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Minimum Standards to the OECD BEPS Multilateral Convention: An Indian Perspective

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1. Introduction

The recent signing of the OECD Multilateral Instrument (MLI) by India has opened up a plethora of topics for academic discussion. It is interesting to note that India and other developing countries have long strived to bring to the notice of the international community some of the issues associated with base erosion and profit shifting (BEPS).

The OECD BEPS initiative is being carried out under the auspices of the Group of 20 nations (G20). Prior to this, the international tax structure has often seemed resistant towards large-scale change. Nations have opposed overhauling tax regimes, domestically as well as internationally, with an eye on tax competition and the desire to remain tax competitive.

Capital-exporting nations, often residence countries of large multinational corporations (MNCs), have advocated residence-based taxation of such MNCs. Simultaneously, developing countries, often the source of income of large MNCs, have had to implement lenient tax policies in order to encourage inbound investment. The willingness of developing countries to forgo taxation of inbound investors has long been reflected in a variety of tax incentives, some of which are offered explicitly (as in the case of tax holidays offered to inbound investors), and others implicitly (as in the case of governments' tolerance of income-stripping through BEPS)[2].

It is often perceived by developing countries that the international tax structure is skewed in favour of residence countries[3]. Thus, in recent years, countries that have reason to believe themselves as having inherent economic advantages in attracting inbound investment (such as India), have often argued towards a more balanced structure in favour of source countries[4]. This is perhaps a reason why India participated to such a great extent, in the OECD BEPS initiative, contributing towards the 15 BEPS Action reports in 2015.This is indeed a change in circumstance because, in the recent past, India often perceived the OECD as detached and disinterested in India or, by and large, other developing country interests[5] and it required considerable effort to get India to participate in selected OECD deliberations. In a world of polarized interests between developed and developing countries, India's strong international stance for a change in the tax system to

[2] See Reuven S. Avi-Yonah, 'Globalization, Tax Competition and the Fiscal Crisis of the Welfare State' (2000) 113(7) Harvard Law Review; Michael C. Durst, 'Limitations of the BEPS Reforms: Looking Beyond Corporate Taxation for Revenue Gains' (2015) ICTD working paper 40 <https://opendocs.ids.ac.uk/opendocs/handle/123456789/11200> accessed 28 January 2018

[3] Citation required. Also give a list of recommended reading

[4] Dhillon (2015); Desouza (2015)

[5] See for example the 'Balance of Payments crisis of 1990'; Sanjaya Baru, 'The Economic Imperatives Shaping Indian Foreign Policy' in David Malone *et al* (eds,), *The Oxford Handbook of Indian Foreign Policy* (1st Edition, OUP 2015)

recognise taxing rights of source countries has been criticised by tax authorities of advanced economies[6].

Shome reveals further, how India has argued long before the BEPS initiative that "tax revenue must justly accrue in source jurisdictions where value added is created in the international supply chain of a commodity or service."[7]While advanced economies by and large ignored this stance, the 2008 global crisis and consequently collapsed economies within such advanced economies, forced a change in their mind-set[8]. As former CBDT chief Anita Kapur elucidates, "As tax administrators, when we used to say, please pay your taxes because you have added value in India, we were a minority voice. With the BEPS project, our concerns have been heard and we are now the majority voice".[9]It is perhaps this change in the international tax perception, which catalysed India towards such strong participation in the BEPS project and thereby contributes strongly to the realization of the MLI.

This change in attitude towards tax avoidance is also noticeable within the OECD, with regards to their evolving model tax convention. The 1977 commentary on article 1 of the OECD model convention put the onus of addressing tax avoidance on the States and their domestic legislation[10]. There was a noticeable, albeit ambiguous, change in stance in the revised Commentary in 1992, which, while still placing the onus of addressing tax avoidance on states, admitted that, "such rules were subject to the general provisions of tax treaties against double taxation, especially where the treaty itself contained provisions aimed at counteracting its improper use."[11] The commentary admitted to the difficulty of reconciling these diverging opinions prevalent in different jurisdictions and added that, "[t]he main problem seems to be whether or not general principles such as "substance-over-form" are inherent in treaty provisions, i.e. whether they can be applied in any case, or only to the extent they are expressly mentioned in bilateral conventions."[12]

It was only in the 2003 revision of the commentary on article 1 that the OECD Model Tax Convention (OMTC) included the purpose of tax conventions to prevent tax avoidance and evasion.[13] Furthermore the commentary also provided a guiding principle

[6] Partho Shome, "MNE's Tax Avoidance and Over Dealt Response" *Business Standard* (17 November 2015)
[7] Shome (Business Standard 2015) (n6)
[8] Shome (Business Standard 2015) (n6)
[9] Anita Kapur quoted in 'The BEPS String 2017' *Scaling BEPS* (2015 – 2016 BMR Advisors/Taxsutra)
[10] Commentaries on the Articles of the Model Tax Convention (OECD 1977)
[11] Commentaries on the Articles of the Model Tax Convention (OECD 1992) para 23
[12] 1992 OECD Commentary (n 11)
[13] Commentaries on the Articles of the Model Tax Convention (OECD 2003) para 7; for a discussion on the 2003 changes to the OECD Commentary see Zornoza Perez and Andres Baez Moreno 'The 2003 Revisions to the Commentary to the OECD Model on Tax Treaties and GAARs: A Mistaken Starting Point' (2010 IBFD)

stating that, "the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions."[14]

A lot of discussion has arisen regarding the OECD BEPS initiative in general, the various Action Plans to counter BEPS, and the MLI itself, including an analysis of its articles. The official sector notwithstanding, certain academics have been critical of the direction in which the BEPS initiative has gone and provided various alternatives that may have had a more effective impact on BEPS[15].

In this paper, we briefly introduce the BEPS project itself and the concept and reasoning behind the MLI. We also discuss certain provisions of the MLI pertaining to the minimum standards set for the signatories of the MLI, along with India's Reservations Document.

2. The OECD BEPS Project

While the 2008 financial crisis is often cited as a catalyst for expediting the BEPS project, Dwarkasing[16] contends that the problems facing the international tax system runs deeper as a result of a series of factors arising from as early back as the colonial era, and the structure of international taxation at the time. According to him the international tax structure has its roots deeply embedded in the mercantilist system of colonial economics, designed to benefit the colonial powers in Europe[17].

The colonial hierarchy surrounding the First World War heavily influenced the framework of tax treaties created by the League of Nations. This was highlighted by the belief that "residence countries were the source of know-how and capital while source countries were 'passive' suppliers of goods or services with little value added functionality" and as a result the taxation of the said product or services would have to be determined reflecting this paradigm[18].

As a result taxing rights shifted significantly, from source to residence countries. This system thus imposed the 'residence' criterion, prevalent to this day. The current OECD

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[14] 2003 OECD Commentary (n 13) para 9.5
[15]See for example Michael P. Devereaux and John Vella, 'Are we heading towards a corporate tax system fit for the 21st century?' (2014) Oxford University Centre for Business Taxation Working paper 14/25 <https://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Working_Papers/series-14/WP1425.pdf> accessed 28 January 2018
[16]Dwarkasing ITRAF
[17]Specific Dwarkasing citation
[18] Bret Wells and Cym H. Lowell, 'Income Tax Treaty Policy in the 21st Century: Residence vs Source' (2013) 5(1) Columbia Journal of Tax Law

model is based on the concept that the residual income for global income tax purposes, i.e. the portion of income earned by all parties to international transactions that remains after a routine return has been allocated to each of the related parties for the function and risks that it performs, should be allocated to the residence country of an MNE and not to the source country of the underlying economic activity[19].

Moreover, subsidiaries were also removed from the purview of permanent establishment (PE) thereby enabling the possibility of base eroding colonized countries/markets. Thus, by removing subsidiaries from the definition of PE, determining profits to the subsidiary through a stand-alone or one sided TP method, ignoring holding companies and exempting royalties from source based withholding taxation, the system created ample opportunities for aggressive tax planning by MNEs which would effectively erode the tax base.

This environment of aggressive planning was quite an issue for the Indian perspective as MNEs used innovative methods to shift profits away from the Indian tax base. This resulted in several cases between the Indian tax authorities and MNEs, though the Indian tax administration also became increasingly aggressive thus resulting in tax disputes with MNC's attracting international attention. It has also resulted in several regulatory changes in Indian tax law, and the renegotiation of DTAAs between India and other nations.

Within this environment of BEPS, the financial crisis of 2008 hit global markets, instigating a reaction against aggressive tax planning and culminating in the G20 commissioning the OECD to draw up its BEPS initiative. In turn, this led to the drawing up of 15 Action Plans[20]. Action Plan 15 was the formulation of an MLI.

The MLI was originally signed by 68 countries (78 signatories in total), including India and was accompanied by a country specific list of 'reservations' categorizing the treaties each country was willing to place under the rules of the MLI and whether there were any rules the countries did not wish to employ in their entirety[21]. However, there was a set of rules that were deemed essential; these minimum standards had to be adhered to by the signatories. These were embodied in Action 6 (Treaty Abuse) and Action 14 (Dispute Resolution) of the BEPS Project. We therefore look at these minimum standards in the following sections along with India's reservations for each.

3. Treaty abuse

[19]Wells and Lowell 2013 (n 18)

[20]OECD Secretary General Report to G20 Finance Ministers (OECD 2015)

[21] Signatories and Countries to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (OECD 2018) <http://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf> accessed 28 January 2018

We first look at the minimum standard related to the prevention of treaty abuse as mandated by Action 6 of the BEPS Project[22]. Part III of the MLI (articles 6 to 11) contains six provisions related to the prevention of treaty abuse, which correspond to changes proposed in the Final Report on Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances). In particular, the Report contains provisions relating to the so-called "minimum standard" aimed at ensuring a minimum level of protection against treaty shopping, mandating: (i) the inclusion of a statement of purpose of a tax treaty in the preamble; and (ii) the inclusion of alternative tests aimed at preventing inappropriate granting of treaty benefits. Articles 6 and 7 of the MLI provide the manner in which to adopt such minimum standard.

Part III also includes provisions relating to dividend transfer transactions (Article 8), capital gains derived from alienation of shares or interests in entities that derive their value principally from immovable property (Article 9), PEs situated in third jurisdictions (Article 10), and rules on the application of tax agreements to retract a Party's right to tax its own residents (Article 11).

The essence of Part III and, more specifically, the minimum standards embedded in Article 6 and 7, are found within the Action Plan on Action 6:

> "Existing domestic and international tax rules should be modified in order to more closely align the allocation of income with the economic activity that generates that income:
>
> Treaty abuse is one of the most important sources of BEPS concerns. The Commentary on Article 1 of the OECD Model Tax Convention already includes a number of examples of provisions that could be used to address treaty-shopping situations as well as other cases of treaty abuse, which may give rise to double non-taxation. Tight treaty anti-abuse clauses coupled with the exercise of taxing rights under domestic laws will contribute to restore source taxation in a number of cases."[23]

As a result, the Final Report on Action 6 concluded that the prevention of treaty abuse should be addressed in one of the following ways: (i) a combined approach consisting of a Limitation on Benefits (LOB) provision and a principal purpose test (PPT); (ii) a PPT alone; or (iii) a LOB provision, supplemented by specific rules targeting conduit

[22] Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6: Final Report (OECD 2015) <http://www.oecd.org/tax/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report-9789264241695-en.htm>
[23] Final Report on Action Plan 6 (n 22)

financing arrangements. With respect to the LOB provision, the Final Report on Action 6 provided for the option of including a detailed or a simplified version[24].

In other words, the PPT is the minimum standard of protection prescribed by the Final Report on Action 6 (option (ii)). If parties desire to strengthen their provisions against treaty abuse, they may provide a standard LOB provision while having the PPT provision in place (option (i)). They may also choose to not have a PPT provisions at all, as long as they keep a LOB provision in place combined with provisions that specifically target shell or conduit companies or arrangements (option (iii)). We explore these options further in the section on Article 7.

3.1 Article 6: Clarifying the Purpose of a Covered Tax Agreement (CTA)

Article 6 prescribes the modification of a CTA preamble to include the words, "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),"[25].

This paragraph reflects the wordings proposed in the Final Report of Action 6[26]. Readers will recall from the discussion in earlier sections, that Action 6 contains one of the minimum standards prescribed by the OECD[27] and manifests in Part III of the MLI. As a consequence, reservations to Article 6 are only permitted in the circumstance that a particular CTA already contains similar language "describing the intent […] to eliminate double taxation"[28]. In such cases the concerned jurisdiction is required to notify the OECD Depository of the existence of such preamble text in each CTA and the specific provisions[29].

However, India, in its MLI reservations document, makes no mention of Article 6[30]. Article 6 does make provisions for such an eventuality through its *compatibility clause* in

[24] Final Report on Action Plan 6 (n 22)
[25] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (BEPS MLI) (OECD 2016) <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm> Article 6(1)
[26] Final Report on Action Plan 6 (n 22) Section B Para 72
[27] See Section 3 Treaty Abuse
[28] BEPS MLI (n 25) Article 6(4)
[29] BEPS MLI (n 25) Article 6(5)
[30] Status of List of Reservations and Notifications at the Time of Signature: India (BEPS India Reservations) (OECD 2017) <http://www.oecd.org/tax/treaties/beps-mli-position-india.pdf> accessed 28 January 2018

Article 6(5)[31]. While the preamble language contained in Article 6(1) would replace or add to the preamble text contained in a CTA[32] if jurisdiction so notifies the Depository, under the compatibility clause "*in all other cases*, the text described in paragraph 1 shall be included in addition to the existing preamble language [*emphasis added*]". Therefore, in the case of India the text of Article 6(1) will be added to the existing preamble text, even if the partner jurisdiction to the CTA has made a notification under Article 6(5)[33]. Furthermore, several of India's DTAAs, including the ones with Mauritius and the US, already include wording similar in intent to Article 6(1) referring to the "prevention of double taxation and avoidance of fiscal evasion"[34].

The text of Article 6 provisions clearly demarcates *minimum standard* provisions from general provisions. Article 6(3), for example, contains further preamble text, which will only be applicable if all parties to a CTA agree on its inclusion through notification. Given India's silence regarding the entire Article 6, the text to Article 6(3) would not apply to any of its CTAs. However, CTAs such as the Mauritius DTAA contain the phrase "for the encouragement of mutual trade and investment"[35] and those of the Swedish and Luxembourg DTAAs contain the phrase, "promoting economic co-operation between the two countries"[36].

3.2 Article 7: A Minimum Standard to Preventing Treaty Abuse

While the text of Article 6 supplements the preamble, Article 7 stipulates the provisions aimed at preventing treaty abuse itself. In this regard, Article 7 provides three alternative options for parties to the MLI – a *Principal Purpose Test* (PPT) on its own, or a PPT supplemented with either a simplified *Limitation of Benefits* (LOB) clause or a detailed LOB clause[37]. As the PPT is the minimum level of protection, against treaty abuse, that the parties to the MLI should implement, it is considered a *minimum standard*[38].

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[31]It is pertinent to note that, for all other circumstances, silence with regards to a MLI provision would normally mean the exclusion of the said provision. However as Article 6 is a *minimum standard,* a compatibility clause has been provided to ensure its inclusion.
[32] BEPS MLI (n 25) Article 6(2)
[33]'in all other cases' BEPS MLI (n 25) Article 6(5)
[34] See for example 'Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with Foreign Countries – Mauritius, (India Mauritius DTAA) (Notification GSR 920(E) (1983) as amended by Notification SO 2680(E) (No. 68/2016 (F. NO. 500/3/2012-FTD-II)) (2016))
[35] India Mauritius DTAA (n 34) Preamble
[36]Agreement for avoidance of double taxation and prevention of fiscal evasion with Sweden (India-Sweden DTAA) (Notification GSR 705(E) (1997) as amended by Notification 63/2013 (F.NO. 505/02/1981-FTD-I)/(SO 2459(E)) (2013); and Agreement for avoidance of double taxation and prevention of fiscal evasion with Luxembourg (India-Luxembourg DTAA) (Notification : No. SO 2591(E) (2009)
[37] BEPS MLI (n 25) Article 7; See also Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (BEPS MLI Explanatory Statement) (OECD 2016) Para 88
[38] BEPS MLI Explanatory Statement (n 37) para 89; see also Final Report on Action Plan 6 (n 22) para 22

Article 7 also provides the mechanism to replace similar provisions in CTAs. This is achieved by stipulating that the provisions of Article 7(1) "shall apply *in place of* or in the absence of" CTA provisions, even when such provision "deny all or part of the benefits" that would have otherwise been allowed by that CTA[39].

Jurisdictions may also choose[40] to supplement Article 7(1) with the provisions of Article 7(4) allowing the granting of the benefit otherwise denied by Article 7(1), if the relevant authorities find that the benefit would have been granted to that person in the absence of the arrangement or transaction that negated the benefit in the first place[41], thus allowing parties to keep provisions protecting the interests of the taxpayer.

We now look at pertinent aspects of Article 7(1). According to the provision:

> "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 [*emphasis added*]"[42].

There are several noticeable aspects to the provision, including the central Principal Purpose test, and a test of Reasonableness[43]. These aspects are analysed below. However, before such analysis it is necessary to understand what may be regarded as a 'benefit' under the MLI. While the commentary to the first paragraph is silent regarding this matter, it does point to the corresponding article under the OECD Model Tax Convention contained in the Action 6 Final Report[44] (The Final Report). The corresponding Article under the Final Report would be Article 6(7) whereby the concept of benefit is explained thus:

> "The term 'benefit' includes all limitations (e.g. a tax reduction, exemption, deferral or refund) on taxation imposed on the State of sources under Article 6 through 22 of the Convention, the relief from double taxation provided by Article 23, and the protection afforded to residents and nationals of a Contracting State

[39] BEPS MLI (n 25) Article 7(2)
[40] BEPS MLI (n 25) Article 7(3)
[41] BEPS MLI (n 25) Article 7(4)
[42] BEPS MLI (n 25) Article 7(1)
[43]Dennis Webber, 'The Reasonableness Test of the Principle Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) versus the EU Principle of Legal Certainty and the EU Abuse of Law Case Law' (2017) 10(1) Erasmus Law Review
[44] BEPS MLI Explanatory Statement (n 37) para 92; The explanatory statement elucidates that the only changes made to the MLI provision is to conform the terminology of the MLI to the Draft Provision in the Final Report.

under Article 24 or any other similar limitations. This includes, for example, limitations on the taxing rights of a Contracting State in respect of dividends, interest or royalties arising in that State, and paid to a resident of the other State (who is the beneficial owner) under Article 10, 11 or 12. It also includes limitations on the taxing rights of a Contracting State over a capital gain derived from the alienation of moveable property located in that State by a resident of the other state under Article 13. When a tax convention includes other limitations (such as a tax sparing provision), the provisions of this Article also apply to that benefit."[45]

3.3 The Principle Purposes Test

The explanatory statement to the abovementioned Article X(7) recognizes that the provision is divided into two parts – the actual PPT which would configure whether an action would trigger the provision and deny any treaty benefit, and the exception to the test[46]. We look at these two aspects in detail.

The first part of the MLI provision states that: "a benefit under the Covered Tax Agreement shall not be granted […] if it is reasonable to conclude, […] that obtaining that benefit was *one of the principal purposes* of any arrangement or transaction that resulted directly or indirectly in that benefit". This is in fact in concord with a guiding principle found under the explanatory notes to Article 1 of the Model Tax Convention, which states that:

> "the benefits of a convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions."

This principle is often found in domestic judgments in various jurisdictions[47]. For example, in the Swiss Federal Court case of A Holding APS[48], the court stated that, "[i]t follows that the objection of an abuse of a convention is unfounded if the company demonstrates that its main purpose, […], is primarily based on valid economic grounds and not aimed at the obtaining of advantages of the applicable double tax convention. The same applies if the company pursues effectively a commercial activity in its state of residence and the tax relief claimed in the other contracting state relates to income

[45] Final Report on Action Plan 6 (n 22) para 26 (Para 7 of the commentary to Article X(7))
[46] Final Report on Action Plan 6 (n 22) para 26 (Para 7 of the commentary to Article X(7))
[47]For a comprehensive analysis of recent case law see Jan Vleggeert 'Abuse of Tax Treaties: a Discussion of Recent Court Cases in Various Countries with Opposite Outcomes' in R. Danon, *Double Taxation Conventions: Latest Developments* (3rd Symposium of International Tax Law. Schulthess, Zurich 2010)
[48] Swiss Federal Court, 28 November 2005, 8 ITLR 557; The case concerned a tax treaty between Switzerland and Denmark whereby dividends paid by a Swiss person to a Danish person was taxable only in Denmark.

connected to this activity." The court held in this case that the company in question (A Holding APS) had not fulfilled either condition and was liable to be taxed[49].

In the Netherlands, similar principles are considered for the abuse of provisions under national law (*fraus legis*) and the abuse of provisions under a tax treaty (*fraus conventionis*)[50]. However, Smit states that Dutch courts are reluctant to apply the principle of *fraus conventionis* when it comes to tax law cases, unless explicit provisions in the relevant tax legislation supplement it[51]. This is also revealed in the Danish Supreme Court case entitled BNB 1994/259[52]. Conversely, the court, in the later judgment of BNB 2007/36c* held that it would be incorrect to assume that "the object and purpose of the tax treaty would be denied"[53]. This was however, seemingly reversed in BNB 2007/42 where the court held that, "the treaty cannot be interpreted in such a manner that the intent […] nevertheless plays a role in respect to those consequences"[54].

Indian legislation, has of course, sought to eliminate any ambiguity by recently codifying its GAAR rules under the IT Act. Section 96 of the IT Act proclaims that an impermissible avoidance arrangement "shall be presumed, unless it is proved to the contrary by the assessee, to have been entered into, or carried out, for the *main purpose of obtaining a tax benefit*, if the main purpose of a step in, or a part of, the arrangement is to obtain a tax benefit, notwithstanding the fact that the main purpose of the whole arrangement is not to obtain a tax benefit [*emphasis added*]"[55]. An impermissible avoidance agreement would then be precluded from obtaning the benefits of a DTAA[56].

We now look at the second part of the provision which provides an exception to the PPT through the words: "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 [*emphasis added*]"[57].

It is prudent to note that while the exception includes the "*object and purpose* of the relevant provisions of the Covered Tax Agreement" it does not mention the object and purpose of the entire treaty itself. However, Kok is of the opinion that the object and purpose of the treaty provision would include the object and purpose of the treaty itself[58]. In that light, he lists areas within a CTA in which one may find the object and purpose of the said treaty provision. This includes the wording of the provision itself and the

[49] Swiss Federal Court, 28 November 2005, 8 ITLR 560/561
[50] Daniel S. Smit 'The Concept of Beneficial Ownership and Possible Alternative Remedies in Netherlands Case Law' in Michael Lang *et al* (eds.), *Beneficial Ownership: Recent Trends* (IBFD 2013), 70
[51] Smit (n 50) 71
[52]BNB 1994/259 para 3.5; Case law analysis taken from Smit (n 50)
[53]BNB 2007/36c* para 3.3 Case law analysis taken from Smit (n 50)
[54]BNB 2007/42 para 3.3 Case law analysis taken from Smit (n 50)
[55] Income Tax Act 1961 (IT Act 1961) Section 96(2)
[56] Income Tax Act 1961 (IT Act 1961) Section 95(1)
[57] BEPS MLI (n 25) Article 7(1)
[58] Q.W.J.C.H. Kok, 'The Principal Purpose Test in Tax Treaties under BEPS 6' (EY 2016) 409

wording of other provisions in the same CTA, the title of the treaty, the preamble to the treaty and the commentaries supplementing the MLI[59].

While the OECD MLI does not recommend a format for the title to a CTA, it is of note that the OECD Model Tax Convention does. It is perhaps revealing of the significance the title to a treaty may play in determining the object and purpose of the treaty itself[60]. The recommended title in the 2017 draft document for changes to the OECD reads:

> "Convention between (State A) and (State B) for the elimination of double taxation with respect to taxes on income and on capital and the prevention of tax evasion and avoidance"[61].

The OECD MLI, however, does insist on changes to the preamble through Article 6, as has been discussed above[62].

Furthermore, the 2017 draft document for changes to the OECD Commentary also provides a definition for the principal purpose of a DTAA. It states:

> "The principal purpose of double taxation conventions is to promote, by eliminating international double taxation, exchanges of goods and services, and the movement of capital and persons. As confirmed in the preamble of the Convention, it is also part of the purposes of tax conventions to prevent tax avoidance and evasion."[63]

The commentary to the OECD MLI, would refer to the explanatory statement to the MLI. The Explanatory Statement was adopted simultaneously with the MLI document[64]. This is not usually the case for commentaries and explanatory statements to international documents and perhaps the reason for the simultaneous release was to increase the legal authority of the statement itself and thereby authority to any determination towards understanding the object and purpose of the MLI itself and, through it, the covered CTA.

One further aspect of the provision that this paper must look at is the *Principle of Reasonableness* embedded in Article 7(1). We look at this test below.

3.4 The Principle of Reasonableness

The Principle of Reasonableness may be found in different legal jurisdictions, including India. In India the principle was mentioned by the Supreme Court in the constitutional case of *Maneka Gandhi v Union of India*[65]. In the judgement, Justice Bhagwati stated, "the principle of reasonableness […] legally as well as philosophically, is an essential

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[59] Kok 2016 (n 58) 409
[60] Kok 2016 (n 58) 409
[61] Commentaries on the Articles of the Model Tax Convention (OECD 2017)
[62] See *3.1 Article 6: Clarifying the Purpose of a Covered Tax Agreement (CTA)*
[63] 2017 OECD Commentary (n 61) para 54
[64] BEPS MLI Explanatory Statement (n 37) para 11
[65] 1978 AIR 597, 1978 SCR (2) 621; In the *Maneka Gandhi* case, the Supreme Court of India was contemplating the procedural aspects of Article 21 (Protection of Life and personal Liberty) and its relationship with Article 14 (Equality before Law)

element of equality or non-arbitrariness"[66]. Justice Iyer, in the same judgement, supplemented this line of reasoning by adding that the "[l]aw is reasonable law, not any enacted piece"[67]. Indian courts (at least within the ambit of constitutional law) recognized the need for a certain degree of detachment from rigidity, and the infusion of reasonableness as a requirement for an equitable application of law.

The concept as envisaged in Indian law is similar to the concept of 'due process' found in jurisdictions such as the US. As Grossi contemplates, the principle of due process embodies "the ideas of fairness, reasonableness, and efficiency, all to be measured, balanced, and applied to the various, changing circumstances that confront a judicial system […]"[68]. Grossi quotes Justice Harlan, in Poe v. Ullman[69]:

> "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. […] No formula could serve as a substitute, in this area, for judgment and restraint."[70]

These sentiments mirror the reasoning provided in *Maneka Gandhi*, especially in cautioning against the substitution of formula ('enacted piece' according to Justice Iyer in *Maneka Gandhi*) for reasoned judgement.

It is therefore evident that the principle of reasonableness aims to afford a degree of flexibility to the method in which the objective of a provision is achieved. In fact, the Final Report to Action 6 says as much, by admitting that "[a]s long as the approach that countries adopt effectively addresses treaty abuses […], some flexibility is therefore possible"[71].

However, one may notice a contrary view in Civil law jurisdictions such as the EU. It is perhaps the very flexibility that the *Principle of Reasonableness* espouses that may conflict with other legal principles. As Kemmeren states, reasonableness may be unacceptable under the ECJ as it 'creates too much uncertainty for the taxpayer'[72]. This may be witnessed in various ECJ caselaw[73].

[66] *Maneka Gandhi* case (n 65)
[67] *Maneka Gandhi* case (n 65)
[68] Simona Grossi, 'Procedural Due Process' (2017) 13 Seton Hall Circuit Review 155
[69] 367 U.S. 497, 542 (1961)
[70] 367 U.S. 497, 542 (1961)
[71] Final Report on Action Plan 6 (n 22) para 22; The Final Report states this right before prescribing the PPT as a *minimum standard*.
[72]E.C.C.M. Kemmeren, 'Where is EU Law in the OECD BEPS Discus- sion?' (editorial) (2014) 23(4) *EC Tax Review* 190, 192 <https://pure.uvt.nl/portal/files/5165981/01_07_2014_Eric_Kemmeren_Where_is_EU_law_in_the_OECD_BEPS_discussion_ECTR_23_4_Eric_C.C.M.Kemmeren.pdf> accessed on 28 January 2018
[73] For an extensive discussion on EU caselaw see Webber 2017 (n 43)

While deciding the *Biehl case*, for example, with regards to the discretionary powers of the tax department of Luxembourg, the ECJ made note of the uncertainty arrived at due to no provisions being available to the tax administration, "to remedy the discriminatory consequences" of tax provisions[74]. The consequential uncertainty was even perceived as discriminatory between residents and non-residents of Luxembourg[75].

The ECJ judgement in the *Itelcar case* is particularly illuminating on the subject of *legal certainty*, as it specifies that "[I]n accordance with [the requirements of legal certainty,] rules of law must be clear, precise and predictable as regards their effects, especially where they may have unfavourable consequences for individuals and companies."[76] Moreover, the ECJ was insistent that, "rules which do not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued."[77]

As Maxeiner states, "Legal certainty is a central tennet of the rule of law"[78]. Various declarations of international organizations have corroborated this statement. In a G8 declaration on the rule of Law from 2007, the foreign ministers of the G8 included the principles of legal certainty as one of the essential ingredients of the rule of law[79]. In fact, the OECD had itself declared that the concept of the Rule of law "seeks to emphasize the necessity of establishing a rule-based society in the interest of legal certainty and predictability."[80]

Various EU centric legal scholars, have asserted the centrality of the *Principle of Legal Certainty* to EU law[81]. However, it would be unjust to dismiss the *Principle of Reasonableness* based on the criticisms emanating from the EU alone.

Indian courts, too, have had to wrestle with legal uncertainty in domestic tax legislation. The Supreme Court has often asserted the necessity for certainty of a tax subject falling

[74] Klaus Biehl v Administration des contributions du grand-duché de Luxembourg CJEU 8 May 1990, C-175/88 para 19
[75]As perceived from the judgment of the court
[76] Itelcar — Automóveis de Aluguer Lda v Fazenda Pública CJEU 3 October 2013, C-282/12 para 44
[77] Itlecar case (n 76) para 44
[78]James Maxeiner, Some Realism About Legal Certainty in the Globalization of the Rule of Law (2008) 31 Houston Journal of International Law 27, 28 <http://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1409&context=all_fac>
[79] Declaration of G8 Foreign Ministers on the Rule of Law (G8 2007) para 2 <http://www.mofa.go.jp/policy/economy/summit/2007/g8dec.pdf>
[80] Equal Access to Justice and the Rule of Law (OECD Development Assistance Committee, Issues Brief) 2 (2005), <http://www.oecd.org/development/incaf/35785584.pdf > accessed 28 January 2018
[81] See a discussion based on these authors in Maxeiner 2008 (n 78)

within the letter of the law. In A.V. Fernandez v/s. State if Kerala[82], Justice Bhagwati stated in the judgement:

> " In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of law. If the revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."

The later judgement of CIT vs. Provident Inv. Co. Ltd.[83], concurred with the above statement stating that, "in construing fiscal statutes and in determining the liability of a subject to tax, one must have regard to the strict letter of the law and the true legal position arising out of the transaction in question."

The *Azadi Bachao Andolan case* and the *Vodafone case* are further examples of the court asserting the need for certainty in the law (albeit in these cases, the issue arose due to retrospective legislation). Both cases concern the retrospective application of capital gains tax on transnational companies taking advantage of DTAAs, through notifications by the Indian Tax Authorities. In the *Azadi BachaoAndolan* case (this case was relied upon by *Vodafone*) the SC decided that they could not agree with the argument that "*an act which is otherwise valid in law can be treated as non-est merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interests*"[84]. Thereby, the SC again asserted the necessity for legal certainty in tax provisions.

The Indian Government, however, persisted with their retrospective intent, by amending the IT Act, to include retrospective provisions aimed at untaxed Capital Gains[85]. A further consequence of these cases was the implementation of the previously mentioned GAAR provisions in the IT Act similar in tone to Article 7 of the MLI[86]. According to Section 96 an impermissible avoidance arrangement "*shall be presumed*, unless it is proved to the contrary by the assessee, to have been entered into, or carried out, for the *main purpose of obtaining a tax benefit* […]"[87].

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[82] [AIR 1957 SC 657]
[83] (1954) 32 ITR 190 (SC)
[84] Union Of India (UoI) And Anr. vs Azadi Bachao Andolan And Anr (2004) 1 CompLJ 50 SC Para 170
[85] Nikhi Kanekal and Kian Ganz, 'Vodafone-Hutch deal: Retrospective change to I-T Act' *Live Mint* (New Delhi/Mumbai 17th March 2012)
[86] See 3.2 Article 7: A Minimum Standard to Preventing Treaty Abuse
[87] Income Tax Act 1961 (IT Act 1961) Section 96(2)

The regulation does not rely on a *Reasonableness Test*, and instead bases its conclusion of *Principle Purpose* on a presumption, following which the onus to prove otherwise lies with the taxpayer. However, a comparative reading of the two mentioned Sections of the Indian IT Act with Article 7 of the MLI would reveal similar tones aimed at affording a degree of flexibility to tax authorities to ascertain whether a transnational arrangement was created to avoid tax. As such the wording of PPT test in the IT Act hints at the compatibility of thought between the current Indian tax climate and the OECD's intentions.

3.5 The Indian Perspective

While India's Reservation document is silent on Article 7(1) and Article 7(4), this situation provides an interesting opportunity to illustrate the differing effect such silence has on a minimum standard and an optional provision. By virtue of Article 7(2) stating that Article 7(1) "shall apply", no mention of it in the Reservations document would imply its application. Furthermore, when a provision in the MLI specifies that it "shall apply *in place of* or in the absence of", the provision of the Convention will apply in all cases. If all Contracting Jurisdictions notify the existence of an existing provision, that provision will be replaced by the provision of the Convention (to the extent described in the relevant compatibility clause). Where the Contracting Jurisdictions do not notify the existence of a provision, the provision of the Convention will still apply. If there is in fact a relevant existing provision that has not been notified by all Contracting Jurisdictions, the provision of the Convention will prevail over that existing provision, superseding it to the extent that it is incompatible with the relevant provision of the Convention. If there is no existing provision, the provision of the Convention will, in effect, be added to the Covered Tax Agreement[88].

Contrarily, since a jurisdiction needs to "choose" to apply Article 7(4), its absence in the reservation document would indicate that India "chooses" not to apply this to its CTAs. Moreover, through reporting requirements of Article 7(17)(a), India provides a list of CTAs indicating provisions similar to those described in Article 7(2), which in turn relates to Article 7(1). Article 7(17)(a) also requires reporting CTAs with provisions similar to those described in Article 7(4). Since no such list has been provided, this would be a further indication of India's intention to ignore the provisions of Article 7(4)[89].

Although the PPT provided in Article 7(1) is a minimum standard, jurisdictions have been allowed to reserve certain rights in relation to the PPT in certain circumstances[90]. Firstly, a jurisdiction may not apply the provisions of Article 7(1) if "it intends to adopt a

88 BEPS MLI Explanatory Statement (n 37) para 15
89 see BEPS India Reservations (n 30) Article 7
90 BEPS MLI (n 25) Article 7(15)

combination of a detailed limitation on benefits provision and either rules to address conduit financing structures or a principal purpose test"[91]. According to the MLI, this would meet "the minimum standard for preventing treaty abuse under the OECD/G20 BEPS package"[92].

Secondly, a jurisdiction may reserve the right to Article 7(1) and/or (4) if the CTA already contains a provision that denies "*all* of the benefits that would otherwise be provided under the [CTA] 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"[93]. While initially this provision appears contradictory to the text of Article 7(2), the absence of the phrase 'a part of' from the reservation article would seem to indicate that a reservation is available only for a comprehensive PPT to all forms of treaty benefits and not just partial PPTs.

Article 7 supplements the PPT minimum standard with a simplified LOB provision (SLOB)[94]. India, through its Reservation document has notified the application of the SLOB to its CTAs[95]. Furthermore, because of the reporting requirements of Article 7(17)(c), India has also provided a list of CTAs with provisions similar to those described in Article 7(14)[96].

However, it is pertinent to note that the SLOB provision is triggered only when all contracting jurisdictions to a CTA have also notified its application[97]. India is one of only 12 jurisdictions that have chosen to apply the SLOB[98]. Therefore, of the 9 CTAs notified by India under Article 7(17)(c), only the Armenia, Mexico and Uruguay CTAs would trigger the SLOB clause[99].

There are certain exceptions for CTAs with contracting jurisdictions (this applies to bilateral as well as plurilateral CTAs), which have not all chosen the SLOB. In the first instance, the SLOB shall apply to a particular CTA, if all the jurisdictions, which have not chosen the SLOB in general, chose to apply it for that CTA and notify the Directory[100]. In the second instance, the contracting jurisdictions to a particular CTA, which have not chosen the SLOB in general, may allow the application of the SLOB by

[91] BEPS MLI (n 25) Article 7(15)(a)
[92] BEPS MLI (n 25) Article 7(15)(a)
[93] BEPS MLI (n 25) Article 7(15)(b)
[94] BEPS MLI (n 25) Article 7(6)
[95] BEPS India Reservations (n 30) Article 7
[96] BEPS India Reservations (n 30) Article 7; also cross reference to discussion on Article 7(14) below
[97] BEPS MLI (n 25) Article 7(6)
[98]Argentina, Armenia, Bulgaria, Chile, Colombia, Indonesia, Mexico, Russia, Senegal, the Slovak Republic and Uruguay
[99] BEPS India Reservations (n 30) Article 7
[100] BEPS MLI (n 25) Article 7(7)(a)

the jurisdiction that has chosen to do so and notify the Directory[101]. This however, does not apply to any CTA involving India. In such circumstances, for the majority of the CTAs notified by India, only a PPT is likely to apply.

Notwithstanding a limited applicability, it is pertinent to understand the factors that trigger the SLOB clause under the OECD MLI. These would be available in the substantive provisions found between Article 7(8) and (13). According to the SLOB provision in Article 7(8), "a resident of a Contracting Jurisdiction to a [CTA] shall not be entitled to a benefit that would otherwise be accorded by the [CTA]" unless such person is a "qualified person"[102] or other than those benefits accorded in three circumstances. These are:

1. the benefits accorded to a person (other than an individual), who is deemed to be a resident of more than one Contracting Jurisdiction of a CTA, as defined by the provisions of the CTA
2. the benefits accorded by a provision which allows for the adjustment of taxes amongst Contracting Jurisdictions on the profits of an associated enterprise
3. the benefits allowing residents of a Contracting Jurisdiction to request an alternative form of dispute resolution to one provided in the CTA.

The test for "qualified person" is unnecessary if "the resident is engaged in *the active conduct of a business* in the first-mentioned Contracting Jurisdiction, and the income derived from the other Contracting Jurisdiction emanates from, or is incidental to, that business"[103].

<u>4. Dispute Resolution</u>

As mentioned previously, Part V of the OECD MLI embodies Action 14 of the BEPS package, which is considered, along with Action 6, a *minimum standard* under the OECD Framework. Action 14 concerns tax related dispute resolution and the effort to make mechanisms for resolution more effective. Article 16 and 17 of the OECD MLI relates to the substantive provisions concerning a minimum standard of dispute resolution and is further supplemented by the optional Arbitration in Part V[104].

[101] BEPS MLI (n 25) Article 7(7)(b)
[102] BEPS MLI (n 25) Article 7(9) provides an exhaustive list of residents who would be considered 'qualified persons'
[103] BEPS MLI (n 25) Article 7(10); the article also lists what may not be regarded as an 'active conduct of business'
[104]Part V of the OECD MLI is not a minimum standard and is kept outside the purview of this paper. Further more, India has not opted for Part VI of the MLI

While Action 6 provisions (Articles 6 and 7 discussed above) regarding treaty abuse consisted of definitive textual demarcations of minimum standards and general provisions, Article 16 is structured differently to create a flexibility in the way the minimum standards of dispute resolution may be imposed. While a minimum standard is ensured, jurisdictions may make reservations against specific parts of provisions subject to certain conditions. We explore the dynamics of Article 16 in this section.

4.1 Article 16

The first three sections of Article 16 are substantive provisions, each consisting of 2 sentences. Article 16(4) consists of eight sub-parts; each providing the method of applicability for the above mentioned six sentences. While this may sound procedural and irrelevant to a substantive discussion, it is important due to the nature of the reservations prescribed in later provisions. We look at all the substantive and reservation provisions next.

As mentioned, Article 16(1) consists of two sentences. The first sentence of Article 16(1) seeks to provide remedy for a person who "considers that the actions of one or both of the Contracting Jurisdictions results in taxation not in compliance with the provisions of the CTA. In such circumstances, the person may approach the competent authority of the Contracting Jurisdiction of his choice, "regardless of any remedy provided by the domestic law"[105].

According to Article 16(4)(a)(i) the first sentence in Article 16(1) "*shall apply* in place or in the absence of an existing provision" of the CTA. However, under Article 16(5)(a), a Contracting Jurisdiction may reserve the right to the first sentence of Article 16(1) on the basis that it "intend to *meet the minimum standard* for improving dispute resolution", as stipulated by Action 14[106].

Although the provision might seem ambiguous in its inclusion of the term 'minimum standard', we may find an indication of its meaning within Final Report to Action 14. The Final Report to Action 14 lists various elements of minimum standards.

According to the Explanatory Statement, Action 14 minimum standards require "jurisdictions to include Article 25(1) through (3) of the OECD Model Tax Convention in their tax treaties, as interpreted in the Commentary to the OECD Model Tax Convention and subject to the variations in these paragraphs provided for under elements 3.1 and 3.3 of the Action 14 minimum standard"[107]. A comparative reading of the MLI provisions

[105] BEPS MLI (n 25) Article 16(1)
[106] BEPS MLI (n 25) Article 16(5)(a)
[107] BEPS MLI Explanatory Statement (n 37) Article 16

reveals similar wordings to the OECD Model Tax Convention. India, in its Reservation Document has declared that it reserves the right, as permitted by Article 16(5)(a), for the first sentence of Article 16(1) on the basis that it intends to meet the minimum standard required under the BEPS Action Plan 14.

The second sentence of Article 16(1) provides that the case must be presented to the competent authority within three years from the first notification of the action alleged to have resulted in taxation not in compliance with the tax treaty[108]. According to Article 16(4)(a)(ii) this provision *shall apply* in place of any CTA provision providing for a time period shorter than three years, or in the absence of a provision describing such a time period[109]. India has not made any reservations to the second sentence of Article 16(1), as permitted by Article 16(5)(b). Subsequently India has, as per its notification obligations under Article 16(6)(b)(i), notified the relevant CTAs (total of four treaties), which provide for a time period less than three years, and the relevant provisions[110]. The Reservation Document also notifies a list of CTAs, which provide for a time period of at least three years as well as the relevant provisions[111].

The first sentence of Article 16(2) provides that if the competent authority finds the objection of the taxpayer justified, and "is not itself able to arrive at a satisfactory resolution", that it attempt to resolve the case through a mutual agreement procedure (MAP) with the relevant authority of the Contracting Jurisdiction, "with a view to the avoidance of taxation which is not in accordance with the [CTA]"[112].

Article 16(4)(b)(i) provides that the provisions of the first sentence to Article 16 *shall apply* only in the absence of provisions for a MAP between the relevant authorities of Contracting Jurisdictions[113]. The absence of a reservation clause for the first sentence of Article 16(2) is also conspicuous. These facts combined would imply that the MAP is considered a minimum standard, as it is assumed that the CTA already has an adequate provision or Article 16(2) will provide it with one, and jurisdictions may not make a reservation towards it.

The second sentence of Article 16(2) states that any agreement reached between the relevant authorities of Contracting Jurisdictions "shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions"[114]. Effectively, this provision circumvents any statute of limitation existent in the domestic law of the

[108] BEPS MLI (n 25) Article 16(1)
[109] BEPS MLI (n 25) Article 16(4)(a)(ii)
[110] BEPS India Reservations (n 30) Article 16
[111] BEPS India Reservations (n 30) Article 16
[112] BEPS MLI (n 25) Article 16(2)
[113] BEPS MLI (n 25) Article 16(4)(b)(i)
[114] BEPS MLI (n 25) Article 16(2)

Contracting Jurisdictions. As per Article 16(4)(b)(ii) this provision *shall apply* in the absence of provisions of a Covered Tax Agreement[115]. The rights to this provision may be reserved on the basis that the MAP shall be implemented notwithstanding any time limits in the domestic laws or the Contracting Jurisdiction intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS package[116]. India has not chosen to employ the reservations to Article 16(2) and as a result must modify or include in its CTA provisions compatible with the provision. As a result of the notifications in Article 16(6)(c)(i) and Article 16(6)(c)(ii), India has provided a list of two CTAs without provisions pertaining to the first sentence of Article 16(2) and seven CTAs without provisions pertaining to the second sentence of Article 16(2)[117].

The first sentence of Article 16(3) is a clause of consultation asking "the competent authorities of the Contracting Jurisdictions shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the [CTA]"[118]. The second sentence of Article 16(3) extends the consultation obligation of the relevant authorities to the "elimination of double taxation in cases not provided for in the [CTA]"[119]. As per Article 16(4)(c) these provisions *shall apply* in the absence of similar provisions in the CTA[120]. Both these sentences are to be applied only in instances where the relevant CTA does not already provide for the same. Notably, there are no reservation provisions for Article 16(3).

5. Conclusion

The BEPS Projects marks a monumental shift in the division of taxes in the international tax structure. The OECD MLI delegates more taxing rights to source countries than previously meted out. However, the complexities of international interests and divergent domestic tax structures and philosophies have perpetuated the production of an overarching multilateral tax treaty that serves more as a guiding set of rules than an instrument of mass change. As a consequence, ambiguities in the international tax structure and the potential for dispute are still prevalent.

However, within this melting pot of confused taxing priorities, the OECD and the G20 have managed to assert two minimum standards, which participating jurisdictions must adhere to. These are found under Action 6 and Action 14 of the BEPS Project. Action 6 addresses treaty abuses arising from treaty shopping and hybrid mismatches. Action 14 addresses dispute resolution.

[115] BEPS MLI (n 25) Article 16(4)(b)(ii)
[116] BEPS MLI (n 25) Article 16(5)(c)
[117] BEPS India Reservations (n 30) Article 16
[118] BEPS MLI (n 25) Article 16(3)
[119] BEPS MLI (n 25) Article 16(3)
[120] BEPS MLI (n 25) Article 16(4)(c)

The minimum standard provisions pertaining to the Action 6 mandate are found under Article 6 and Article 7. Article 6 asserts a change in the preambular language of all covered CTAs. The insert proclaims that one of the purposes of the CTA is to prevent tax evasion. Article 7 is the actual substantive provision addressing tax evasion through a *principle purpose* test.

The Action 14 mandate is embedded within Article 16 and instructs covered CTAs to allow a person taxed under a CTA by any of the contracting jurisdictions, to approach tax authorities in either of the contracting jurisdictions regardless of whether the other jurisdiction provides a remedy. Article 16 further obligates the jurisdiction to a period of three years within which the case must be brought in front of a competent authority. Article 16 also has provisions for mutual agreement procedures. However this is not a minimum standard in its entirety, and may be forgone if there is a similar clause already existing in the CTA. However, it is a minimum standard in the sense that a MAP provision has to be provided, whether it is the one recommended by the OECD or one provided by a contracting jurisdiction.

India has met its minimum standard obligations in its Reservations Document. In terms of Article 7 not only does it meet the minimum requirement through a PPT test, it has also notified a simplified limitation of benefit clause. However, this is a moot point in most of India’s covered CTAs, as the supplementary provision is not a minimum standard and is only triggered by its inclusion by the other involved contracting jurisdiction.

In terms of dispute resolution, however, although India has met its minimum standard through its Article 16 reservations and notifications, it is perhaps revealing of India’s preference towards domestic litigation than arbitration, that it has reserved in entirety Part VI of the MLI, which concerns arbitration. It may also be significant that caselaw such as *Azadi Bachao Andolan* and *Vodafone* reveal the tax authorities’ intention to protect and prioritize the tax base aggressively, over leniency to the taxpayer and as such regulatory assertion would be a preference over arbitration. It would therefore be interesting to observe future litigation, as a result of the MLI provisions, in the light of a renewed validation of the substance over form mindset that tax authorities in India have frequently harped on.