MAURITIUS REVENUE AUTHORITY

Opinions of the Conference Of Parties (COP) to the MLI

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Background

In accordance with Article 31(1) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI"), the COP is responsible for taking decisions or exercising any functions in respect to the provisions of the MLI. The major role of the COP in accordance with Article 32 of the MLI, is to address any question arising as to the interpretation or implementation of the Convention

The COP issued the following opinions to address the questions as set out below regarding the interpretation or implementation of the provisions of the MLI.

A. Opinion on Entry into effect under Article 35(1)(a),issued on 25 March 2021

The question which has arisen on Article 35(1)(a) is this : When will the MLI have effect for taxes withheld at source where the latest of the dates of entry into force of the MLI for a pair of contracting Jurisdictions is on 01 January of a given calendar year?

Opinion of COP:

The text of Article 35(1)(a) of the MLI reads as follows:

"1. The provisions of this Convention shall have effect in each Contracting Jurisdiction with respect to a Covered Tax Agreement: a) with respect to taxes withheld at source on amounts paid or credited to non-residents, where the event giving rise to such taxes occurs on or after the first day of the next calendar year that begins on or after the latest of the dates on which this Convention enters into force for each of the Contracting Jurisdictions to the Covered Tax Agreement; […]"

For example, if the second of the pair of Contracting Jurisdictions deposits its instrument of ratification on 15 September 2018, the date of entry into force of the MLI for that Contracting Jurisdiction pursuant to Article 34 of the MLI will be 1 January 2019. The question which has been raised is whether the inclusion of the word "next" in Article 35(1)(a) means that, in such a case, the MLI has effect for events giving rise to withholding taxes which occur on or after 1 January 2019 or on or after 1 January 2020.

The logical interpretation of Article 35(1)(a) is that, in a case where the MLI enters into force for the second Contracting Jurisdiction on 1 January 2019, the provisions of the MLI should have effect for events giving rise to withholding taxes which occur on or after 1 January 2019. This follows from the use of the words "on or after" when referring to "the calendar year that begins on or after the latest of the dates on which this Convention enters into force for each of

the Contracting Jurisdictions…". The use of the word "on" can only mean that the date from which the MLI can have effect can be the same as the latest of the dates of entry into force.

The above interpretation is affirmed by the following:

(i) The preparatory work of the MLI which confirms that the intention was to ensure that the provisions of the MLI entered into effect quickly with respect to withholding taxes on amounts paid to non-residents.

(ii) The equally authentic French text of Article 35(1)(a) which does not include the equivalent of the word "next".

Accordingly, if the latest of the dates of entry into force for the pair of Contracting Jurisdictions is on 01 January 2019, the provisions of the MLI will have effect for events giving rise to withholding taxes which occur on or after 01 January 2019.

The same reasoning and conclusion apply to the interpretation of the similar formulations used in Article 35(3) ("… 1 January of the next year beginning on or after …") and Article 35(5) (" … first day of the next calendar year that begins on or after …").

For more information on the opinion of the COP, please click ***here***.

B. Opinion on the Interpretation and Implementation Questions, issued on 20 May 2021

The note below sets out the principles drawn from public international law, the design of the MLI itself, and its drafting history for addressing questions about the interpretation and implementation of the MLI.

1. The interpretation and implementation of the MLI is a matter for the Parties to the MLI to determine

The text of the MLI was negotiated and adopted by the jurisdictions that were members of the ad hoc Group. Therefore, questions of interpretation and implementation are ultimately for the Parties themselves to determine. In fact, the MLI explicitly provides for a mechanism by which the Parties can determine questions of the interpretation and implementation of:

i) the provisions of a Covered Tax Agreement as modified by the MLI (**"first category"**); and
ii) the provisions of the MLI itself (**"second category"**)

Opinion of COP:

For the first category, Article 32(1) of the MLI provides that questions of interpretation or implementation of the provisions of a Covered Tax Agreement as modified by the MLI should be settled in accordance with the provisions of the Agreement that govern the resolution of such questions.

In other words, Contracting Jurisdictions should use the Agreement's mutual agreement procedure to endeavor to settle questions of interpretation and implementation of the provisions of the Agreement that have been modified by the MLI. This would include agreeing on how the MLI has modified a specific Agreement – as long as the agreement reached is consistent with the provisions of the MLI.

For the second category, Article 32(2) of the MLI provides that questions on the interpretation or implementation of the MLI itself may be addressed by a Conference of the Parties convened in accordance with the procedure set out in Article 31(3) of the MLI. Such questions could include recurrent questions about how the provisions of the MLI modify Covered Tax Agreements.

2. Article 31 of the Vienna Convention on the Law of Treaties and the basic principle for interpretation of the MLI

As with any international agreement and as per Article 31 of the Vienna Convention on the Law of Treaties ('VCLT'), the following rules reflect the ordinary principles of treaty interpretation:

(i) the MLI shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose;

(ii) the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty; and

(iii) any subsequent agreement between the parties regarding the interpretation or application of a treaty shall be taken into account together with the context.

Furthermore, the COP has established a set of guiding principles to enable Parties for the interpretation and implementation of the provisions of a Covered Tax Agreement as modified by the MLI as follows:

(i). The MLI should be interpreted in light of its object and purpose which is to implement the tax treaty-related BEPS measures;

(ii). The provisions of the MLI should be interpreted and implemented in light of the policy objectives of the relevant tax treaty-related BEPS measure implemented via the MLI (the commentary developed in the BEPS project and the MLI explanatory notes should be considered when interpreting MLI provisions);

(iii). The application of the MLI to Covered Tax Agreements follows the general principle that when two rules apply to the same subject matter, the later-in-time rule prevails (*lex posterior derogat legi priori*), to the extent they are incompatible.

(iv). The MLI should be interpreted in light of the consent given by each Contracting Jurisdiction to modify their Covered Tax Agreement (MLI Positions);

(v). Compatibility clauses set out whether and to what extent provisions in the MLI interact with existing provisions of the Covered Tax Agreements. When an MLI provision

conflicts with existing provisions in Agreements covering the same subject matter, this conflict is addressed through a compatibility clause, which describes the existing provisions that the MLI is intended to modify, as well as the effect the MLI has on those existing provisions.

(vi). The notification clauses were introduced in the MLI to ensure clarity and transparency about existing provisions of Covered Tax Agreements that are modified by the MLI. While the notification clauses sometimes trigger the application of the MLI, in other cases, they do not.

For more information on the opinion of the COP, please click ***here***.

C. Opinion on the Implementation and Application of Article 16 (Mutual Agreement Procedure) of the MLI, issued on 30 September 2021

The question which has arisen on the implementation of Article 16 of the MLI is this: Whether the compatibility clauses "in the absence of" in Article 16(4)(b)(i) and (ii) and (c)(i) and (ii) of the MLI apply to Covered Tax Agreements that contain existing provisions that are not in line with the Action 14 minimum standard (that is, that include some but not all of the components of the relevant sentences in Article 16(2) and (3) of the MLI or that provide for additional requirements)?

Opinion of COP:

The COP confirms that the expression "in the absence of" in the compatibility clauses in Articles 16(4)(b)(i) and (ii) and (c)(i) and (ii) of the MLI should be interpreted not only to cover the absence of a provision but also to include provisions that contain some but not all of the components of the relevant sentences in Article 16 of the MLI, or that contain additional requirements. For example, a Covered Tax Agreement that contains an existing provision modelled after the first sentence of Article 25(3) of the OECD Model Tax Convention ("[t]he competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention"), but that does not include the word "interpretation" would be within the scope of the compatibility clause in Article 16(4)(c)(i) of the MLI and could apply to such provision provided the Contracting States notify the same provision.

According to the opinion, this interpretation of the MLI would allow Article 16 of the MLI to apply as broadly as possible, in particular to Covered Tax Agreements not aligned with BEPS Action 14 (dispute resolution). As a result, Article 16 of the MLI may apply to more Covered Tax Agreements.

It is important to note that this opinion brings closer the ''in the absence of'' compatibility clause to the ''in place of or in the absence of'' compatibility clause. However, there is salient difference that remains between these two clauses. The latter type of compatibility clause would apply even in the absence of a notification or in situations where there is a mismatch at the level of the notification (i.e., provision notified by a jurisdiction does not coincide with the notification made by the other Contracting Jurisdiction).

For more information on the opinion of the COP, please click ***here***.

D. Opinion on the Application of the entry into effect of Part VI (Arbitration) and Article 36(1)(b) and 36(2) of the MLI, issued on 30 September 2021

The question which has arisen on the Application of the entry into effect of Part VI (Arbitration) and Article 36(1)(b) and 36(2) is this: 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?

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). Part VI only applies between Parties that explicitly choose to apply it.

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.

Article 36(1)(b) provides that the provisions of Part VI will take effect on the date when both Contracting Jurisdictions have notified the Depositary 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.

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.

The 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), which requires

that the competent authorities conclude the competent authority agreement before the date on which unresolved issues are first eligible for arbitration.

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.

Opinion of COP:

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.

For more information on the opinion of the COP, please click ***here***.

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