The BEPS MLI: A Global Promise, Emerging Domestic Puzzle!

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Aditya Hans
Partner, Dhruva Advisors

Zeel Gala
Associate Partner, Dhruva Advisors

Darshana Dattani
Principal, Dhruva Advisors

Swetha Madhan
Senior Associate, Dhruva Advisors

Genesis of BEPS MLI – A global and India viewpoint:

The genesis of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument" or "BEPS MLI" or "Convention") originated in 2013, when the G20 Finance Ministers requested the Organisation for Economic Co-operation and Development (OECD) to address BEPS in a coordinated and comprehensive manner. An Ad Hoc Group of more than 100 jurisdictions came together under the OECD's BEPS Project, reached consensus on the final text of the BEPS MLI, and its Explanatory Statement after nearly three years.

The Convention was opened for signature in Paris in June 2017, where countries from around the world gathered to formally join the initiative including India. In 2019, India was

among the first few jurisdictions to deposit the Instrument of Ratification with the OECD in Paris, along with its final position on Covered Tax Agreements (CTAs), Reservations, Options, and Notifications under the MLI. Soon after, the Indian government issued an official press release[1], and shortly after, formally notified[2] India's position under section 90 of the Income-tax Act, 1961.

Legal enforceability of BEPS MLI – Emerging Dilemma!

As can be seen above, the implementation of BEPS MLI seemed to have been fully attended to by the Indian Government, having been signed, ratified, and implemented vide a formal notification - its legislative enforceability in India is being examined in new light in the past weeks firstly consequent to the ruling of the Hon'ble Mumbai Tribunal, in Sky High Leasing Limited[3] and now with the recent ruling of the Delhi Tribunal in Kosi Aviation Leasing Ltd[4] which has relied on the decision of Mumbai Tribunal. Several issues turned up before the Hon'ble Tribunals including *inter alia* whether the revenue authorities could invoke the Principal Purpose Test ('PPT') under the MLI to deny treaty benefits provided under the India-Ireland DTAA. The Hon'ble Tribunals, by placing reliance on the Supreme Court decision in the case of Nestle SA[5] have ruled that the provisions of the MLI lack applicability in India sans a statutory notification expressly incorporating the relevant articles into the respective tax treaties. The Hon'ble Mumbai Tribunal's observation, which capture this dichotomy between international and domestic practices have been reproduced below:

"We are conscious that the MLI was conceived as a swift and efficient vehicle for implementing the BEPS treaty-related measures across jurisdictions without the need to bilaterally renegotiate each covered agreement. However, efficiency in the multilateral sphere cannot displace the domestic rule of law requirement that any such modification be consciously received into municipal law through the statutorily prescribed process"

While this interpretation of the Tribunals will be tested in the judicial process, through this article, we seek to provide an alternative perspective, not just on the interplay of the Tribunals ruling with the decision of Supreme Court in the case of Nestle SA (supra) but also how the BEPS MLI stands on its own, especially in light of the Vienna Convention on the Law of Treaties ('VCLT'). We have also examined the approaches adopted in other jurisdictions, with a view to assessing whether such international practices may hold persuasive value for India, particularly given the novel nature of this Convention.

Notifications – How many is too many?

As mentioned above, following the ratification of BEPS MLI, the Indian Government issued a Notification to assimilate the articles of the BEPS MLI into the respective bilateral tax treaties which India has with other countries as per the Instrument of Ratification deposited with the OECD. The operative part of the Notification which brings out this intention is reproduced below:

"Now, therefore, in exercise of the powers conferred by sub-section (1) of section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies that the provisions of the said Convention shall be given effect to in the Union of India, in accordance with India's Position under the said Convention, as set out in the Annexure hereto"

The Annexure in essence covers the following aspects: the various objectives of the BEPS MLI which India has agreed upon on a global footing; the full text of the Articles of the BEPS MLI; and, most importantly, India's *List of Reservations and Notifications* deposited along with its Instrument of Ratification. It is this list that details the scope, limitations, and specific positions India has chosen to adopt under the BEPS MLI framework. Thus, it includes

a. a list of CTAs (i.e., which bilateral tax treaties India intends to bring within the scope of the MLI as required under Article 2)
b. the reservations chosen by India– i.e., relevant articles of the BEPS MLI which India opts out of or limits its application in respect of particular treaties, and
c. notifications of optional choices and existing treaty provisions corresponding to certain articles of the MLI, such as identifying which optional MLI provisions India chooses to apply, or which existing treaty clauses map onto MLI provisions.

Thus, all in all, the Notification captures India's position vis-à-vis the BEPS MLI and its CTAs, to facilitate changes in a synchronised and efficient manner across the network of India's 90+ tax treaties, which is in essence what the BEPS MLI seeks to do to a network of 3000+ tax treaties. **The Notification, however, does not provide for the positions adopted by India's treaty partners and the final tax treaty incorporating such changes.**

It is precisely to this point, that the Hon'ble Mumbai Tribunal in the case of Sky High Leasing Limited (supra) and Delhi Tribunal in the case of Kosi Aviation Leasing Ltd (supra) have ruled that for incorporating the articles of MLI in the respective tax treaty, a separate notification capturing the changes to the respective tax treaties needs to be issued relying on the decision of Supreme Court in the case of Nestle SA (supra).

Does Nestle really apply?

Leaving aside the factual considerations discussed above, an equally critical issue arises in relation to the very applicability of the ratio laid down by the Supreme Court in *Nestle SA*. This question merits closer examination, particularly because the BEPS MLI is neither an amending protocol nor an amending instrument in the conventional sense. Unlike bilateral protocols that directly alter treaty text, the MLI operates through a unique overlay mechanism, modifying CTAs in accordance with the positions adopted by the contracting jurisdictions. OECD guidance also states that the effects of the BEPS MLI on a specific CTA are to be drawn from the "matching" of the choices of the contracting jurisdictions[6].

Against this backdrop, it becomes necessary to assess whether the principles enunciated by the Supreme Court in *Nestle SA* can logically extend to the MLI framework. In the discussion that follows, we attempt to analyse the reasoning of the Supreme Court in *Nestle SA* and juxtapose it with the operational dynamics of the MLI, with a view to evaluating the extent to which the decision provides guidance for interpreting India's treaty obligations under the BEPS MLI.

Particulars	**Most Favoured Nation (MFN) Clause (in the context of Switzerland, notification issued on 27 December 2011)**	**Multilateral Instrument**
Scope	To facilitate incorporation of beneficial provisions from other	To facilitate changes in existing tax treaties to prevent BEPS.

	tax treaties, inter-alia, with respect to tax rates or scope of taxation.	
Notification	Notification is limited to incorporating the language for MFN in the tax treaties	Notification captures all the articles of BEPS MLI and also India's position with respect to each such article
Identification of changes	No specific changes (such as lower tax rates for dividends or restrictive scope in relation to technical services) referring to other tax treaties have been notified.	India's position for adopting articles of BEPS MLI against each of its existing tax treaties has been notified.
Practical difficulties in implementation	A pick-and-choose approach needs to be followed by the taxpayers and revenue authorities for availing benefits, if any.	There is no requirement for a pick-and-choose approach as India's position is clear from the notification itself. The respective countries' position (which could also be result of bilateral negotiations) needs to be verified for applying the respective article of BEPS MLI unlike MFN which involves adoption of rate / scope from other OECD country's tax treaties.
Past practice	Issuance of notifications has been a prevalent practice in bringing into effect such amendments.	MLI being a novel instrument, there is no past practice which can be referred to.

Unlike the case of MFN where the Supreme Court has held the requirement for a notification is mandatory to give effect to the same in a tax treaty, a notification has already been passed by the Government for effectuating the BEPS MLI. If reliance is placed on the decision of the Hon'ble Tribunals, the BEPS MLI notification is rendered otiose with no operational validity in the present case.

It would be relevant to highlight here that the BEPS MLI already provides how each CTA would stand amended. The BEPS MLI is a flexible instrument since it permits the participating jurisdictions to make choices about which Articles, or parts of Articles, to adopt and to make reservations about the instrument's application to CTAs. Consequently, it requires them to deposit the Instrument of Ratification, Acceptance or Approval with the OECD. Once a position is adopted, it applies uniformly to all the CTAs so notified by each jurisdiction subject to the matching principle. To facilitate the complex interpretation of the MLI positions layered over existing CTA provisions, the OECD also hosts an up-to-date toolkit which includes a matching database of positions adopted by the participants.

Against this backdrop, the ruling of the Tribunals raises an important question of whether India's extensive engagement in discussions with the Ad Hoc Group, followed by its signing and ratification of the BEPS MLI, will in practice translate into any meaningful changes in its tax treaties.

Vienna Convention – A relevant reference?

Before understanding the approach followed by other signatories to the BEPS MLI, reference can also be made to the VCLT.

In its Opinion on the Interpretation and Implementation of the BEPS MLI (20 May 2021), the Conference of the Parties ('COP's Opinion') clarified that, like any international agreement, the MLI must be interpreted according to the principle in Article 31(1) of the VCLT i.e., it should be read in good faith, using the ordinary meaning of its terms, in their context, and in light of the treaty's object and purpose.

While India is not a signatory to the VCLT, the relevance of Article 31 of VCLT has also been noted by the Hon'ble Supreme Court in the decision of Nestle SA (supra) as below:

"74. Article 31 of the VCLT reflects the general rules of treaty interpretation. India is not a signatory to the convention. However, the convention has been accepted by consensus as reflecting the customary international law on general rules of treaty interpretation and is thus still relevant in the Indian context."

Consequently, Article 30 of the VCLT which governs the application of successive treaties relating to the same subject matter, would come into play, specifically Article 30(3) which deals with the interpretation rules in situations where there are two or more treaties on the same subject matter (i.e., one bilateral treaty and other BEPS MLI in the context of tax treaties). This follows the general legal principle that when two rules apply to the same subject matter, the later in time rule prevails.

Further, in its Opinion, under Guiding Principle 3, the COP has also referred to Article 30(3) and stated as under:

"As set out in the MLI and Explanatory Statement, the MLI operates to modify tax treaties between two or more Parties to the MLI. It does not function in the same way as an amending protocol to a single existing treaty, which directly amends the text of that treaty; instead, it applies alongside existing tax treaties, modifying their application in order to implement the BEPS measures. Some jurisdictions consider that due to their domestic law they may need to come to a mutual understanding with the competent authorities of their treaty partners of the precise effects of the modifications made by the MLI on their Covered Tax Agreements. Such agreements do not impact the applicability of the MLI.

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 (lex posterior derogat legi priori). Accordingly, to the extent that they are incompatible, a subsequent treaty (i.e. the MLI) prevails over a previously concluded treaty between the same Parties on the same subject matter (i.e. a Covered Tax Agreement). This rule is explicitly set out in Article 30(3) of the VCLT."

BEPS MLI being a novel instrument with no past precedent, the VCLT and guiding principles shed light on the emerging international treaty practices and consensus. While the Hon'ble Tribunals have not dealt with VCLT or aforesaid guiding opinion issued by the OECD, it would be interesting to see how the courts interpret the same in the future.

Country Actions on MLI Adoption & Domestic Implementation

While the Hon'ble Delhi ITAT has observed that global practice does not determine how the MLI is to be made effective in India, it is pertinent to note that Article 31(3) of the VCLT, as

referred to by the Supreme Court in Nestlé SA (supra), provides that 'subsequent practice' must also be considered when interpreting the application of a treaty. In the present context, since examples on 'subsequent practice' does not exists domestically, it is relevant to examine how other signatories to the BEPS MLI have given domestic effect to its provisions, given the novel nature of the instrument.

Netherlands

- The Dutch Lower House of Parliament passed a bill on 12 February 2019 approving ratification of the MLI, with certain reservations;
- The Upper House approved ratification on 5 March 2019, and
- The Netherlands deposited its instrument with the OECD on 29 March 2019;

United Kingdom

- On 23 May 2018, the UK issued a statutory instrument (Double Taxation Relief (Base Erosion and Profit Shifting) Order 2018 S.I. 2018/630) ratifying the MLI.
- On 29 June 2018, the UK deposited its instrument of ratification with the OECD depository.

Switzerland

- On 22 March 2019, the Swiss parliament approved ratification of the MLI, enabling the Swiss government to place the ratification bill with the OECD.
- On 29 August 2019 Switzerland deposited the instrument of ratification with the OECD after parliamentary approval.

A common thread across all the above, is that the MLI was given domestic legal effect through parliamentary or statutory approval mechanisms embedded within each jurisdiction's constitutional and legislative framework. India, by issuing the Notification has adopted a similar approach. In view of the same, the Hon'ble Tribunals reasoning in above mentioned cases needs reconsideration factoring the established international practice of giving effect to the MLI through domestic measures aligning with each country's constitutional and legislative framework.

Conclusions:

This article is only an endeavour to draw attention to various issues and considerations that arise in this context, especially in light of the ruling of the Mumbai Tribunal in Sky High Leasing Limited (supra) and Delhi Tribunal in Kosi Aviation Leasing Ltd (supra). While the Mumbai Tribunal's decision introduced fresh questions regarding the enforceability of the MLI, the Delhi Tribunal's ruling has added another layer of uncertainty to the puzzle. It is noteworthy that both Tribunals did not specifically address the factual differences between the Supreme Court's decision in Nestlé SA (supra) and the cases before them. By transposing the Supreme Court's observations in the context of specific treaties and the MFN clause into the implementation of the MLI, the Tribunals risks overlooking the fundamental shifts in treaty interpretation that the MLI was specifically designed to achieve.

It is, however, important to recognise that the Tribunals decision can be subject to a more nuanced judicial scrutiny before the Hon'ble High Courts, where the contextual differences vis-à-vis the Supreme Court's ruling are likely to be analysed in detail. In the interim, the

rulings have raised significant questions regarding the applicability and interpretation of the BEPS MLI. The developing jurisprudence on these questions will require careful, sustained attention, given the far-reaching implications on how the MLI is interpreted and applied in India, and to influence cross-border taxation more broadly.

[1] (Release ID: 1576728) Visitor Counter : 2279

[2] Notification No. 57/2019/F. No. 500/71/2015-FTD-I

[3] TS-1085-ITAT-2025(Mum)

[4] TS-1296-ITAT-2025(DEL)

[5] TS-616-SC-2023

[6] https://www.oecd.org/en/data/tools/beps-mli-matching-database.html