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by Alfred Chan

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# A New Interpretation of the Capital Gains Article in the MLI

by Alfred Chan

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In this article, Chan analyzes the capital gains article of the OECD's multilateral instrument, based on the Conference of the Parties' recent opinion regarding the MLI's interpretation and implementation.

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On May 3 the Conference of the Parties (COP) to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting approved an opinion titled "Interpretation and Implementation Questions," which was published on May 20.[1] Article 32(2) of the multilateral instrument provides that "any question arising as to the interpretation or implementation of this Convention may be addressed by a Conference of the Parties convened in accordance with paragraph 3 of Article 31." The opinion was issued to address the questions that had arisen in the interpretation and application of the MLI after its conclusion on June 7, 2017.

This article provides an in-depth analysis of the capital gains article of the MLI in light of the updated information in the COP opinion. It starts with the exception relating to the interaction between the notification clause and the compatibility clause, which is also the focus of this analysis. By examining the language pattern used in the compatibility and notification clauses, the author derives the general conception from the specifics and then applies those concepts to the cases that illustrate how the MLI provisions modify the covered tax agreements (CTAs) concluded by some selected countries in the Asia-Pacific region.

## Conference of the Parties

The COP categorized its May 3 opinion into six guiding principles, which provide the theoretical and technical tools in the interpretation and implementation of the MLI.

The third guiding principle introduces the later-in-time rule. It states that the application of the MLI to CTAs follows the general principle that when two rules apply to the same subject matter, the later-in-time rule prevails (*lex posterior derogat legi priori*), to the extent they are incompatible.

The COP in its May 3 opinion endorses the term "MLI positions" under the fourth guiding principle, which was first used in a note issued by the OECD Directorate for Legal Affairs.[2] This principle provides that the MLI should be interpreted in light of the consent given by each contracting jurisdiction to modify their CTAs, as expressed in their MLI positions, and with the consequences set out in the relevant MLI provisions. The MLI, while respecting countries' sovereignty and the bilateral nature of the CTAs, allows for flexibility through a system of reservations and notifications of choices of

[1] OECD, "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI): Interpretation and Implementation Questions" (May 3, 2021).

[2] *See* OECD Directorate for Legal Affairs, "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Functioning Under Public International Law," at para. 21.



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alternative provisions and optional provisions. The lists of CTAs, reservations, and notifications are submitted in the form of so-called MLI positions that represent the boundaries of each party's consent to its CTA modifications.

In the fifth guiding principle, the opinion provides that the compatibility clauses set out whether, and to what extent, provisions in the MLI interact with existing provisions of CTAs. When a substantive MLI provision conflicts with specific CTA provisions covering the same subject matter, it is addressed through a description in the compatibility clause of the existing provisions that the MLI is intended to modify.

The sixth guiding principle provides that the notification clauses ensure clarity and transparency about existing CTA provisions that are modified by the MLI. While the notifications sometimes trigger the application of the MLI, in other cases, they do not.

## The Application of the MLI to CTAs

As explained by the May 3 opinion, the compatibility clause, which is the cornerstone for MLI implementation, objectively defines the relationship between MLI and CTA provisions, in relation to its interactive relationships with the operative and notification clauses.

### Mechanisms on MLI Application to CTAs

The MLI modifies CTA application in four different ways using specified language. The MLI provision:

- applies "in place of" an existing provision (case a);
- "applies to" or "modifies" an existing provision (case b);
- applies "in the absence of" an existing provision (case c); or
- applies "in place of or in the absence of" an existing provision (case d).

The operation of the MLI provision requires notification by both CTA contracting jurisdictions of the existence (cases a and b) or the absence (case c) of an existing provision. In case d, the MLI provision will apply in all cases, regardless of whether the notification has been given by the parties.

Notification clauses serve two purposes in the operation of the MLI. First, when an MLI provision modifies specific types of existing provisions described in compatibility clauses, parties to the MLI are generally required to make a notification to identify which existing provisions of CTAs are within the scope of compatibility clauses. Second, notifications made under the MLI sometimes have the effect of triggering the application of the MLI.

The May 3 opinion states that there are exceptions in the notification mechanism to achieve those purposes. For the first purpose, the parties to a CTA are also required to notify a list of CTAs that do not contain a provision described in a compatibility clause. Take article 6(3) for example, which provides that:

> A Party may also choose to include the following preamble text with respect to its covered tax agreements that do not contain preamble language referring to a desire to develop an economic relationship or to enhance co-operation in tax matters: "Desiring to further develop their economic relationship and to enhance their co-operation in tax matters . . . ."

The quoted sentence is added to the preamble language paragraph if it does not exist in the CTA. For the second purpose, a party is obligated to give notification so that the compatibility clause takes effect. The COP also opined that:

> Article 8 of the MLI (dividend transfer transactions), which contains a compatibility clause in its article 8(2) referring to "in place of or in the absence of," does not operate in the same manner. Rather, article 8(2) of the MLI describes the interaction between its article 8(1) and existing provisions of Covered Tax Agreements only with respect to minimum holding periods. In this case, notifications made under article 8(4) of the MLI have the effect of triggering the application of article 8(1) of the MLI. This is also true for article 9(2) of the MLI, which cannot apply without an existing



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**Table 1. Summary of Different Uses of the Notification Rules**

| Specified Phrases for Cases a Through d | Notification Required to Take Legal Effect? | Notes |
|---|---|---|
| a) applies in place of | Yes. | |
| b) applies to or modifies | Yes. | |
| c) applies in the absence of | Yes. | It is also used to notify a list of CTAs that do not contain the provision described in the compatibility clause. |
| d) applies in place of or in the absence of | No, the compatibility clause will apply in all cases regardless of whether notification is given. | Except for paragraph 4 of article 8 (dividend transfer transactions) and paragraph 7 of article 9 (capital gain). |

provision described in article 9(1) of the MLI.[3]

A summary of the notification rule for the purpose of giving legal effect to the operative clause is set out in Table 1.

To facilitate further analysis, the legal text of article 9 (capital gains from alienation of shares or interests of entities deriving their values principally from immovable property) is reproduced in Table 2.

## Comparing the Main and Alternative Articles

Article 9(1) prescribes two requirements to be met for the taxation on capital gain arising from disposal of shares in a land-rich entity:

- a time period test to determine whether gains from the disposal of shares or comparable interests in an entity deriving most of its value from landed properties situated in the other contracting jurisdiction is taxable; and
- the inclusion of comparable interests to the scope of shares that are the subject of article 9(1).

Article 9(4) is an alternative provision that provides both the time period test and the value threshold test for shares in an entity holding immovable property or comparable interests, in respect of which a party to the MLI may choose to exclude article 9(1). These two articles are for the parties to choose to achieve the same policy objective under the BEPS measures in action 6.

[3] *See* the explanation in footnotes 23 and 26 in the opinion of the COP issued on May 3, 2021.

The compatibility clauses of article 9(2) and article 9(5) modify article 9(1)(a) and article 9(4), respectively, by using the same language — "shall apply in place of or in the absence of" the relevant provisions — that is used in case d above. Although the language of the notification given under articles 9(7) and 9(8) is the same, the reasons why the notifications are given are different.

The modification of article 9(1) by article 9(2) will apply the subject to the sole condition that all the parties have given notification under article 9(7). The notification clause reads: "Paragraph 1 shall apply with respect to a provision of a Covered Tax Agreement only where all Contracting Jurisdictions have made a notification with respect to that provision." Note that the use of the preceding sentence in article 9(7) is to trigger the application of the modification by article 9(2) to article 9(1). That is an exception to the cases of other MLI articles that provide that when the provisions of the MLI "apply in place of or in the absence of" are used to modify the operative clause, "the compatibility clause shall apply *in all cases* irrespective of whether notification is required" (emphasis added).

The modification of article 9(4) by article 9(5) will apply subject to the sole condition that all the parties have given matching notifications in accordance with article 9(8). It reads: "Paragraph 4 shall apply to a Covered Tax Agreement only where all Contracting Jurisdictions have made such a notification. In such case, paragraph 1 shall not apply with respect to that Covered Tax Agreement." The notification is required to inform all other parties to the MLI that the



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**Table 2. Full Text of Article 9**

| Main Provisions | Alternative Provisions |
|---|---|
| | 3. A Party may also choose to apply paragraph 4 with respect to its Covered Tax Agreements. |
| 1. Provisions of a Covered Tax Agreement providing that gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or other rights of participation in an entity may be taxed in the other Contracting Jurisdiction provided that these shares or rights derived more than a certain part of their value from immovable property (real property) situated in that other Contracting Jurisdiction (or provided that more than a certain part of the property of the entity consists of such immovable property (real property)):<br>a) shall apply if the relevant value threshold is met at any time during the 365 days preceding the alienation; and<br>b) shall apply to shares or comparable interests, such as interests in a partnership or trust (to the extent that such shares or interests are not already covered) in addition to any shares or rights already covered by the provisions. | 4. For purposes of a Covered Tax Agreement, gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting Jurisdiction if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property (real property) situated in that other Contracting Jurisdiction. |
| 2. The period provided in subparagraph a) of paragraph 1 shall apply in place of or in the absence of a time period for determining whether the relevant value threshold in provisions of a Covered Tax Agreement described in paragraph 1 was met. | 5. Paragraph 4 shall apply in place of or in the absence of provisions of a Covered Tax Agreement providing that gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or other rights of participation in an entity may be taxed in the other Contracting Jurisdiction provided that these shares or rights derived more than a certain part of their value from immovable property (real property) situated in that other Contracting Jurisdiction, or provided that more than a certain part of the property of the entity consists of such immovable property (real property). |
| 6. A Party may reserve the right: | |
| a) for paragraph 1 not to apply to its Covered Tax Agreements;<br>b) for subparagraph a) of paragraph 1 not to apply to its Covered Tax Agreements;<br>c) for subparagraph b) of paragraph 1 not to apply to its Covered Tax Agreements;<br>d) for subparagraph a) of paragraph 1 not to apply to its Covered Tax Agreements that already contain a provision of the type described in paragraph 1 that includes a period for determining whether the relevant value threshold was met;<br>e) for subparagraph b) of paragraph 1 not to apply to its Covered Tax Agreements that already contain a provision of the type described in paragraph 1 that applies to the alienation of interests other than shares; | f) for paragraph 4 not to apply to its Covered Tax Agreements that already contain the provisions described in paragraph 5. |



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**Table 2. Full Text of Article 9 *(Continued)***

| Main Provisions | Alternative Provisions |
|---|---|
| 7. Each Party that has not made the reservation described in subparagraph a) of paragraph 6 shall notify the Depositary of whether each of its Covered Tax Agreements contains a provision described in paragraph 1, and if so, the article and paragraph number of each such provision. Paragraph 1 shall apply with respect to a provision of a Covered Tax Agreement only where all Contracting Jurisdictions have made a notification with respect to that provision. | 8. Each Party that chooses to apply paragraph 4 shall notify the Depositary of its choice. Paragraph 4 shall apply to a Covered Tax Agreement only where all Contracting Jurisdictions have made such a notification. In such case, paragraph 1 shall not apply with respect to that Covered Tax Agreement. In the case of a Party that has not made the reservation described in subparagraph f) of paragraph 6 and has made the reservation described in subparagraph a) of paragraph 6, such notification shall also include the list of its Covered Tax Agreements which contain a provision described in paragraph 5, as well as the article and paragraph number of each such provision. Where all Contracting Jurisdictions have made a notification with respect to a provision of a Covered Tax Agreement under this paragraph or paragraph 7, that provision shall be replaced by the provisions of paragraph 4. In other cases, paragraph 4 shall supersede the provisions of the Covered Tax Agreement only to the extent that those provisions are incompatible with paragraph 4. |

notifying party has chosen to adopt (or opted into) article 9(4), the alternative provision to article 9(1), in accordance with article 9(3). It is also used to clarify that articles 9(1) and 9(4) are mutually exclusive in application.

## Enhance Clarity in Implementing MLI Article 9(4)

Furthermore, a standard wording has been used in article 9(8):

> Where all Contracting Jurisdictions have made a notification with respect to a provision of a Covered Tax Agreement under this paragraph or paragraph 7, that provision shall be replaced by the provisions of paragraph 4. In other cases, paragraph 4 shall supersede the provisions of the Covered Tax Agreement only to the extent that those provisions are incompatible with paragraph 4.

The language used in paragraph 9(8) is not for triggering the application of article 9(4). Rather, it enhances clarity and transparency in the implementation of the MLI. In a bilateral CTA, "all parties" means both parties, and vice versa. If both parties give a matching notification, the MLI provisions will apply to the CTA provision. In a situation in which a party A signs a CTA with one of the parties to a multilateral CTA (parties B1, B2, and B3), article 9(4) will apply in that bilateral relationship between party A and the multilateral CTA only if both party A and all the parties in the multilateral CTA have given matching notifications.[4]

Assume that party B1 has given a notification that its CTA contains a provision that addresses the same issue as that under article 9(4). Article 9(4) will not apply to the bilateral relationship between party A and party B1. Assume that party B2 concluded a CTA with party A using an old model tax convention decades ago but has not given notification because of an oversight. In that case, the later-in-time rule applies. That is, "paragraph 4 shall supersede the provisions of the CTA only to the extent that those provisions are incompatible with paragraph 4." Assume that party B3 has not given notification because the CTA it has concluded does not contain a provision equivalent in content to article 9(4). Then, the provision of article 9(4) will apply to the CTA between party A and party B3 in absence of a provision described in article 9(4), or article 9(4) is added to the CTA between party A and party B3.

[4] An example of a multilateral agreement is the Convention Between the Nordic Countries for the Avoidance of Double Taxation With Respect to Taxes on Income and on Capital, which covers Denmark, the Faroe Islands, Finland, Iceland, Norway, and Sweden.



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### Definition of Covered Tax Agreement

It is useful to examine paragraph 1 of article 2 (interpretation), which provides that:

> a) The term "Covered Tax Agreement" means an agreement for the avoidance of double taxation with respect to taxes on income (whether or not other taxes are also covered):
>
> i) that is in force between two or more:
>
> A) Parties; . . .
>
> ii) with respect to which each such Party has made a notification to the Depositary listing the agreement as well as any amending or accompanying instruments thereto . . . as an agreement which it wishes to be covered by this Convention.

It is useful to compare the compatibility clause of the arbitration article, adopted by two parties under article 18, Part VI, and the compatibility clause, used by the parties in article 9 of the MLI (and the other articles of the MLI). The notification clauses in the arbitration articles and article 9 are worded differently, as shown in Table 3.

As noted in a bilateral agreement such as that in article 26, the standard wording beginning with "in other cases" won't apply. Knowledge of the standard wording for the notification used in connection with the term "covered tax agreement" as well as the later-in-time rule is useful for understanding the same contents in the rest of the MLI because the same language is used in a total of 10 articles, including article 9, that are contained in Part II (hybrid mismatches), Part III (treaty abuse), Part IV (avoidance of permanent establishment status), and Part V (improving dispute resolution) of the MLI.

### The Later-in-Time Rule

The COP's May 3 opinion explicitly provided that the later-in-time rule in Guiding Principle 5 applies in the interpretation of the MLI. The rule provides that the approach taken in the MLI follows the general legal principle that when two rules apply to the same subject matter, the rule that is later-in-time prevails.

Article 9(6) provides for six reservations, five being applicable to article 9(1) and one being applicable to article 9(4), which permit a party to make a reservation in accordance with paragraph (1)(g) of article 28 (reservation). The reservation clauses in article 9(6) read:

> A Party may reserve the right:
>
> (a) for paragraph 1 not to apply to its CTAs;
>
> (b) for paragraph (1)(a) not to apply to its CTAs;
>
> (c) for paragraph (1)(b) not to apply to its CTAs;
>
> (d) for paragraph (1)(a) not to apply to the CTAs that already contain a provision of the type described in paragraph 1 that includes a period for determining whether the relevant value threshold was met;
>
> (e) for paragraph (1)(b) not to apply to the CTAs that already contain a provision of the type described in paragraph 1 that applies to the alienation of interests other than shares;
>
> (f) for paragraph 4 not to apply to its CTAs that already contain the provisions described in paragraph 5.

Because article 9 does not come within the scope of the minimum standards in the BEPS package, article 9(6)(a) is a full reservation (exclusion) that a party may adopt. If adopted, the whole of the capital gains article won't apply unless the same party opts in for the alternative provision under article 9(4). In contrast, articles 9(6)(b) to (f) are all partial reservations that fall into different categories under two important principles of public international law.

On the one hand, articles 9(6)(b) and (6)(c) are partial reservations that restrict the scope of the application of the MLI provision to the corresponding provisions of all, instead of some, of the CTAs. This is in accordance with the provision of paragraph 3 of article 28 (reservations) of the MLI, which replicates article 21(1) of the Vienna Convention on the Law of Treaties. Article 28(3) reads:

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



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**Table 3. Comparing Article 9 With Article 26**

| Article 9 (Capital Gain From Alienation of Shares or Interests of Entities Deriving Their Value Principally From Immovable Property) | Article 26 (Compatibility Under Part VI — Arbitration) |
|---|---|
| 5. Paragraph 4 shall apply in place of or in the absence of provisions of a Covered Tax Agreement providing that gains derived by a resident of a Contracting Jurisdiction from the alienation of shares or other rights of participation in an entity may be taxed in the other Contracting Jurisdiction provided that these shares or rights derived more than a certain part of their value from immovable property (real property) situated in that other Contracting Jurisdiction, or provided that more than a certain part of the property of the entity consists of such immovable property (real property). | 1. Subject to Article 18 (Choice to Apply Part VI), the provisions of this Part shall apply in place of or in the absence of provisions of a Covered Tax Agreement that provide for arbitration of unresolved issues arising from a mutual agreement procedure case. Each Party that chooses to apply this Part shall notify the Depositary of whether each of its Covered Tax Agreements, other than those that are within the scope of a reservation under paragraph 4, contains such a provision, and if so, the article and paragraph number of each such provision. Where two Contracting Jurisdictions have made a notification with respect to a provision of a Covered Tax Agreement, that provision shall be replaced by the provisions of this Part as between those Contracting Jurisdictions. |
| 8. Where all Contracting Jurisdictions have made a notification with respect to a provision of a Covered Tax Agreement under this paragraph . . . that provision shall be replaced by the provisions of paragraph 4. In other cases, paragraph 4 shall supersede the provisions of the Covered Tax Agreement only to the extent that those provisions are incompatible with paragraph 4. | |

> a) modify for the reserving Party in its relations with another Party the provisions of this Convention to which the reservation relates to the extent of the reservation; and
>
> b) modify those provisions to the same extent for the other Party in its relations with the reserving Party.

On the other hand, article 9(6)(d), (e), and (f) are partial reservations that only apply to some of the CTAs. This appears to be at odds with the reciprocity principle in public international law, with which article 28 has not explicitly dealt.

A contracting jurisdiction is permitted to make these reservations under article 9(6)(d), (e), or (f) because the relevant CTA provisions are modeled on article 13(4) of the 2017 OECD model convention, as revised in paragraph 44 (page 72) of the BEPS action 6 final report. In other words, because the provision of the CTA is compatible, or not in conflict, with article 9(1)(a) or 9(1)(b) of the MLI, it is excluded from the modification by the compatibility clause under article 9(2). The exclusion to the reciprocity principle owes its legal basis to article 30(3) of the Vienna Convention on the Law of Treaties that provides that:

> When 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.

This means that if an existing CTA (the earlier treaty) contains a provision that addresses the same issue as that under the relevant MLI article, that CTA provision should be excluded from (opted out of) the modification by the compatibility clause and will continue to apply in the future. As noted, this is endorsed by the COP in its May 3 opinion.

## Implementation of MLI at Country Levels

The information in Table 4 is extracted from the database kept by the OECD Depositary as of September 30 that contains the MLI position of the signatories and parties to the MLI and the matrix of options and reservations.



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**Table 4. The MLI Position of Selected Countries in the Asia-Pacific Region**

| Selected Parties | Article 9(1) Main Provision | Article 9(1) Main Provision | Article 9(4) Alternative Provision | Remarks |
|---|---|---|---|---|
| | Article 9(6)(a), reserve for article 9(1) not to apply | Article 9(6)(e), reserve for article 9(1)(b) not to apply | Article 9(8), notify to opt in for article 9(4) | |
| Australia | | X | | Later-in-time rule applies |
| Japan | | | X | Matching notification is given |
| India | | | X | Matching notification is given |
| New Zealand | | | X | Matching notification is given |
| Singapore | X | | | Opt out of article 9(1) |

The X's of Table 4 represent reservations that the parties have made in accordance with article 28 of the MLI and the notification given for choosing an optional or alternative provision in accordance with article 29 of the MLI.

## Australia-Japan CTA

The following are the extracts of the reservation made and notification given by Australia (the MLI position).[5]

### Reservation

Under article 9(6)(e), Australia reserves the right not to apply article 9(1)(b) to CTAs already containing a provision described in article 9(1) applying to the sale of interests other than shares. The agreements listed in Table 5 are within the scope of this reservation.

**Table 5. Extracts of Australia's Notification of Reservation**

| Listed Agreement Number | Other Contracting Jurisdictions | Provision |
|---|---|---|
| 17 | Japan | Article 13(2) |
| 24 | New Zealand | Article 13(4) |

### Notification of Existing Provisions

Australia considers that under article 9(7), the following agreements contain a provision described in article 9(1). The article and paragraph number of each is listed in Table 6.

**Table 6. Extracts of Notification of Australia's CTAs Modified by Article 9(1)(a)**

| Listed Agreement Number | Other Contracting Jurisdictions | Provision |
|---|---|---|
| 13 | India | Article 13(4) |
| 17 | Japan | Article 13(2) |
| 24 | New Zealand | Article 13(4) |
| 31 | Singapore | Article 10A(4) of Agreement 31 after the amendment by article 12 of its amending instrument (a) |

Australia reserves its right for article 9(1)(b) not to apply to its CTAs in accordance with the notification given in its MLI position. Australia does it because the "share or comparable interest" provision has been included in the CTAs that it has concluded with some of the parties to the MLI, including Japan. In other words, paragraph 2 of article 13 (alienation of property) in the Australia-Japan CTA is compatible with article 9(1)(b) of the MLI, as per the later-in-time rule.

On the other hand, Australia has not reserved its right for article 9(1)(a) not to apply under

[5] OECD, "Status of List of Reservations and Notifications Upon Deposit of the Instrument of Ratification, Acceptance or Approval" (Sept. 26, 2018).



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article 9(6)(d). Therefore, article 9(1)(a) will apply in the absence of a time period for determining whether the relevant value threshold in the provision of the Australia-Japan CTA described in article 9(1) is met. Consequently, the modified text of article 13(2) in the Australia-Japan CTA will contain the same contents as article 9(4):

> Income, profits, or gains derived by a resident of a Contracting State from the alienation of shares in a company or of interests in a partnership, trust or other entity may be taxed in the other Contracting State where the shares or the interests derive at least 50 per cent of their value directly or indirectly from real property referred to in Article 6 and situated in that other Contracting State. *Paragraph (1)(a) of Article 9 of the Convention [the MLI] shall apply if the relevant value threshold is met at any time during the 365 days preceding the alienation.* [Emphasis added.]

Because New Zealand is also on the reservation list under article 9(6)(e), the modification to the Australia-New Zealand CTA follows the same legal logic and language pattern as the Australia-Japan CTA.

### Australia-India CTA

Australia and India have given notifications that provide that article 9(1) and article 9(4) apply in accordance with article 9(7) and 9(8), respectively. The adoption of either article 9(1) or article 9(4) achieves the same policy objective under the OECD BEPS project.

### India-Japan, India-NZ, and Japan-NZ CTAs

Paragraph 4 of article 9 of the MLI replaces the provisions of the India-Japan CTA, the India-New Zealand CTA, and the Japan-New Zealand CTA because all parties have opted in for article 9(4) and given a matching notification in accordance with article 9(8) for each of the three bilateral relationships.

### Australia-Singapore CTAs

There is no capital gains tax in Singapore. The capital gains article in the CTAs that Singapore concluded with Australia will be excluded from modification by article 9 of the MLI because Singapore has reserved its right for article 9(1) to not apply to all its CTAs, without making the choice to apply article 9(4). However, article 9(1) would apply to the Australia-Singapore CTA if Singapore later chose to withdraw its article 9(1) reservation as permitted under article 28(9) of the MLI. Note that Australia is not permitted to make additional reservation to bring its MLI position in line with Singapore. Article 28 of the MLI only works in one direction for making changes to the scope of the reservation. The reason is that when a party withdraws a reservation or replaces it with one that is more limited in scope, it will be moving closer to the full adoption of the MLI — not away from it.[6]

## Conclusion

The COP opinion issued May 3 helps clarify the doubts and overcome the difficulties arising over the interpretation and implementation of the reservation and notification provisions in the MLI. It is believed that the anatomy of the capital gains article — a single article of the MLI — shows that knowledge of the language patterns obtained can enable stakeholders to understand the underlying logic structures in other parts of the MLI, including the notification rules used in connection with the compatibility clause and the later-in-time rule used in connection with the reservation clause. ■

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[6]For further analysis of the principle under article 28, see discussion of the anti-fragmentation rule in Alfred Chan, "Applying the Multilateral Instrument's Specific Activity Exemption," *Tax Notes Int'l*, Dec. 16, 2019, p. 991, at 996-997.



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