

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI): Application of the entry into effect of Part VI (Arbitration) and Article 36(1)(b) and (2) of the MLI

Opinion of the Conference of the Parties of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting

1. This opinion of the Conference of the Parties of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) seeks to clarify the interpretation and application of the entry into effect of Part VI (Arbitration) with respect to cases presented to competent authorities prior to the later of the dates on which the MLI enters into force for each of the Contracting Jurisdictions to a Covered Tax Agreement in the case where a Contracting Jurisdiction has made the reservation in Article 36(2) to apply Part VI to those cases only to the extent that the competent authorities agree that it will apply to specific cases.
2. The opinion was approved by the Parties to the MLI under written procedure on 11 June 2021.

1. Question and opinion of the Conference of the Parties

3. The question which has arisen is when would Part VI take effect with respect to those cases within the scope of the reservation under Article 36(2) in the case where two Contracting Jurisdictions to a Covered Tax Agreement for which the MLI is in force have each chosen to apply Part VI and one of those Contracting Jurisdiction has made the reservation in Article 36(2) to apply Part VI to cases presented prior to the later of the dates on which the MLI enters into force for each of the Contracting Jurisdictions only to the extent that the competent authorities agree that it will apply to specific cases.
4. The Conference of the Parties confirms that the rules on the entry into effect of Part VI provided in Article 36(1)(b) continue to apply to cases within the scope of the reservation in Article 36(2). Thus, when a Contracting Jurisdiction has made a reservation in Article 36(2) and the competent authorities have agreed that Part VI would apply to a specific existing case, the provisions of Part VI would enter into effect with respect to that case on the date on which the Contracting Jurisdictions have notified the Depositary that they have reached mutual agreement pursuant to Article 19(10), along with information regarding the date or dates on which that case shall be considered to have been presented.
5. It is understood that in all cases, Article 36(1)(b) allows competent authorities to delay the eligibility of existing cases to Part VI and to spread out the dates on which such cases become eligible for arbitration, so all existing cases do not become eligible for arbitration on the same day. Where a Party has made a reservation under Article 36(2), its existing stock of mutual agreement procedure cases would not be covered unless the competent authorities both agree that a particular existing case may be submitted to arbitration. Among other things, this is intended to address concerns that resource constraints may make it challenging for Contracting Jurisdictions with a large backlog of cases to apply Part VI effectively to those cases, despite the ability under paragraph 1(b) to defer eligibility for

arbitration.

2. Background

6. The arbitration provisions of the MLI are set out in Part VI – Articles 18 to 26 and provide a solution for cases of dispute that have not been resolved by the competent authorities within a period of two years (or three years where applicable)¹. Part VI only applies between Parties that explicitly choose to apply it.²

7. Article 36 contains the entry into effect rules for Part VI and Article 36(2) provides that Parties may reserve the right for Part VI to apply to an existing case only to the extent that the competent authorities of both Contracting Jurisdictions agree that it will apply to that specific case. Where a Party has made this reservation, its existing stock of mutual agreement procedure cases would not be covered unless the competent authorities both agree that a particular existing case may be submitted to arbitration.

3. Analysis

8. Article 36(1)(b) provides that the provisions of Part VI will take effect on the date when both Contracting Jurisdictions have notified the Depository that they have reached mutual agreement on the mode of application of Part VI pursuant to Article 19(10) (a competent authority agreement), along with information regarding the date or dates on which the existing cases shall be considered to have been presented. The intention of Article 36(1)(b) is to allow competent authorities to delay the eligibility of existing cases until they have settled the mode of application of Part VI, and to spread out the dates on which such cases become eligible for arbitration, so all existing cases do not become eligible for arbitration on the same day.³

9. The reservation in Article 36(2) allows Parties not to cover their existing stock of MAP cases unless the competent authorities both agree that a particular existing case may be submitted to arbitration. As provided in paragraph 348 of the MLI Explanatory Statement, the reservation in Article 36(2) is intended to, as part of the rules of entry into effect of Part VI, narrow the scope of existing cases eligible for Part VI.

10. This is further confirmed by the text of the reservation in Article 36(2) which provides that “a Party may reserve the right for Part VI to apply to a case [...] only to the extent that the competent authorities of both Contracting Jurisdictions agree that it will apply to that specific case”. This reservation is only provided to limit the application of Part VI to specific cases.

11. This interpretation that Article 36(1)(b) will still apply even where the reservation in Article 36(2) has been made is also consistent with the requirement in Article 19(10).

12. Article 19(10) requires that the competent authorities conclude the competent authority agreement before the date on which unresolved issues are first eligible for arbitration. By providing that Part VI will take effect only after the notification of the conclusion of the competent authority

¹ Article 19(11) of the MLI allows a Party to reserve the right to replace the two-year period set forth in Article 19(1)(b) with a three-year period for the purposes of applying Part VI to its Covered Tax Agreements.

² Article 18 of the MLI.

³ [Explanatory Statement](#), para. 347.

agreement, Article 36(1)(b) effectively secures this requirement in Article 19(10). In the absence of a competent authority agreement, competent authorities and taxpayers may experience difficulty and delay in progressing through the arbitration process.⁴

13. Applying Article 36(1)(b) even where the reservation in Article 36(2) has been made secures the conclusion of the competent authority agreement before the date on which unresolved issues are first eligible for arbitration. This provides greater certainty and facilitates the smooth functioning of the arbitration process for both competent authorities and taxpayers.

14. In contrast to Article 36(1)(b), Article 36(2) does not contain a similar condition as to the conclusion of the competent authority agreement in advance. In the absence of the application of Article 36(1)(b), competent authorities and taxpayers would be placed in an uncertain position as Part VI could take effect before the conclusion of the competent authority agreement in respect of specific existing cases to which the competent authorities would agree that Part VI would apply.

15. As a result, when a Party makes the reservation in Article 36(2), the rule in Article 36(1)(b) would still apply for the entry into effect of cases within the scope of Article 36(2).

⁴ [Explanatory Statement](#), para. 230.