tax treaty, but also the multiple parties of a multilateral tax treaty respectively.

An example of a multilateral tax treaty is the Convention between the Nordic Countries for the Avoidance of Double Taxation with respect to Taxes on Income and Capital (23 September 1996) (the Nordic Tax Convention), as concluded by six signatory states: Denmark, the Faroe Islands, Finland, Iceland, Norway, and Sweden.[31]Note that Greece and Norway, which are two of the contracting jurisdictions listed in Table 2 , have pursuant to article 7(17)(d) made a matched notification that the SLOB provision shall apply symmetrically. However, the opt-in provision for SLOB under article 7(7)(a) shall not *apply in place of* the relevant provision in the aforesaid Nordic Tax Convention (the CTA) as it does not satisfy the approval requirement of "all contracting jurisdictions" in article 7(17)(e) with respect to the Nordic Double Taxation Convention. In that case, the SLOB provision shall supersede the provision of the CTA only to the extent that those provisions are incompatible with the SLOB provision, pursuant to article 7(17)(e) of the MLI. Article 7(7)(a) shall apply to Greece and Norway only.

29. *See* para. 2 of art. 34 MLI.
30. 28 June 2019 is the reference date, as adopted from the OECD MLI Database – Matrix of options and reservations, *supra* n. 24 .
31. *Convention between the Nordic Countries for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital* (23 Sept. 1996), Treaties & Models IBFD, also available at http://internationaltaxtreaty.com/download/Sweden/DTC/Sweden-Iceland-DTC-Sep-1996.pdf (accessed 6 Aug. 2019).

Table 3 – Notifications by some of the parties opting for granting discretionary benefits under article 7(4) in addition to the PPT

	Status	Russia	Mauritius	New Zealand	Singapore	United Kingdom
Russia		–				
Mauritius	P		–	Y	Y	Y
New Zealand			Y	–	Y	Y
Singapore			Y	Y	–	Y
United Kingdom			Y	Y	Y	–

It is observed from Table 3 that, except for Russia, four other contracting parties have chosen to opt-in for article 7(4). Therefore, article 7(4) shall apply to the New Zealand-Singapore CTA,[32] the New Zealand-United Kingdom CTA,[33] and the Singapore-United Kingdom CTA[34] because each of the CTAs contains a matched notification with respect to the application of article 7(4). With regard to the CTAs concluded by Mauritius provisionally, they have no legal force until after Mauritius has deposited the Instrument of Ratification to the OECD Depositary, pursuant to article 34(2).

5.2. Reservations

5.2.1. Reservations under articles 7(15)(a), (15)(b), and (15)(c)

Article 7(15) provides that:

> [a] Party may reserve the rights:
>
> (a) for paragraph 1 not to apply to its Covered Tax Agreements on the basis that it intends to adopt a combination of a detailed limitation on benefits provision and either rules to address conduit financing structures or a principal purpose test, thereby meeting the minimum standard for preventing treaty abuse under the OECD/G20 BEPS package; in such cases, the Contracting Jurisdictions shall endeavour to reach a mutually satisfactory solution which meets the minimum standard;
>
> (b) for paragraph 1 (and paragraph 4, in the case of a Party that has chosen to apply that paragraph) not to apply to its Covered Tax Agreements that already contain provisions that deny all of the benefits that would otherwise be provided under the Covered Tax Agreement where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits;
>
> (c) for the Simplified Limitation on Benefits Provision not to apply to its Covered Tax Agreements that already contain the provisions described in paragraph 14.

Article 7(15) provides for three reservations in respect of which a party is permitted to make pursuant to article 28(1), as follows:

(1) The first under article 7(15)(a) is for a party to opt out of the default PPT option in article 7(1) on the basis that it intends to adopt the DLOB-Plus option, as defined earlier, in order to meet the minimum standard for preventing treaty abuse, with the condition that both parties shall endeavour to reach a mutually satisfactory solution that meets the minimum standard.

(2) The second under article 7(15)(b) is for the party not to apply the PPT provision under paragraph 1, as modified by paragraph 4 if applicable, to the CTAs that already have such a provision addressing the same issue.

(3) The third under article 7(15)(c) is for a party not to apply the SLOB provision to the CTAs that already have such a provision dealing with the same issue.

Article 7(15)(a) is a full reservation (exclusion) entered by a party. But articles 7(15)(b) and (15)(c) is a partial reservation that only applies to some of, instead of all, the CTAs, which appears at odds with the reciprocity principle in public international laws.

5.2.2. Compatibility principle

A contracting jurisdiction is permitted to make such reservations under article 7(15)(b) or (c) because the relevant CTA provision was modelled on the 2017 update of the OECD Model, which had incorporated the provisions meeting the minimum standard under the recommendations of the BEPS Action 6 Final Report (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances). In other

32. *Agreement between the Government of New Zealand 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* (21 Aug. 2009), Treaties & Models IBFD.
33. *Convention Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains* (4 Aug. 1983), Treaties & Models IBFD.
34. *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.

words, because the provision of the CTA is compatible with article 7(15)(b) or 7(15)(c) of the MLI, it is excluded from the modification by the compatibility clause under paragraph 2 and paragraph 5 of article 7.

The compatibility principle owes its legal basis to article 30(3) of the Vienna Convention on the Law of Treaties that provides that:

> [w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59 (the Vienna Convention), the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.[35]

This means that where an existing CTA contains a provision that addresses the same issue as that under the relevant MLI article, that CTA provision should be excluded from the modification by the compatibility clause and shall continue to apply in future.

6. Applications of Article 7 to CTAs: Country Survey

As of 28 June 2019, out of a total of 89 contracting jurisdictions, 29 already deposited their Instruments of Ratification and their positions have become definitive. Among the 29 contracting jurisdictions, Singapore is one of the four Asian contracting jurisdictions that have ratified its MLI position, including Australia, Japan, New Zealand, and Singapore. Yet Hong Kong is not on the list. As Hong Kong and Singapore are two of the four dragons in Asia and both are also the international financial centres, they deserve closer scrutiny.

6.1. Comparisons

6.1.1. Hong Kong and Singapore

Singapore signed the MLI on 7 June 2017, ratified its MLI position on 21 December 2018, and the MLI has come into force for Singapore as from 1 April 2019. In addition, Singapore has voluntarily started the lengthy process of preparing the synthesized texts that combine the applicable MLI provisions with the relevant CTAs.[36]

Hong Kong became a signatory to the MLI but, as at 28 June 2019, it has not yet ratified its position. Politically speaking, Hong Kong is part of China. China included Hong Kong as a signatory of the MLI on 7 June 2017, pursuant to articles 28(4), 28(7) and 29(4).[37]China is the responsible party for Hong Kong that will extend its list of CTAs, enter a new reservation if the extension is first to fall into the scope of such a reservation, and give notifications to the Depositary pursuant to article 28(4), article 29(2) and article 29(5) respectively.[38]Article 28(4) also provides that:

> the reservation entered into by or on behalf of a jurisdiction or territory for whose international relations a party is responsible [...] shall be made by the responsible Party and can be different from the reservations made by that Party for its own CTAs.

Significantly, China did not extend the application of the MLI to Macau.[39]

The respective MLI positions of China, Hong Kong, and Singapore are set out in Table 4 .

Table 4 – MLI positions of China, Hong Kong and Singapore

Jurisdiction	Status	Adopt default PPT option in article 7(1)	Opt-in for article 7(4) to modify application of 7(1)	Opt-in for SLOB in article 7(6)	Reserve right not to adopt article 7(1) under 7(15)(b)
China	Provisional	Yes			
Hong Kong	Provisional	Yes			Yes
Singapore	Definitive	Yes	Yes		

Hong Kong reserves its right for article 7(1) not to apply to the Hong Kong-Belarus CTA[40]and the Hong Kong-Pakistan CTA.[41]For no reason given from publicly available information, Hong Kong does not opt in for the discretionary tax benefit provision under article 7(4). It

35. *Vienna Convention on the Law of Treaties* , *supra* n. 7 .
36. Only Japan and Singapore have taken the lead in preparing the synthesized texts in Asia.
37. *See* http://www.oecd.org/tax/treaties/beps-mli-position-hong-kong.pdf (accessed 6 Aug. 2019).
38. *See* A.K.K. Chan, *Application of Mutual Agreement Procedure Article under the Multilateral Instrument to Covered Tax Agreements* , 25 Asia-Pac. Tax Bull. 2, sec. 5.2. (2019), Journal Articles & Papers IBFD.
39. Macau is also a Special Administrative Region of China. Macau earns most of its income from the casino industry and is not a finance centre. Its GDP stood at USD 55.45 billion as at 31 December 2018, which is about 15.28% of the GDP of Hong Kong that stood at USD 362.99 billion. As of 30 June 2019, Macau just signed five comprehensive double tax agreements with Portugal, Belgium, the Republic of Cabo Verde, the Republic of Mozambique and Vietnam, and 16 tax information exchange agreements. Macau is not a member of the MLI but it has joined the Inclusive Framework on BEPS. *See* http://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf (accessed 6 Aug. 2019).
40. *Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Belarus for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (16 Jan. 2017), Treaties and Models IBFD.
41. *Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (17 Feb. 2017), Treaties & Models IBFD.

is not conducive to attracting foreign capital and inbound investment to Hong Kong. However, the fact that Hong Kong does not adopt the SLOB option does not means it does not grant any tax benefits to a person who meets certain prescribed conditions under its domestic tax rules.[42]

6.1.2. Tax treaties

As of 28 June 2019, Singapore has signed 86 tax treaties,[43]with the Australia-Singapore tax treaty[44]first concluded in 1969.

Hong Kong only signed three tax agreements before 2010 with the first one concluded with Belgium in 2003. Hong Kong has concluded 40 tax agreements excluding that with China, up to 28 June 2019.[45]Compared to Singapore, Hong Kong was initially not so quick to embrace the international cooperation in tax matters. This state of affairs has, however, changed following the amendments to the Inland Revenue Ordinance in 2010, 2013, and 2016. These amendments have brought about the removal of domestic interest elements, the removal of bank secrecy, and the entry into exchange of tax information agreement with treaty jurisdictions.[46]Hong Kong concluded most of the tax agreements after 2010. Therefore, most of its tax treaties are modelled on the most recent versions of the OECD Model.

6.1.3. International cooperation in tax matters

Singapore signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Multilateral Convention) on 29 May 2013, ratified it on 20 January 2016, and the Multilateral Convention came into force on 1 May 2016.

In contrast, the Multilateral Convention was extended by China to Hong Kong on 29 May 2018 and it came into force on 1 September 2018. The corresponding enactment of the Inland Revenue (Convention on Mutual Administrative Assistance in Tax Matters) Order (the Order) was gazetted domestically in Hong Kong and came into operation on 13 July 2018. Hong Kong also passed the Inland Revenue (Amendment) (No. 6) Ordinance 2018 to introduce the MLI rules to its domestic legal rules on 13 July 2018.[47]

6.2. Applications of article 7(1)

6.2.1. CTAs concluded by Hong Kong provisionally[48]

6.2.1.1. Reservations made under article 7(15)(a) and 7(15)(b)

Pursuant to article 7(15)(a), a contracting jurisdiction (a party) may opt out of the default option in article 7(1) on the basis that it intends to adopt a combination of a DLOB provision and conduit structure or a DLOB and PPT, thereby meeting the minimum standard for preventing treaty abuse under the OECD/G20 BEPS package. In such cases, the contracting jurisdictions shall endeavour to reach a mutually satisfactory solution that meets the minimum. It is noted that Hong Kong does not intend to adopt a DLOB provision and rules to address conduit financial arrangement, pursuant to article 7(15)(a).

Pursuant to article 7(15)(b), article 7(1) shall not apply because the CTA provision already contains an article 7(1) provision. Hong Kong has provisionally reserved its right, pursuant to article 7(15)(b), not to apply article 7(1) to the CTA with Belarus because article 27(1) of the HK-Belarus CTA already contains a PPT provision, which is compatible with article 7(1).[49]

6.2.1.2. Notification given under article 7(17)(a)

A contracting jurisdiction that has not made a reservation under article 7(15)(a) shall, pursuant to article 7(17)(a), notify the Depositary of whether any of its CTAs that is *not* subject to a reservation made under article 7(15)(b) contains a provision, as described under article 7(2). For example, Hong Kong has provisionally notified that article 7(1) shall "apply in place of" the provisions of article 10(7), article 11(9), and article 12(7) of the Hong Kong-Canada CTA.[50]

The reason for the requirement to give notification under article 7(17)(a) is that if a contracting jurisdiction adopts the PPT-only approach (article 7(1), and article 7(4) if applicable), provided that it has not made reservation for article 7(1) but instead chosen to adopt the DLOB-plus approach as provided under article 7(15)(a), it should give notification that which CTA contains a provision as described in paragraph 2 of article 7 (the compatibility clause) unless that CTA has been excluded by the reservation as per article 7(15)(b) that it already contains the provision that is compatible to the PPT option.

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42. For example, sec. 21A of the Inland Revenue Ordinance provides that a non-resident person shall be taxed at a reduced rate on the income derived from the use of an intellectual property in Hong Kong if the recipient is not a related entity of the Hong Kong company that pays for the use of the IP rights.
43. *See* https://www.iras.gov.sg/irashome/Quick-Links/International-Tax/List-of-DTAs--limited-treaties-and-EOI-arrangements/ (accessed 6 Aug. 2019).
44. *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 2009), Treaties & Models IBFD.
45. *See* https://www.ird.gov.hk/eng/tax/dta_inc.htm (accessed 6 August 2019).
46. *See* Inland Revenue Amendment Ordinance (No. 1 of 2010), Inland Revenue (Amendment) (No. 2) Ordinance 2013, and Inland Revenue (Amendment) (No. 3) Ordinance 2016; *See also* A.K.K. Chan, *Recent Developments in Hong Kong's Exchange of Information Rules* , 22 Asia-Pac. Tax Bull. 6, secs. 3.1., 3.2. and 3.3. (2016), Journal Articles & Papers IBFD.
47. *See* https://www.gld.gov.hk/egazette/pdf/20182228/es12018222827.pdf (accessed 6 Aug. 2019).
48. China signed the MLI on 7 June 2017 on behalf of Hong Kong, which has not completed the internal procedure for ratification by the legislative body.
49. *See* http://www.oecd.org/tax/treaties/beps-mli-position-hong-kong.pdf ; https://www.ird.gov.hk/eng/tax/dta_inc.htm (both accessed 6 August 2019).
50. *See* http://www.oecd.org/tax/treaties/beps-mli-position-hong-kong.pdf ; https://www.elegislation.gov.hk/hk/cap112CF@2014-04-10T00:00:00 (both accessed 6 Aug. 2019); *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 & Models IBFD.

6.2.2. CTAs concluded by Singapore

The same rule applies with respect to the notification given under article 7(17)(a), which provides that Singapore shall make a notification that the PPT provision in article 7(1) shall apply in place of an existing provision in the CTA, or be added to it in the absence of such a provision. For example:

– Article 7(1) of the MLI is inserted as article 28A immediately after article 28 of the Japan-Singapore CTA "in the absence of" a PPT provision.[51]

– Article 7(1) of the MLI is inserted as article 24A immediately after article 24 to "replace paragraph 6 of article 10 (Dividend) and paragraph 7 of article 12 (Royalty)" of the New Zealand-Singapore CTA.[52]

Table 5 lists the available policy choices in the application of article 7(1). First, a party can opt out of the PPT option (subject to certain conditions being met) pursuant to article 7(15)(a), or adopt the default PPT option. Second, if a party has adopted the PPT option, it can reserve its right for article 7(1) not to apply to its CTAs pursuant to article 7(15)(b) on grounds that the CTA already contains a compatible provision.

Table 5 – Summary of available choices for the PPT-only approach

Operative clause	CTA version	Modification by compatibility clause, subject to reservation	Notification
Do not apply PPT in article 7(1) to CTA, and intends to adopt DLOB-Plus approach		Make reservation pursuant to article 7(15)(a), subject to a mutually satisfactory solution reached between the parties	Notify Depositary of the reservation, pursuant to article 28(1)[1]
Adopts the PPT provision under article 7(1)	The CTA already contains a PPT provision compatible to article 7(1), i.e. HK-Belarus CTA	Reserve the right pursuant to article 7(15)(b), not to apply article 7(1) to the CTA	Notify Depositary of the reservation pursuant to article 28(1)[1]
	The CTA does not contain a PPT provision i.e. HK-Canada CTA; New Zealand-Singapore CTA, Japan-Singapore CTA	Article 7(1) shall apply in place of, or in the absence of, a PPT provision	Notify Depositary that the CTA contains a provision described in article 7(2), pursuant to article 7(17)(a)

1 *See* http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf .

6.3. Application of article 7(4)

6.3.1. Notification

Table 6 expands upon the information from Table 2 . It shows that Ireland, New Zealand, Singapore and the United Kingdom all have adopted the option in article 7(4) that supplements the application of the PPT provision in article 7(1). Japan and the Slovak Republic, both of which have confirmed their MLI position definitively, do not adopt the supplementary option in article 7(4).[53]

From a Singaporean perspective, article 7(4) shall apply to the Singapore-Ireland CTA,[54]the Singapore-New Zealand CTA,[55]the Singapore-Mauritius CTA,[56]and the Singapore-United Kingdom CTA[57]because the four jurisdictions have chosen to apply article 7(4) and the notifications have been matched for the preceding bilateral CTAs. However, article 7(4) shall not apply to the Singapore-Japan CTA[58]and the Singapore-Slovak Republic CTA[59]because both Japan and Slovak Republic have not chosen or opted in to apply article 7(4) to their respective CTAs. This is demonstrated by Table 6 .

51. *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 & Models IBFD, also available at https://www.iras.gov.sg/irashome/uploadedFiles/IRASHome/Quick_Links/Protocol%20amending%20Singapore-Japan%20DTA%20(Ratified)(MLI)(1%20Apr%202019).pdf (accessed 6 Aug. 2019).
52. *Agreement between the Government of New Zealand 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* (21 Aug. 2009), Treaties & Models IBFD, also available at https://www.iras.gov.sg/irashome/uploadedFiles/IRASHome/Quick_Links/Singapore-New%20Zealand%20DTA%20(Ratified)(MLI)(1%20Apr%202019).pdf (accessed 6 Aug. 2019).
53. *See* http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (accessed 6 Aug. 2019).
54. *Agreement between the Government of the Republic of Singapore and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (28 Oct. 2010), Treaties & Models IBFD.
55. *Supra* n. 52 .
56. *Agreement between the Government of the Republic of Singapore and the Government of the Republic of Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (19 Aug. 1995), Treaties & Models IBFD.
57. *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 & Models IBFD.
58. *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 & Models IBFD.
59. *Agreement between the Government of the Slovak Republic 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 May 2005), Treaties & Models IBFD.

Table 6 – Contracting jurisdictions that adopt article 7(4) to supplement article 7(1) with reference to Table 2

	Ireland	Japan	Mauritius	New Zealand	Singapore	Slovak Republic	United Kingdom
Ireland	–		Y	Y	Y		Y
Japan		–					
Mauritius	Y		–	Y	Y		Y
New Zealand	Y		Y	–	Y		Y
Singapore	Y		Y	Y	–		Y
Slovak Republic						–	
United Kingdom	Y		Y	Y	Y		–

6.4. Application of article 7(6)

The following information in Table 7 relates to the MLI positions taken by four of the contracting jurisdictions listed in Table 2 on the SLOB options (opt-in provisions) and the reservations (opt-out provisions)

Table 7 – Contracting jurisdictions in Table 2 that adopt the SLOB option

Contracting jurisdictions (parties to the MLI)	Status	Opt-in for the SLOB under article 7(6) in addition to the PPT, pursuant to article 7(17)(c)	Reserve right not to apply article 7(6) to the CTAs, pursuant to article 7(15)(c)
Argentina	Provisional	Y	Y
India	Definitive	Y	
Russia	Definitive	Y	Y
Slovak Republic	Definitive	Y	

6.4.1. Notification

Article 7(17)(c) of the MLI provides that:

> each Party that chooses to apply the Simplified Limitation on Benefits Provision pursuant to paragraph 6 of article 7 shall notify the Depositary of its choice. Unless such Party has made the reservation described in subparagraph c) of paragraph 15, such notification shall also include the list of its Covered Tax Agreements which contain a provision described in paragraph 14, as well as the article and paragraph number of each such provision.

From an Indian perspective, India, Russia and the Slovak Republic have given notification to the Depositary to apply the SLOB provision to their CTAs. Article 7(6) shall apply to the India-Russia CTA,[60] the India-Slovak Republic CTA,[61] and the Russia-Slovak Republic CTA[62] because the parties to each pair of CTAs have made a matched notification. However, in respect of the CTAs with Argentina, article 7(6) shall apply but have no legal effect because Argentina has not confirmed its position definitively.[63] Pursuant to article 34(2), article 7(6) shall come into force on the first day of the month after a period of three calendar months that begins on the date Argentina deposits the instrument of ratification to the Depositary. If Argentina confirms its position later, the Argentina-India CTA,[64] the Argentina-Russia CTA,[65] and the Argentina-Slovak Republic CTA are considered to have made a matched notification to the Depositary and article 7(6) shall apply.

60. *Agreement between the Government of the Russian Federation and the Government of the Republic of India for the Avoidance of Double Taxation with Respect to Taxes on Income* (25 Mar. 1997), Treaties & Models IBFD.
61. *Agreement between the Government of India and the Government of the Czechoslovak Socialist Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (27 Jan. 1986), Treaties & Models IBFD.
62. *Agreement between the Government of the Russian Federation and the Government of the Slovak Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital* (24 June 1994), Treaties & Models IBFD.
63. *See* http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (accessed 6 Aug. 2019).
64. *Agreement between the Government of the Argentine Republic and the Government of the Republic of India for the Exchange of Information and Assistance in Collection with Respect to Taxes* (21 Nov. 2011), Treaties & Models IBFD.
65. *Convention between the Government of the Russian Federation and the Government of the Republic of Argentina for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital* (10 Oct. 2001), Treaties & Models IBFD.

6.4.2. Reservation

Russia has chosen to adopt the SLOB option in article 7(6) but it also reserves its right not to apply article 7(6) to some of its CTAs. Pursuant to article 7(15)(c), article 7(6) shall not apply with respect to the China-Russia CTA,[66] and the Ecuador-Russia CTA[67] on the grounds that the respective CTA already contains a provision that is compatible with the SLOB under article 7(6). As of 28 June 2019, the other parties to those CTAs have not confirmed their respective positions by submitting the Instrument of Ratification to the OECD Depositary.[68]

Table 8 displays the interactive relationships between the opt-in provision under paragraph 6 of article 7 and the opt-out provision (reservation) under paragraph (15)(c) of article 7.

Table 8 – The PPT-Plus approach-1 [either the PPT-and-SLOB approach or PPT-and-DLOB approach]

Operative clause	CTA versions	Reservations made?	Notifications
A party adopts the SLOB provision pursuant to article 7(6)	The CTA already contains a SLOB provision, compatible to article 7(6)	Reserve the right pursuant to article 7(15)(c) for the SLOB provision not to apply to the CTA	Notify Depositary of the reservation
	The CTA does not contain a SLOB provision in article 7(6)	Article 7(6) shall apply in place of, or in the absence of, a SLOB provision	Notify Depositary of the CTA containing a provision described under article 7(14), pursuant to article 7(17)(c)

6.5. Application of article 7(7)

6.5.1. Notification

Article 7(17)(d) of the MLI provides that:

> each Party that does not choose to apply the Simplified Limitation on Benefits Provision pursuant to paragraph 6, but chooses to apply either subparagraph a) or b) of paragraph 7 shall notify the Depositary of its choice of subparagraph. Unless such Party has made the reservation described in subparagraph c) of paragraph 15, such notification shall also include the list of its Covered Tax Agreements which contain a provision described in paragraph 14, as well as the article and paragraph number of each such provision.

Article 7(7) addresses the situation that provides that only some of the parties adopt the SLOB provision in article 7(6), all the parties not adopting the SLOB, when granting the benefits under the CTA, may by agreement adopt article 7(7)(a), under which the SLOB provision shall apply to all parties symmetrically, or article 7(7)(b) under which the SLOB provision shall apply asymmetrically to the parties that have chosen the SLOB option.

A summary is provided in Table 9, which highlights the interactive relationships between the parties that adopt the SLOB option under article 7(6), and the parties that do not adopt the SLOB option.

Table 9 – The PPT-Plus approach-2 [either adopting the PPT-and-SLOB approach, or the PPT-and-DLOB approach]

Some parties adopt the SLOB provision under article 7(6)	Do all the parties *not* adopting article 7(6) agree to adopt article 7(7)(a) or (b), pursuant to article 7(17)(d)?	If yes for (a), does either party make reservation not to adopt SLOB under article 7(15)(c) and has given notification?	If yes, article 7(7)(a) shall not apply	
			If no, article 7(7)(a) shall apply in place of, or in the absence of, a SLOB provision symmetrically	Notify Depositary pursuant to article 7(17)(d)
		If yes for (b), does either party make reservation not to adopt SLOB under article 7(15)(c) and has given notification?	If yes, article 7(7)(b) shall not apply	
			If no, article 7(7)(b) shall apply in place of, or in the absence of, a SLOB provision asymmetrically	Notify Depositary pursuant to article 7(17)(d)
		If no, does either party adopting article 7(6) make reservation for entire article 7 not to apply, pursuant to article 7(16)?	If yes, article 7 does not apply, subject to a mutually satisfactory solution reached that meets the minimum standard	
			If no, the SLOB does not apply	

66. *Agreement between the Government of the People's Republic of China and the Government of the Russian Federation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (13 Oct. 2014) (as amended through 2015), Treaties & Models IBFD.
67. *Convention between the Government of the Russian Federation and the Government of the Republic of Ecuador for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (14 Nov. 2016), Treaties & Models IBFD.
68. *See* http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (accessed 6 Aug. 2019).

6.5.2. Reservation

As of 28 June 2019, six contracting jurisdictions that do not adopt the SLOB option in article 7(6) have provisionally agreed to apply either article 7(7)(a) symmetrically or article 7(7)(b) asymmetrically to the CTAs with the parties that adopt the SLOB provision when granting the tax benefits.[69]Among them, both Denmark and Norway, as listed in Table 2 , have provisionally chosen to adopt article 7(7)(a).[70]

Article 7(16) also addresses the situation under which a party not adopting the SLOB provision in article 7(6) does not agree to adopt either article 7(7)(a) or (b). If that happens, any party that adopts the SLOB provision in article 7(6) has two policy choices:

(1) it may reserve its right for the entire article 7 not to apply to the CTAs for which one or more of the other parties have not agreed to adopt the SLOB provision in article 7(6). In that case, article 7(16) provides that the parties should reach a mutually satisfactory solution that meets the minimum standard for preventing treaty abuse under the OECD/G20 BEPS package; or

(2) it does not reserve its right under article 7(16). If it does not, that will not satisfy the requirement "where all the contracting jurisdictions have chosen to apply it" as per article 7(6). In that case, the provision of SLOB under article 7(6) does not apply to the CTAs.

7. Option and Game-Tree Structure

In negotiating a tax treaty, both parties can discuss and cover every topic and insert it in the agreement or protocol. A multilateral instrument differs from a bilateral treaty in that parties to the MLI, including those that will become parties but they are unknown at the time of negotiating the MLI, can choose the opt-in and opt-out provisions that best fit individual circumstances. In addition, the options and its game-tree type of structure in the MLI provide both certainty and great flexibility for the parties to the MLI with different levels of commitment to the BEPS minimum standards. Furthermore, it can achieve the purposes of amending the more than 3,000 CTAs in a swift and synchronized manner.[71]It is worthwhile to study this structure in depth, as follows.

7.1. SLOB options under articles 7(6) and 7(7)

One can use a game tree structure with perfect information sets to explain the relations between articles (6) and 7(7), and the results from the choice of alternatives. The game tree has four decision nodes in which each of the contracting jurisdictions (players) knows that he has to make a choice from available alternatives and what comes next from each of those alternatives.

The game tree starts with the SLOB option under article 7(6) as the initial node, which contains three possible outcomes:

(1) First, if all other parties adopt the SLOB option and notify the Depositary of the choices, then article 7(6) shall apply, and the game comes to an end.

(2) Second, if all other parties do not adopt the SLOB option, then article 7(6) shall not apply and that ends the game.

(3) Third, in the situation that some of the parties adopt the SLOB option and some of them do not, the game proceeds to a second decision node:

a) The parties that do not adopt the SLOB option when granting the tax benefit agree to adopt the SLOB option, pursuant to articles 7(7)(a) or (7)(b). The SLOB provision shall apply either symmetrically or asymmetrically. It is important to note that the game does not end here. Here is a third decision node in the application of article 7(7)(a) or (7)(b) to the CTAs.

A. If the CTA already contains a provision that is compatible to the SLOB provision, the compatibility clause does not apply. The party may reserve its right for article 7(7)(a) or (b) not to apply to the CTA. That brings the proceedings to the terminal node of the game-tree.

B. If the CTA does not contain a compatible provision, the compatibility clause shall apply. Then, one has to check whether notification is given and also given properly in order that article 7(7)(a) or (b) shall have legal force. The terminal node will come as follows:

- If notification is matched, article 7(7)(a) or (b) shall apply in place of the CTA provision.
- If it is not, article 7(7)(a) or (b) shall supersede the CTA provisions to the extent that the CTA provisions are incompatible with the SLOB provision;[72]or

b) The parties that do not adopt the SLOB provision do not agree to adopt articles 7(7(a) or 7(7)(b). In this case, the game tree does not end here. A party that adopts the SLOB option proceeds to the terminal node:

69. Denmark, Iceland, Jamaica, and Norway provisionally adopt (7)(a), while Ivory Coast and Greece provisionally adopt (7)(b).
70. *See* http://www.oecd.org/tax/treaties/mli-database-matrix-options-and-reservations.htm (accessed 6 Aug. 2019).
71. Since the MLI came into force on 1 July 2018, 22 out of 89 contracting jurisdictions have submitted the Instrument of Ratification. That accounts for more than one fourth of the total number of contracting jurisdictions.
72. *See* sec. 6.4.1.

A. Do nothing and the SLOB provision shall not apply; or

B. Opt out of the entire article 7, subject to certain condition being satisfied.

7.2. Arbitration processes under article 23

The arbitration process under article 23 also contains a game-tree structure.

The initial node is the "final offer" approach under article 23(1), which is the default option of the arbitration process with respect to any unresolved issues of a case under the mutual agreement procedure. If party A chooses the final offer approach, then party B may accept it, or reject it. The game tree proceeds to the beginning of a second decision node.

If Party B accepts the final offer approach, then the game tree ends here. If party B does not accept the final offer approach, it may reserve its right for (opt-out of) the final offer approach not to apply to its CTAs. Concurrently or simultaneously, the independent opinion approach in article 23(2) shall automatically apply to the arbitration proceeding.

In that case, the MLI provision provides for a third decision node. Party A, who adopts the final offer approach, has two choices (the terminal node):

– it accepts the independent opinion approach that party B has chosen; or

– it can reserve its right not to apply with respect to its CTA with party B who has made a reservation for the final offer approach.[73]

8. Conclusion

Article 7 contains three opt-in provisions under paragraphs 4, 6 and 7. The opt-in provision under paragraph 4, which supplements the application of PPT provision under article 7(1), provides that the contracting jurisdiction may grant discretionary tax benefits with respect to an item of income or capital where certain conditions are satisfied. Paragraph 6 provides for a party to adopt the SLOB provision in addition to the default option of PPT under paragraph 1, as modified by paragraph 4 where applicable. Paragraph 7 provides that all the parties not adopting the SLOB provision may agree that, when granting benefits under the CTA, the SLOB provision shall apply to the CTAs either symmetrically or asymmetrically.

Article 7 contains four reservations under paragraph 15(a), (b), (c), and paragraph 16 respectively. A party to the MLI may reserve its right under paragraph 15(b) or 15(c) where the CTA provision contains a provision that is compatible to the PPT or SLOB provision respectively. A party may reserve its right under paragraph 15(a) for the default PPT provision not to apply to its CTAs, on the basis that it intends to adopt either a DLOB provision and a conduit structure, or a DLOB and a PPT provision. A party may also reserve its right under paragraph 16 for the entire article 7 not to apply to its CTAs if either one of the parties that adopts a PPT-only option does not agree to adopt the option under paragraph 7(a) or 7(b). In both cases of reservation entered under either paragraph 15(a) or paragraph 16, the contracting jurisdictions are required to reach a mutually satisfactory solution that meets the minimum standard under the OECD/G20 BEPS package.

This article examined the legal principles of the public international law that the MLI has contained, the mechanism of the reservations and the notifications in the MLI, the policy considerations of the parties with respect to the reservations made and notifications given, and the static and dynamic structure with respect to article 7. The aim is to provide a step-by-step guide to understanding the legal texts. Specifically, the logic underlying the texts of article 7(6) and article 7(7) makes it a bit complicated for the stakeholders to understand how the contracting jurisdictions could apply articles 7(6) and 7(7) to the CTAs. However, the effort would be justified if a maximum number of the parties with different levels of commitment to the adoption of the MLI to the CTAs were to be included into the Action 15 project.

73. Para. 3 of art. 23 continues "[...] in such a case, the competent authorities of the contracting jurisdictions of each such covered tax agreement shall endeavor to reach agreement on the type of arbitration process that shall apply with respect to that CTA. Until such an agreement is reached, Article 19 (Mandatory Binding Arbitration) shall not apply with respect to a CTA."