
TAXING GOVERNANCE: THE PRINCIPAL PURPOSE TEST AND THE CORPORATISATION OF TREATY ABUSE IN INDIA

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ABSTRACT

The Principal Purpose Test, incorporated in India's Double Taxation Avoidance Agreements by virtue of the Multilateral Instrument ('MLI') since October 2019, has spawned a doctrinal development that legal literature is yet to acknowledge: far from a simple restructuring of India's treaty anti-avoidance rules, it makes the legitimacy of the structuring of corporate entities across borders a question of tax law. From courts and tribunals merely asking if income was taxable, the issue now hinges on questions of why the entity was incorporated where it was, who directed its decisions, and whether the investment committee was independent. These questions are ultimately questions of corporate governance. This paper argues that along with the Supreme Court's path-breaking ruling in *Tiger Global International II Holdings v. Union of India*, the ITAT's first ruling on the PPT in *SC Lowy P.I. (Lux) S.A.R.L. V. ACIT (2025)* and CBDT Circular No. 1/2025, the PPT has brought about a corporatization of tax treaty anti-abuse: tax authorities scrutinize SPVs, holding companies, private equity fund vehicles, and cross-border M&A transactions through the prism of governance, for which corporate law never developed the necessary legal concepts. This paper analyses the impact of such a corporatization along three lines: (i) a profound expansion in the scope of due diligence and transactional documentation to convert governance evidence into primary tax proof; (ii) an uncoordinated double layer of jeopardy to investment structures through interaction between the PPT and GAAR; and (iii) evidence of pre-emptive investment behavioural change in the form of an unratified 2024 India-Mauritius Protocol. Four targeted reforms are proposed: PPT codification, a corporate substance safe harbor, an advance ruling mechanism, and parliamentary approval for treaty amendments, to restore structuring certainty that corporate governance requires.

INTRODUCTION

For most of India's post-liberalization history, whether foreign persons should receive the benefits of a Double Taxation Avoidance Agreement turned on two questions: was the foreign person formally resident or did the foreign person possess substantial real commercial activity; and, was the structure that it used legitimate tax planning? Whether you held a tax residency certificate you had residence; had real business operations you had substance; any structure, however conceived, that had a tax planning reason was a permitted structuring outcome.¹ The PPT, now part of all Indian Double Taxation Avoidance Agreements by virtue of the MLI and bilateral treaties, turns both questions inside out. Instead of, did it have substance, it asks, why was it established and did the purpose of the structure involve receiving a treaty benefit, either among others or one that was principal.²

The flip from substance to purpose has consequences that go far beyond treaty law. When an Indian tax authority asks why Luxembourg was placed between a Cayman feeder fund and Indian debt instruments, it is asking a question that was, all along, a question of corporate law: was this a structure put in place for good and valid governance reasons or was it an architecturally empty vehicle? When a court asks whether decisions were made in Mauritius or in New York, it is, in fact, asking a question of corporate governance: were these genuine board decisions made under Mauritius governance or decisions made in New York by a US-based fund manager? The legal semantics of tax law mask what are, in reality, questions of board control, management of corporate decision-making, governance, and institutional purpose.

This paper argues that the PPT, now embedded in India through the MLI, articulated Supreme Court ruling of *Tiger Global International II Holdings v. Union of India*,³ and interpreted in the Income Tax Appellate Tribunal order of *SC Lowy P.I. (Lux) S.A.R.L. V. ACIT*,⁴ and partially refined by CBDT Circular No. 1/2025, has the effect of corporatizing treaty abuse analysis in India. What was once about what corporate or other persons did, or who owned and controlled them, the tax department is now asking how they decided; how and why they set up and executed their transactions, all through criteria that are, in their core substance, corporate

¹ *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, opened for signature Nov. 24, 2016, O.E.C.D. Doc. C/MIN(2016)8/FINAL (2016) [hereinafter MLI].

² MLI art. 7(1).

³ *Tiger Global Int'l II Holdings v. Union of India*, 2026 INSC 60 (Jan. 15, 2026).

⁴ *Vodafone Int'l Holdings B.V. v. Union of India*, (2012) 6 S.C.C. 613 (India).

governance criteria. These corporatization effects are far from academic; they change what constitutes proper documentation in cross-border dealings, they redefine due diligence requirements in the private equity and M&A space, and they inject significant structural uncertainty into every investment structure routed through the cover of any treaty jurisdiction.

This paper begins by situating India's anti-treaty abuse jurisprudence within the broad context of international investment architecture to demonstrate how structures attacked by the PPT were used for sound non-tax purposes. It then discusses the framework of the PPT to argue that the PPT changes corporate decision-making into a taxable event by transforming an originally tax-neutral act into a purpose that can be impugned on tax grounds. It considers the interpretation of this paradigm shift through the lens of Tiger Global and SC Lowy, moving on to a discussion of the consequences for M&A and private equity structuring. The upcoming, still unratified, 2024 Mauritius Protocol is then interrogated as to the lessons it imparts regarding prospective PPT impact on board and corporate governance behavior. Finally, there is a short constitutional argument regarding the statutory weakness of the PPT and the danger of a double jeopardy situation that will arise if a coordination mechanism between the GAAR and the PPT are not developed before it, along with four targeted proposals for legislative and administrative action.

CORPORATE STRUCTURING, TREATY SHOPPING AND THE EVOLUTION OF INDIA'S ANTI-ABUSE FRAMEWORK

A. Corporate Structuring as Investment Architecture: The Non-Tax Logic of Cross-Border Entities

SPVs, holding companies, fund feeders, acquisition entities, and portfolio companies established in intermediate jurisdictions are not primarily tax instruments; rather, they are structural vehicles that carry out various, and often divergent, functions simultaneously. A SPV established in Mauritius or Luxembourg by a PE fund can, simultaneously: aggregate capital from investors in various jurisdictions under a single governing law; ring-fence liability with respect to portfolio assets so that a failure of one portfolio investment does not impact other portfolio investments; meet the regulatory requirements of the country of investment (e.g., SEBI's FPI regime); offer a politically certain forum to provide dispute resolution with respect to investor agreements; or simply comply with the internal requirements of the fund's limited

partnership agreement.⁵

The multi-purpose nature of a structure is neither an accident nor is it necessarily a deception. It is a characteristic feature of the current architecture of cross-border investment. A global private equity fund with US, UK, Middle East, and South East Asian investors cannot, as a practical matter, invest in each of their respective jurisdictions into India and manage Indian portfolio companies in situ. There is a genuine need for aggregation, governance, and regulatory compliance as functions carried out by an intermediary entity. Tax efficiency, where present, is merely an ancillary consequence, not the primary rationale.

The PPT requires an Assessing Officer to determine whether the provision of treaty benefit was “one of the principal purposes” for the arrangement and applies the same test whether the arrangement was established exclusively to avail a treaty benefit or was established for legitimate reasons of investor governance but happened to be established in a treaty-favoured jurisdiction. There is a lack of discrimination, which is not a byproduct of the structure of the PPT: in fact, the carve-out relating to the “object and purpose” of the treaty was established for precisely this reason. However, as argued in this paper, this carve-out remains definitionally meaningless under India's domestic legal implementation.

B. From Formal Residence to Commercial Substance: Azadi Bachao and Vodafone

Under the India-Mauritius DTAA, the historical treaty shielded capital gains on the sales of Indian securities from Indian taxation, conferring taxing jurisdiction exclusively to Mauritius, which has no capital gains tax on its residents. This treaty mechanism was upheld as valid in *Azadi Bachao Andolan v. Union of India*, which also determined that a TRC was conclusive for treaty benefits and that while treaty shopping was an unwelcome device for impermissible avoidance, it was permissible in the absence of a statutory anti-avoidance measure.⁶ For 20 years, virtually every major FDI structure into India was predicated on this treaty interpretation.

In 2012, the Vodafone judgment marked the emergence of a more sophisticated test, with the Supreme Court dismissing the claim that, through looking through a series of Cayman Islands holding entities, the underlying Indian asset could be ascribed to the transferor.⁷ The Court’s more holistic, ‘look at’ test proposed six objective indicators of a commercial purpose:

⁵ Cyril Amarchand Mangaldas, *India: Private Equity 2024*, ICLG (2024).

⁶ *Union of India v. Azadi Bachao Andolan*, (2003) 263 I.T.R. 706 (S.C.) (India).

⁷ *Vodafone Int’l Holdings B.V. v. Union of India*, (2012) 6 S.C.C. 613, ¶¶ 65–67 (India)

the duration of the structure, participation in the investment, existence of taxable revenues, commercial continuity, and other factors.⁸ The essence of the indicators themselves is one of corporate governance, since they were predicated upon whether or not the structure was a functioning corporate entity over a period of time, and not whether a paper trail existed.

The GAAR regime came into force in India on April 1, 2017, and is predicated on demonstrating that “any arrangement” “had for its principal purpose” tax benefit plus, inter alia, one of other conditions before benefits under a treaty could be denied.⁹ The investment-date grandfathering protected investments made prior to the onset of the GAAR provisions or so investors hoped; as was to prove to be the case in Tiger Global, discussed in later in the paper.

C. The PPT and the Purposive Turn: A New Standard for a New Era

PPT was introduced into the MLI for India, which applied from October 2019 and introduced a standard that was texturally different from the Azadi Bachao formal-residence test and the Vodafone substance test, requiring a reasonable conclusion that having ‘one of the principal purposes’ of an arrangement was to obtain treaty benefits, a lesser standard than the ‘main purpose’ test (dominance) for GAAR, and an even more intrusive standard than Vodafone (which tests what structures do, not why they were established).¹⁰ So, in a way, it is the least intruding of the Indian anti-abuse standards in India, and also the least intruding in India’s anti-abuse standards, and by far the most intrusive standard focused on corporate decision-making.

Indeed, the BEPS Action 6 Report that introduces the PPT concept directly acknowledges that the PPT is directed toward arrangements where the principal purpose is to obtain treaty benefits and does not target bona fide commercial arrangements in which tax advantages are a byproduct.¹¹ This test, that a taxpayer must demonstrate that tax savings were not “the principal purpose,” is conceptually sound. However, in the Indian experience, the examples and illustrations of the PPT contained in the BEPS Report do not easily translate into Indian practice. Without domestic statutory guidance to differentiate “purpose driven” and “incidentally efficient,” the choice is between two Assessing Officers, one with strong

⁸ *Vodafone Int’l Holdings B.V. v. Union of India*, (2012) 6 S.C.C. 613, ¶¶ 68–74 (India)

⁹ Income Tax Act, No. 43 of 1961, §§ 95–98 (India).

¹⁰ MLI, supra note 1, art. 7(1)

¹¹ Organisation for Economic Co-operation and Development (OECD), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances: Action 6 – 2015 Final Report* 10 (2015), <https://www.oecd.org/tax/beps/beps-actions/action6/>

intuition and one without.

TAXING CORPORATE PURPOSE: THE PPT AS A CORPORATE GOVERNANCE INSTRUMENT IN DISGUISE

A. The Anatomy of the Test: Text, Object, and Exception

Under MLI Article 7(1), a benefit will be denied where it is reasonable to conclude that obtaining such a benefit was one of the principal purposes of any arrangement or transaction, unless according to the ‘object and purpose’ of the provision of the treaty under which such a benefit would be afforded to a person.¹² Since this comprises an almost limitless rule to exclude tax benefits and an equally broad exception clause to bring back the tax benefits, the scope of the operation of the PPT has almost wholly to be deduced from the application of its two standards in practice as the standards are nowhere defined in the MLI.

In applying the PPT test, the OECD Model Commentary suggests that it is an objective test, as in what would a reasonable person believe were the purposes behind the arrangement or transaction given the particular facts and circumstances. It explains that a reasonable person will not assume that the person only reviewed tax documents, as “The reasonable person will have regard to the structure of the transaction and all the other facts and circumstances in evaluating the structure; how the transaction was initiated; how it was executed; what the objectives were; the alternatives available to the person”. It is clear from this explanation that the scope can be quite broad and include governing documents, boards, investment committees, and constitutional documents of the fund.

B. The Core Argument: PPT Merges the Corporate and Tax Inquiry

Traditionally, corporate law and tax law have asked different questions of the same entity. The former asks, “What is this thing, and what are its duties? Is it being used correctly pursuant to its own constituting documents?”. The latter asked, “What income has it produced and where is it taxable?” There is little intersection.

The PPT has erased this dichotomy in the context of international structures. When a tax authority uses the PPT on a Mauritius holding company, it asks, “Why was the Mauritius

¹² OECD, *Model Tax Convention on Income and on Capital: Condensed Version* art. 29 cmt. ¶ 182 (2017)

holding company incorporated there, rather than somewhere else? Why is the investment taking place through that entity rather than the US fund itself? Who made the actual investment decisions and where?” The answer (or, more accurately, the answers) that determine whether the PPT is invoked, are now found in corporate law, not income tax or withholding tax: the structure of the corporate governance: its board composition, the powers given to its directors, where its board meetings took place, the nature of its decision making ability, and the reality of its operations.

This is what the Supreme Court in *Tiger Global* and the ITAT in *SC Lowy* focused on. In *Tiger Global*, the basis of the court finding GAAR applicable was, “the core of effective management and control... was not with the board of the Mauritian entities but rather with Mr. Charles P. Coleman, the New York-based fund manager, whose authority on transaction exceeded \$250,000...”.¹³ In *SC Lowy*, the basis on which treaty benefit was granted was “genuine management and control in Luxembourg, its diversified investment portfolio (86% offshore), and taxing its global income in Luxembourg”. The determination in both cases was on governance issues.

The consequences of this convergence of inquiries are as follows: First, lawyers must consider the corporate structures that they advise on both as a tax planning and governance planning exercise. It is not just about having the most tax-efficient structure, but one that would stand up to corporate scrutiny on governance. Second, corporate documents, such as board minutes, investment committee papers, authorities, and organization charts, are now likely to become primary sources of evidence in tax disputes. Third, what corporate law regards as a legitimate decision of organizational choice may have become indistinguishable from what tax law regards as treaty abuse.

C. The Definitional Gap: What is a ‘Principal’ Purpose?

PPT applies where one of the principal purposes of entering into an arrangement is to obtain treaty benefits. According to the CBDT PPT Circular, the application is fact-specific and case-by-case.¹⁴ There is no explanation in the MLI, OECD Commentary, or the Circular as to how a purpose can be characterized as “principal” as opposed to merely “ancillary”. This gap is significant in that it dictates how much tax efficiency an investment structure can have

¹³ *Tiger Global Int’l II Holdings v. Union of India*, 2026 INSC 60 (Jan. 15, 2026)

¹⁴ CBDT Circular No. 1/2025, F. No. 500/05/2021-FT&TR-I (Jan. 21, 2025).

before it triggers PPT.

Assume a PE fund is assessing three possible jurisdictions for establishing its India feeder fund: Singapore (treaty protected), Cayman Islands (no treaty with India), and Gibraltar (no treaty with India). The fund decides to incorporate in Singapore primarily for reason of its India tax treaty, familiarity with a common law jurisdiction, robust financial service regulation, and geographical proximity. Tax efficiency is but one factor of several. Is PPT likely to apply?

Under current Indian interpretation, the answer is unknown. The CBDT Circular is clear on its fact-specific and case-by-case assessment. SC Lowy indicated that while substance would prevail and treaty benefits should be available absent fraud, Tiger Global considers that documentation pertaining to governance would resolve the issue. None of these offers guidance on how one determines whether tax efficiency is a “principal” rather than an “incidental” aspect of a transaction. The absence of guidance on this fundamental point is, by itself, a significant risk for transactional lawyers engaged in fund formation.

TIGER GLOBAL AND SC LOWY: TWO JUDICIAL ARTICULATIONS OF CORPORATE GOVERNANCE AS TAX EVIDENCE

A. Tiger Global International II Holdings v. Union of India (2026): The Supreme Court’s Governance Turn

On January 15, 2026, the Supreme Court of India pronounced its ruling in Tiger Global, the most impactful judgment in Indian international tax law since Vodafone. Tiger Global, a prominent US-based private equity and venture capital firm, routed its investments in Flipkart Private Limited through Mauritius-incorporated entities.¹⁵ In 2018, in connection with Walmart’s approximately USD 16 billion acquisition of Flipkart, Tiger Global sold its Mauritius-entities’ shares in Flipkart Singapore, realizing approximately USD 1.6 billion in capital gains. Tiger Global applied for a nil withholding tax certificate under the India-Mauritius DTAA.

The Indian tax authorities rejected the application, and the Authority for Advance Rulings ruled in 2020 that the Mauritius entities were conduit companies, and that the management and control rested with the US fund manager. The Delhi High Court reversed this in 2024, ruling

¹⁵ Tiger Global, *supra* note 3.

that a valid TRC was sufficient in the absence of fraud or sham. The Supreme Court reversed the Delhi High Court ruling and held, in terms that will guide Indian international tax practice for years to come, that GAAR was rightly invoked against the Mauritius entities for lack of commercial substance, TRC is necessary but not sufficient to qualify for the treaty, the application of GAAR is applicable from April 1, 2017, for the taxation of arrangements achieving the intended tax outcome, irrespective of the date of initial investment, and on a valid invocation of GAAR, the burden of proof rests on the taxpayer.¹⁶

The Corporate Governance Dimension. Whether or not the Mauritius entities possessed commercial substance was essentially a corporate governance issue. The Supreme Court analyzed the signing authority over the bank accounts and material transactions of the entities, the quality of deliberation of the boards of directors in Mauritius, and the independence of investment decision-making by Mauritius-entities versus the directives from US-parent, in addition to any economic activities of the Mauritius-entities in Mauritius apart from holding of shares in Flipkart Singapore. The determination that the signing authority of transactions in excess of USD 250,000 resided with the US fund manager was definitive, and the same represented a finding regarding board authority and governance structure, as distinct from income or withholding tax.¹⁷

Structural Implications. After Tiger Global, there have been reports of at least seven other private equity and venture capital funds receiving notices from the Indian authorities.¹⁸ The decision in *Hareon Solar Singapore Pte Ltd. V. DCIT (ITAT)* confirmed that the Tiger Global logic extends to Singapore-routed structures with no employees, offices, or genuine governance infrastructure of Singapore entities.¹⁹ Governance documents have become the central battleground in all disputes regarding treaty benefits after these decisions; the query is not of holding TRCs but of demonstrating real deliberative decision-making power.

B. SC Lowy: The Corporate Substance Safe Harbour in Embryonic Form

SC Lowy P.I. (Lux) S.A.R.L. V. ACIT came up for decision before the ITAT just months prior

¹⁶ Tiger Global, supra note 3.

¹⁷ *Tiger Global*, supra note 3.

¹⁸ DLA Piper, *Supreme Court Ruling on Tiger Global Tax Treaty Eligibility and Indirect Share Transfers* (Feb. 2026), <https://www.dlapiper.com/en-us/insights/publications/2026/02/supreme-court-ruling-on-tiger-global-tax-treaty-eligibility-and-indirect-share-transfers>

¹⁹ *Hareon Solar Singapore Pte. Ltd. v. Deputy Comm'r of Income Tax*, ITA No. 2226/Del/2024 (I.T.A.T. Delhi Jan. 30, 2026).

to the Tiger Global case going to the Supreme Court, and the two decisions together form a complementary set of bookends to the post-MLI corporate governance-tax debate.²⁰ The ITAT in SC Lowy was prepared to grant benefits under the treaty to a Luxembourg-incorporated FPI based on evidence of a solid corporate structure that included a pre-existing incorporation that preceded the application of the PPT to the India-Luxembourg DTAA by several years; that the entity derived approximately 86% of its investments from outside India; that it paid tax on its global income in Luxembourg; and that it retained genuine operational decision-making through a Luxembourg management entity.

However, the more analytically important output of SC Lowy is not what it decided but how it decided it. The Tribunal asserted that the PPT should be invoked only in cases of fraud and sham and demanded that the Revenue prove a high burden of compelling and convincing evidence.²¹ Although investor-friendly, this threshold has analytical shortcomings as a reflection of PPT law, inasmuch as the PPT does not contemplate tax fraud per se as a trigger, and this pronouncement might limit the PPT to essentially the same functional standard as the pre-MLI beneficial ownership tests. However, SC Lowy implicitly addressed the establishment of a test of minimum corporate governance substance that, if met, would provide an effective safe harbor from the PPT. This set of factors includes a pre-existing incorporated structure, a diversified investment profile outside the treaty jurisdiction, legitimate taxation in the treaty jurisdiction, and proper control over investment decision-making by board members in the treaty jurisdiction.

Taken together, Tiger Global and SC Lowy offer an initial vision of the post-MLI tax treaty benefit landscape in India: the PPT and the GAAR, which operates in parallel to the PPT, will be satisfied when an entity's governance does not reflect the substance of genuine, independent investment decision making within the treaty jurisdiction; and will not be satisfied when an entity's choice of treaty jurisdiction can be demonstrably justified by reference to the documentation supporting substantive decision-making authority vested in the board of directors.

²⁰ *SC Lowy P.I. (Lux) S.A.R.L. v. Assistant Comm'r of Income Tax*, ITA No. 3568/DEL/2023 (I.T.A.T. Delhi Bench D 2025)

²¹ *SC Lowy*, supra note 20.

THE CORPORATISATION OF TREATY ABUSE: PPT'S IMPACT ON CROSS-BORDER INVESTMENT STRUCTURES

A. Private Equity and Venture Capital Fund Structures

Typically, PE and VC funds looking to invest in India are structured in a multi-tier way: an offshore master fund (commonly Cayman Islands-based), feeder fund(s) domiciled in treaty-beneficial jurisdictions (Mauritius, Singapore, Luxembourg, or Netherlands), and at the bottom, the Indian SPV/portfolio company. The feeder fund serves to channel capital from a varied group of master fund investors and to fulfil SEBI's requirements regarding FPI registration and to create a stable structure for the investment documents.²²

The PPT, however and in the form executed by Tiger Global and SC Lowy, modifies the very legal character of the governing requirements of the feeder funds. In the pre-PPT world, a feeder fund was needed to have an existing TRC, a registered address in the treaty jurisdiction, and easy compliance with the local corporate rules (plus a degree of substance after GAAR); after Tiger Global, a feeder fund is needed to: genuinely hold board meetings in the treaty jurisdiction with official records; show that actual investment decisions were made at the feeder fund level, not just a ratification; ensure that there is an investment committee whose powers have not been delegated in full to the offshore manager; and local directors have genuine powers, not just ceremonial powers, and there are clear records justifying the choice of the treaty jurisdiction on a tax basis.²³

The burden placed on PE Funds with regard to compliances does not become negligible. A PE Fund, with say ten portfolio investments under its portfolio via a Singapore feeder fund, now has to ensure that for each investment, its Singapore governance records show genuine deliberations and not simply that the investment decision was ratified by the Singapore board and its records will provide substantial proof of local directors, local boards, and local investment decisions for taxation purposes.²⁴ The cost incurred in maintaining this documentation regime over a large portfolio would be quite high and these are costs that directly result from the PPT's transformation of corporate structuring into a matter of tax

²² Cyril Amarchand Mangaldas, *India: Private Equity 2024*, ICLG (2024)

²³ Khaitan & Co., *SC Denies India-Mauritius Tax Treaty Benefit for Tiger Global, Rejects Grandfathering Protection Under GAAR* (Jan. 2026), <https://www.khaitanco.com/thought-leadership/SC-denies-India-Mauritius-tax-treaty-benefit-for-Tiger-Global-rejects-grandfathering-protection-under-GAAR>

²⁴ Stephenson Harwood, *Tiger-Flipkart Tax Ruling: The Bottom Line* (Jan. 2026), <https://www.stephensonharwood.com/insights/tiger-flipkart-tax-ruling-the-bottom-line/>

legitimacy.

B. Cross-Border M&A and Acquisition Vehicles

When it comes to cross-border mergers and acquisitions of an Indian target company, typical acquisition structures include an offshore SPV, which is incorporated in a treaty-favored jurisdiction and then acquires the Indian target company. The functions of an SPV include ring-fencing the acquisition liability from the rest of the acquirer's assets, a non-accountable jurisdiction-neutral platform for the financing of the acquisition with debt, and a clear jurisdiction of operation based on the future exit from the acquisition. Tax efficiencies of future exits are almost always based on the treaty position of the SPV, but rarely the sole objective for the incorporation of SPVs.

The PPT's impact on the acquisition SPV results in a documentation problem fundamentally different from fund feeder structures. The acquisition SPV is set up specifically for one deal and has a limited life, and usually few directors and minimal activity when compared to aged fund feeders. The very corporate purpose is to conduct the acquisition and future exit. If a tax authority applies PPT to the SPV incorporated in a treaty jurisdiction purely for the transaction, it will have a plausible case to argue that securing treaty benefits is one of the primary purposes for the creation of the SPV-the SPV was established for this very purpose to a certain extent.

The post-PPT environment has introduced new features in acquisition transaction documents. Documents establishing the acquisition SPV and board resolutions for it usually explicitly state the non-tax rationale of having the choice of jurisdiction: including regulator familiarization, preference in choice of governing law, investors' agreement needs, and the logic for acquisition finance structures. This kind of documentation has not been legally required under any law, but pragmatically needed because PPT transforms the purpose into tax proof.

C. FPI Structures and the Post-Tiger Global Compliance Shift

Registered FPIs with SEBI account for the highest volume of foreign investors in the Indian securities markets. The largest amount of foreign investment is channelled through the four countries that the PPT will hit hardest through the MLI and bilateral treaties: Mauritius, Singapore, Luxembourg, and Cyprus. The reality for an FPI manager after Tiger Global is clear: you don't get paid if you don't have a TRC; you don't get paid if you don't

demonstrate in your governance and in your commercial realities that you are genuinely taking economic decisions in the treaty jurisdiction.²⁵

Large, institutionally managed, fully staffed, locally active, and diversified vehicles that actually have something else going on will be able to meet the test (but will likely incur additional costs). Small, single-purpose vehicles, which comprise the vast majority of India-focused offshore fund structures, will find the governance test outlined in Tiger Global and SC Lowy difficult to meet operationally without a significant restructuring of their governance infrastructure.

The likely outcome will be the emergence of a bifurcation in the FPI markets: a market for large, institutionally robust funds with sufficient governance substance will remain, while smaller structures with thin or insufficient governance will be forced to either restructure and/or bear significant additional legal and compliance costs. In short, there will be a move away from diversity in fund structures toward the institutionalization of fund structures, which could prove to be an unintended, but unavoidable, side-effect of implementing a vague anti-abuse test without any precise description of what will satisfy the standard.

THE 2024 INDIA-MAURITIUS PROTOCOL: INVESTMENT BEHAVIOUR BEFORE LEGAL FORCE

A. The Protocol and the Ratification Gap

On 7 March 2004, India and Mauritius signed a protocol for the amendment of the India-Mauritius DTAA. A new PPT clause and a revised preamble have been added to the DTAA to prevent abuse of the DTAA or its non-taxation by evasion or avoidance.²⁶ To date, the Protocol has not been ratified by the Mauritius National Assembly or notified by the Central Government pursuant to Section 90 of the IT Act. According to Indian constitutional and tax law, an unratified and unnotified treaty instrument carries no legal weight, and the investors' tax rights in the existing structures technically remain unaltered.

²⁵ SEBI (Foreign Portfolio Investors) Regulations, 2019

²⁶ *Protocol Amending the Agreement Between the Government of the Republic of India and the Government of Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, Mar. 7, 2024 [hereinafter 2024 Mauritius Protocol].

However, the economic implications are stark. Mauritius has been one of the largest channels of FDI into India during April 2000 and December 2003, accounting for over USD 170.9 billion (approx. 25.6%) of total inflows, according to DPIIT data.²⁷ Indeed, since the announcement of the Protocol in March, the market witnessed capital outflows amounting to approx. USD 1 billion from Indian equities during March-April 2004, as FPIs routed through Mauritius were scrambling to re-evaluate their structures.²⁸ The Income Tax Department had to clarify publicly that the Protocol had not yet been notified.

B. Why Investors Restructured Before Ratification: The PPT's Behavioural Effect

The more analytically fruitful question is not whether the Protocol had legal force, but why rational investors restructured ahead of legal enforceability. The explanation for this tells us more about the PPT's single most important effect: its altering, proactively and before any specific application is ever made to any particular transaction, of the governance risk calculus of international investment structuring.

A fund manager already utilizing a Mauritius-routed FPI vehicle, armed with knowledge that: (i) the 2024 Protocol indicates India's trajectory toward PPT-based anti-abuse in Mauritius, (ii) Tiger Global evidences GAAR's reach to pre-2017 investments where the exits come post-2017, and (iii) SC Lowy clarifies that governance documents will be the determinative evidence in a dispute over treaty benefits, rationally chooses to restructure his vehicle toward a jurisdiction of greater governance substance or to focus on building such substantiation within the Mauritius structure, in advance of receiving any tax demand. This Protocol—even if legally defunct—altered the governance risk calculus as of that date.

This behavioural impact—the restructuring decision-making influenced by a legally flaccid tool, is the core predicted consequence. The greatest effect of the PPT is not the treaty benefit disallowances in adjudicated cases, but the anticipatory alteration of corporate structures (their design, their documentation, their governing regimes) due to perceived future PPT exposure. It is the present influence of tax law on future corporate governance decisions

²⁷ Dep't for Promotion of Industry & Internal Trade, *Fact Sheet on Foreign Direct Investment* (Apr. 2024), <https://dpiit.gov.in/publications/fdi-statistics>

²⁸ Grant Thornton India, *India-Mauritius Tax Treaty: Impact of New Protocol* (2024), https://www.grantthornton.in/globalassets/1.-member-firms/india/assets/pdfs/alerts/india_mauritius_tax_treaty_impact_of_new_protocol.pdf

prior to any revenue generation or transactional execution.

C. The Retrospective Application Risk and Its Structural Significance

The 2024 Mauritius Protocol's entry-into-force clause provides that the Protocol would have effect “without regard to the date on which the taxes are levied or the taxable years to which the taxes relate.”²⁹ Investors instantly feared a retrospective application of the Protocol. CBDT Circular No. 1/2025 provided assurance of the prospective nature of PPT, but a circular cannot overrule the treaty’s wording.³⁰ The retrospective fear has been buried for the moment, but remains a live doctrinal question that will require resolution at treaty level to be absolutely excluded.

The India-Mauritius Protocol forms part of a growing trend of India altering its treaty network to curb pre-existing tax benefits; this includes the 2016 Mauritius Protocol abolishing the capital gains exemption for investments made after 2017, the withdrawal of the retrospective amendment under section 289A after arbitrations, and the current revision of treaties with a range of European states.³¹ The overall implication of this trend is that no treaty benefit is guaranteed, and that corporate structures resting on treaty access need built-in governance resilience independent of any particular treaty provision remaining unaltered.

CONSTITUTIONAL AND ADMINISTRATIVE CONCERNS: A CONDENSED CRITIQUE

No tax is to be levied or collected except by the authority of law. Article 265 of the Constitution of India: The substance of the PPT, the definition of principal purpose, the scope of the ‘object and purpose’ carve-out, and the type of evidence needed to meet the Revenue’s burden is currently found in the MLI, OECD Commentary, and CBDT Circular; none of which are statutes.³² When the PPT denies the benefit, it denies a right that the taxpayer has under Section 90(2) of the Income Tax Act, and the denial of a right must be statutorily grounded. The present structure lacks that statutory basis.

Equally concerning is the separation of powers issue: It seems that the PPT, as now

²⁹ 2024 Mauritius Protocol, *supra* note 26.

³⁰ CBDT Circular No. 1/2025, *supra* note 14

³¹ Finance Act, 2012, No. 23 of 2012, § 2(3) (India).

³² Constitution of India art. 265.

implemented, empowers a series of individual Assessing Officers and executive officers devoid of treaty law expertise to conclude that treaty shopping was the principal purpose behind a given corporate transaction. This is a fundamentally subjective question, and there is no statutory standard for this analysis, which could potentially lead to inconsistent conclusions from jurisdiction to jurisdiction and from assesses to assesses. The Supreme Court's warning in Vodafone that the substance-over-form principle should not be allowed to be invoked unless the Revenue has first shown abuse on facts is a manifestation of the same constitutional rationale. The clarification by Tiger Global that the burden shifts to the taxpayer under the GAAR upon its invocation heightens the urgency for a statutorily clear trigger for that invocation.

The lack of a statutory mechanism that requires coordination between the PPT and GAAR can also result in a double-jeopardy scenario for the corporate structure, especially because under Section 90(2A), GAAR supremacy over treaty benefits.³³ One may argue that GAAR can be invoked on domestic grounds while PPT is invoked on treaty grounds against the same arrangement, in the same assessment order, on distinct evidentiary standards, yet without any framework or guideline stipulating priority or prohibiting concurrent invocation. This problem seems to be directly resulting from the application of a purpose-based treaty standard without correlating it with the already present domestic anti-avoidance framework.

REFORMING INDIA'S POST-MLI FRAMEWORK: FOUR TARGETED PROPOSALS

A. Statutory Codification of the PPT Standard

Parliament must introduce into the Income Tax Act an explicit section providing for the PPT standard, stating the evidential burden between the Revenue and the taxpayer, establishing an operational definition for the 'object and purpose' carve-out, and confirming that parallel proceedings can be taken neither under PPT nor under GAAR for the same arrangement. The section must separate, as proposed by the BEPS Action 6 Report, those structures whose organizing principle is the achievement of treaty efficiency from those whose commercial choice produces treaty efficiency as a secondary consequence.

³³ Income Tax Act, No. 43 of 1961, § 90(2A) (India).

B. A Corporate Substance Safe Harbour

Based on the favorable results in SC Lowy and the unfavorable results in Tiger Global, the Parliament or CBDT ought to define a corporate substance safe harbor for PPT purposes. A taxpayer meeting the criteria of i) having a board with actual, evidenced, decision-making powers in the treaty jurisdiction, ii) investment decisions made, and not just rubber-stamped, at the level of the vehicle, iii) holding a portfolio that is diversified beyond India geographically, iv) being resident in the treaty jurisdiction and paying tax on its global income therein, and v) not having a non-tax business reason for choosing the treaty jurisdiction would automatically be considered to not meet the denial trigger of the PPT.³⁴

This single measure would achieve two separate goals. On the one hand, it would provide clarity on structuring to a great number of investors who already have bona fide multifactorial cross-border vehicles and are unsure whether they meet the PPT. It would secondarily mean that the PPT is directed at and focused on those that do not and cannot meet any of those factors, which is what the PPT was meant for.

C. A Dedicated PPT Advance Ruling Mechanism

As noted above, the Board for Advance Rulings should be entitled to issue a binding advance ruling on whether a structure (proposed or in existence) in a cross-border form would attract the PPT. The ruling should be issued within ninety days and should be binding for a five-year period, unless the facts materially change.³⁵ Currently, there is no such mechanism: all investors in a treaty-routed structure have the alternative of entering the structure and running with uncertainty or going to court once the matter has arisen, neither of which is acceptable commercially for deals worth hundreds of millions and governance implications that cannot be undone for years.

D. Parliamentary Oversight of Treaty Amendments

We propose an amendment to Section 90 of the Income Tax Act stating that bilateral treaty modifications shall have no domestic legal effect unless they are notified by the Central Government and laid before Parliament for a period of 30 days, during which the same may be

³⁴ BEPS Action 6 Report, supra note 11, at 54–55.

³⁵ Income Tax Act, No. 43 of 1961, § 144C (India).

objected to by resolution of either House of Parliament. The system cost occasioned by the present gap between treaty signature and treaty domestic effect-an outflow of USD1bn capital through a legally dormant treaty-modification, resulting from the 2004 Mauritius protocol-is simply too large and could easily be removed through parliamentary review.

CONCLUSION

The Principal Purpose Test has achieved something its creators might not have intended: corporate governance has been transformed into a tax issue. When the PPT asks why a corporation was incorporated in a particular territory, who exercised the actual control over its affairs, and whether its governance mechanisms correspond with some real economic activities, it is posing questions that corporate law itself has always understood to be inherent to the governance of the corporate entity; it has externalized these questions, and they have become the prerequisite for obtaining the benefit of a treaty.

The Supreme Court decision on the Tiger Global case dated January 15, 2006, best represents the above principle. The reason for the Court's conclusion that the entities registered in Mauritius lacked commercial substance was that of the nature of the power to board the entities, to sign any document relating to these entities, and control over the management of these entities, which are the very issues that one would find as internal to a corporate governance test.³⁶ From the facts, the same conclusion was arrived at by the ITAT in the SC Lowy case. These two decisions therefore stand for the proposition that all disputes regarding obtaining benefits under tax treaties shall be fought over the corporate governance records of entities and not their income computation figures.

However, India must ensure that the corporatization of treaty abuse analysis does not turn into the corporatization of anti-abuse arbitrariness. The PPT is a useful mechanism in a global world where it is easy to delink a corporate structure from economic reality. However, a useful tool that is applied without a legal definition, without a corporate substance safe harbor, without a ruling from the Advance Ruling Authority, and without any control of Parliament over amendment of treaties under which it is applied, turns from a tool of law to an administrative tool. The proposals listed in the above section of the article are not too ambitiously scoped and can be implemented within one Finance Act cycle, and their omission

³⁶ *Tiger Global*, supra note 3.

has been responsible for a state of depression in the corporate governance standards regarding cross-border investment, thus increasing transaction costs for every business crossing Indian borders.

The PPT has ceased to be just an anti-abuse clause under the treaty; it has turned into a means by which the Indian revenue authorities assess the genuineness of a cross-border corporate structure, the integrity of the investment governance mechanisms applied to a corporate structure, and even a country-specific basis for the formation of corporate structures. The issue before India is therefore no longer the prevention of treaty abuse, but whether in the application of the anti-abuse norms, the government can prevent the disruption of a genuine corporate structure by the mechanisms of tax legislation, thereby putting a damper on India's ambition of having USD 100 Billion FDI inflows each year.