



International
SOCIAL SCIENCES
STUDIES JOURNAL



SSSjournal (ISSN:2587-1587)

Economics and Administration, Tourism and Tourism Management, History, Culture, Religion, Psychology, Sociology, Fine Arts, Engineering, Architecture, Language, Literature, Educational Sciences, Pedagogy & Other Disciplines in Social Sciences

Vol:5, Issue:46
sssjournal.com

pp.5674-5682
ISSN:2587-1587

2019
sssjournal.info@gmail.com

Article Arrival Date (Makale Geliş Tarihi) 06/09/2019 | The Published Rel. Date (Makale Yayın Kabul Tarihi) 21/10/2019
Published Date (Makale Yayın Tarihi) 21.10.2019

TURKEY'S RESERVATIONS ON MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING ("MULTILATERAL INSTRUMENT" OR "MLI")

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Article Type : Research Article/ Araştırma Makalesi
Doi Number : <http://dx.doi.org/10.26449/sss.1825>

Reference : Atesagaoglu, E. & Armagan, A. (2019). "Turkey's Reservations On Multilateral Convention To Implement Tax Treaty Related Measures To Prevent Base Erosion And Profit Shifting ("Multilateral Instrument" Or "MLI")", International Social Sciences Studies Journal, 5(46): 5674-5682.

ABSTRACT

OECD's BEPS project is one of the major steps toward a new era in international taxation. This 15-step project revealed several deep issues in existing international taxation system. While OECD provides possible solutions and recommendations to fight these issues, it is highly unlikely to achieve sustainable results without changing existing bilateral tax treaties. Since changing these treaties would be a burden globally, the last action plan of BEPS project introduces a multilateral convention, which will co-exist with the existing tax treaties and will host all the new developments arose from the project.

Multilateral Instrument (MLI) is a comprehensive document which includes necessary provisions to eliminate problems in international tax field. While some articles of MLI can not be reserved, some others provide options to jurisdictions to choose from or can be opted-out entirely. To understand how MLI will affect both international and domestic tax law of a jurisdiction, it is necessary to investigate said jurisdiction's MLI position which includes preliminary list, reservations and notifications provided by this jurisdiction.

Within this study firstly the scope and the structure of MLI will be explained. As the second part, this study aims to investigate Turkey's reservations and the reasoning behind them.

Keywords: International Taxation, Multilateral Convention, Multilateral Instrument, BEPS

1. INTRODUCTION

Within the new global change through the digitalization and new data era, legal systems were always falling behind. This new global trend which include digital and multinational economy, force lawmakers to keep up and come up with practical and more importantly sustainable solutions. These trends had impacts on tax law and taxpayers also. Those impacts shouldn't be degraded to taxation, since tax evasion is closely tangled with free-market and competition law.

Base erosion and profit shifting (BEPS) is one of the problems may arise from the weaknesses of international tax systems (OECD Background Brief, 2017: p.7). According to OECD, BEPS should be seen as a triple threat: it is harmful for governments, as they are receiving less revenue; taxpayers, as because of the businesses reducing their tax obligations that burden falls on their shoulder; and corporations, since some of them have to compete with much advantaged others (OECD "Policy Brief: Taxing Multinational Enterprises", 2013). In order to combat this issue, in September 2013 G20 leaders endorsed BEPS Action Plan among with OECD member countries (OECD Background Brief, 2017: p. 9). In 2013 first report on the matter titled "Addressing Base Erosion and Profit Shifting" released by OECD (OECD Addressing

Base Erosion and Profit Shifting, 2013). Soon enough it was clear that there is not any single solution to BEPS, rather there must be several actions to constitute (OECD Information Brief, 2015: p.3). In this report, overview of the BEPS problem and outlines of the BEPS project action plans was prepared. Development of the actions took two years of hard work of OECD and in 2015, 15 action plan final reports were released. Action plans were agreed on and delivered by OECD members and G20 leaders in G20 summit in Antalya, Turkey, on November 2015 (OECD Background Brief, 2017: p. 10).

Action plans base on three fundamental pillars: introducing new domestic regulations for cross-border activities, reinforcing existing international standards with substance requirements and improving transparency within state and tax payer and within countries (OECD Information Brief, 2015: p. 3). To achieve these main goals, OECD sets actions on three principle: coherence, substance and transparency (OECD “Policy Brief: Taxing Multinational Enterprises”, 2019) and it can be seen these principles in the order of actions plans: Actions 2-5, which are on hybrid mismatches, controlled foreign country (CFC) rules, interest deduction and harmful tax practices, regulate coherency, Actions 6-10, which are on treaty abuse, permanent establishment status and transfer pricing, restore substance and Actions 11-14, which are on BEPS data analysis, mandatory disclosure rules, transfer pricing documentation and dispute resolution, maintain transparency (OECD Action Plan on Base Erosion and Profit Shifting, 2015: p. 14-24). Remaining Action 1, which defines difficulties of digital economy, and Action 15, which helps the implementation of actions plans, can be considered as analytic reports. This study mainly focuses on multilateral instrument which is the subject of Action 15.

In this paper; a general overview of MLI and Turkey’s reservation on some articles mentioned above of the relevant convention will be analyzed, possible reasons and some significant assessments together with conclusions of such reservation are also be presented additionally. Thus, function of the articles of MLI and the meanings of reservations made by Turkey can be understood better.

2. SCOPE AND STRUCTURE OF MLI

Implementation of new regulations is as much, if not more, important as introducing them. Within this perspective Action 15 of BEPS project solely focuses on the implementation of changes that arose from other action plans (Brauner, 2018: p. 8). All actions suggest multiple changes in existing international tax treaties. Since there are more than 3000 bilateral tax treaties around the globe (Brooks & Krever, 2015: p. 160), analyzing all in accordance with all actions and making the necessary changes would put an immense burden on governments. Negotiation of each term on a bilateral tax treaty in a give and take method would be ineffective (Brauner, 2018: p. 66).

In order to eliminate this problem, Action 15 provides a new tool: Multilateral Instrument. MLI provides unified sets of rules for the global tax law. Aside from few much smaller multilateral treaties such as Nordic treaty, it is the first global multilateral treaty in tax field which contains not only the procedural regulations but also substantive regulations (Malherbe, 2015: p. 93). One the other hand, some views are pointing out the existing tax treaties mostly made according to the model convention released by OECD (Brauner, 2018: p. 8; Kleist, 2016: p. 829). So, from this point of view, there were already a kind of unification. Yet, revisiting those bilateral tax treaties was a burden, which MLI eliminates. Another comment on MLI is that it is decreasing the predictability in taxation. Since in bilateral tax treaties, there are only two laws to be consider, as the domestic law and treaty law and MLI brings up a third layer to implement (Kleist, 2016: p. 829). Increased uncertainty in taxation is a problem both for persons and countries. Even with these critics, MLI would be an ideal tool to eliminate different results may arise from different applications, therefore unifying the global taxation among world (Debelva&Mosquera, 2017: p. 378). It is also states that the multilateralism is necessary because in the new globalized world, unilateral and bilateral solutions are not sufficient (Hidalgo&Sánchez, 2015: p. 720).

The purpose of this tool is to bring and effective mechanism to implement agreed changes (Özgenç, 2019: p. 46; Baker, 2015: p. 89). With MLI, countries simply eliminate all the negotiation procedure had to be made to apply changes introduced with BEPS project. MLI designed to be modular for each countries’ needs (Brauner, 2018: p. 7). Also, MLI is a living document, it can change with the proposal of a party (Article 33 of MLI). Flexibility is mentioned as one of the characteristic aspects of MLI (Malherbe, 2015: p. 94; Bosman, 2017: p. 644; OECD Developing a Multilateral Instrument to Modify Bilateral Tax Treaties: Action 15, 2015: p. 20, Özgenç, 2019: 71). It is important to put a remark on the first article of MLI says, “*This Convention modifies all Covered Tax Agreements*”, which contains the verb “*modify*” which is different than “*replace*” or “*revoke*”. According to this article, MLI does not revoke existing

bilateral treaties, it coexists with them. While MLI introduces new regulations and clauses, to manage the gap that will left by the country reservations, it is designed with an ability to coexist alongside the existing bilateral tax treaties (OECD Developing a Multilateral Instrument to Modify Bilateral Tax Treaties: Action 15, 2015: p. 20, Özgenç, 2019: p. 71).

MLI obtains three different clause types to clarify the application process. These are compatibility clauses, reservation clauses and the notification clauses (OECD, Explanatory Statement to The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, 2016; p. 5). The first one is to regulate the possible overlap between the MLI articles and the covered tax agreement. Compatibility clauses of MLI can be seen in 4 categories; “in place of” clauses, “applies to” clauses, “in absence of” clauses and “in place of or in absence of” clauses. If the provision in MLI has the phrase “in place of”, it can only apply to an existing provision. In another meaning this MLI provision is intended to replace an existing provision if one exists. If a provision on that matter does not exists in bilateral tax treaty, MLI provision is not intended to apply. If the provision in MLI has the phrase “applies to” or “modifies”, the provision of MLI is intended to change the existing provision without replacing it, and therefore can only apply if there is an existing provision. If the provision in MLI has the phrase “in the absence of”, the provision of MLI will apply only in cases where all parties notify the absence of an existing provision of the bilateral tax treaty. Lastly, if the provision in MLI has the phrase “in place of or in the absence of”, the provision of MLI will apply in all cases. If all parties notify the existence of an existing provision of bilateral treaty, that provision will be replaced by the provision of MLI. If there is no existing provision, the provision of MLI will be added to the tax agreement. Reservation clauses regulates whether a jurisdiction able to put reservation on an article. The articles which can not be reserved are called “minimum standards”. Notification clauses regulate optional provisions which allows jurisdictions to choose from several options.

MLI includes provisions introduced in Action 2, 6, 7 and 14 which are hybrid mismatches, treaty abuse, permanent establishment status and dispute resolution, respectively (Kleist, 2016: p. 825-826.). Within MLI, the regulations may be reviewed in three categories: minimum standard clauses, provisions that apply if there is not a reservation and provisions that will not apply unless it is specifically chosen (Valente, 2017: p. 220; Brauner, 2018: p. 8.). Except minimum standard clauses, countries have their right to have reservation in any part of MLI. Provisions labeled as minimum standard, on the other hand, can only be reserved if there is a clause which provide this minimum standard in the existing bilateral treaty. Minimum standards include a preamble that clearly states the motivation behind the treaty which is to eliminate tax avoidance, the principle purpose test clause and a mutual agreement procedure clause (Valente, 2017: p. 221). 28 articles of MLI introduce optional clauses which counties choose from. Countries also can choose which existing bilateral treaty they want MLI apply. So far 88 countries signed MLI and 6 (Algeria, Eswatini, Kenya, Lebanon, Oman and Thailand) have expressed their intent to sign (Retrieved on April 14th, 2019 from <https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>).

MLI consists 6 parts, each addressing a different BEPS problem. Scope and interpretation of terms (article 1 and 2, respectively) constitute Part I. Part II (article 3 to 5) includes hybrid mismatches. Part III (article 6 to 11) includes treaty abuse. Part IV (article 12 to 15) covers permanent establishment status and avoidance of it. Part V (article 16 and 17) regulates dispute resolution. Lastly Part VI (article 18 to 26) addresses mandatory Binding Arbitration. Other than the 6 primary parts, last part, Part VII (article 27 to 39) regulates procedural clauses which include signature, reservations, notifications etc.

When jurisdictions sign MLI they must submit a preliminary list of which existing tax treaties they want to cover. If the other party of said bilateral treaty, also includes the first jurisdiction in their lists, then there is a “match” which basically allows MLI to apply between these two jurisdictions. Beside, being a match it is important to determine the MLI positions. Even there is a match since jurisdictions may put reservations on some articles and/or may choose different elective provisions from the other, the applicability of each article of MLI requires a deeper investigation. Aside from that, while the general rule is when a jurisdiction chose to apply one article, to eliminate double taxation, some articles of MLI allows asymmetrical application which means when a jurisdiction is the source state the article applies but it doesn’t apply when the counter state is the source state.

3. TURKEY’S RESERVATIONS ON ARTICLES

Turkey signed MLI for all 90 of its bilateral treaties in 07.06.2017 (Retrieved on April 14th, 2019 from <https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf>). Turkey also released a declaration

states that MLI will apply only to the states parties which it has diplomatic relations with and Turkey's signatures should not be construed as the recognition of "Republic of Cyprus". According to the article 28/5 of MLI, reservations and notifications shall be made at the time of signature. On the other hand, if the reservations are not made at the said time, a provisional list of reservations and notifications shall be provided (art. 28/7). Turkey did provide a provisional list according to this clause. According to the list, article 4, 5, 8, 10, 11, 14, 17 and 35 are reserved by Turkey. However, article 35 will not be examined in this study since it's a clause to regulate the entry into effect of MLI.

As said above, Turkey signed MLI for all 90 of its bilateral tax treaties. Yet MLI will only apply to 56 of them. This is an outcome of nature of MLI which only can apply when both parties of a bilateral tax agreement signs. 34 non-covered tax agreements of Turkey are with Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Belarus, Bosnia and Herzegovina, Brazil, Ethiopia, Iran, Jordan, Kyrgyzstan, Lebanon, Macedonia, Moldova, Mongolia, Morocco, Oman, Philippines, Somalia, Sudan, Syria, Tajikistan, Thailand, The Gambia, Turkish Republic of Northern Cyprus, Turkmenistan, United States, Uzbekistan, Vietnam, Yemen and Montenegro (Ateş, 2019).

3.1 Article 4: Dual Resident Entities

Article 4 of MLI titled as "Dual Resident Entities". This clause is linked to art. 4 of OECD model convention. In the recent 2017 update of Model Convention 2, updates accrued in art. 4. Updated paragraph 1 states that a pension fund should be considered to be a resident of the State in which it is constituted regardless of whether that pension fund benefits from a limited or complete exemption from taxation in that State. Updated paragraph 3 states the when a person other than an individual is a resident of both parties, parties must endeavor to determine the residency by mutual agreement. In the absence of such agreement this person should not be subject to any relief not exemption and contracting states can determine how much relief and exemption the person may benefit. This update eliminated the old clause which stated the "place of effective management" is the criteria to determine a non-individual person's residency. Turkey reserved it's right to use "registered office" and "place of effective management" criteria to determine the residence of a non-individual person (OECD, 2019: p. 84). This updated criterion, is criticized since this provision seeks to solve the non-taxation problem, it may cause double taxation (Schoueri&Galdino, 2018: p. 108).

MLI art. 4 provides a similar clause to OECD Model. It states that when a non-individual person has dual residency, contracting states must endeavor to determine by mutual agreement which state such person shall be deemed to be a resident. Art. 4 also states this is a "in absence or in place of" clause yet that entirety of the article can be reserved.

Turkey reserved entirety of this clause with choosing from the options listed in the 3th paragraph of art. 4. The option Turkey chose is art. 4/3-a. In a study based on this reservation it is suggested all the bilateral tax treaties of Turkey already exist the clause provided in MLI so Turkey's option of reservation should be art 4/3-b which states the clause is reserved for the treaties that provides a similar clause (Konca&Haraççı, 2019). On the other hand, when 85 of the treaties that was published by official revenue administration get analyzed only 44 of them has regulated mutual agreement procedure as a part of the existing art. 4¹. Within this context it is clear that with the reservation Turkey made both on MLI and OECD Model Convention, mutual agreement procedure will not be used within at least half of its tax treaties.

3.2. Article 5: Application of Methods for Elimination of Double Taxation

Article 5 of MLI titled as "Application of Methods for Elimination of Double Taxation". This clause is linked to art. 23A of OECD model convention in the recent 2017 update of Model.

In the updated OECD model art. 23/A it is stated that, "where a resident of a Contracting State derives income or owns capital which *may be taxed in the other Contracting State* in accordance with the provisions of this Convention (*except to the extent that these provisions allow taxation by that other State solely because the income is also income derived by a resident of that State or because the capital is also capital owned by a resident of that State*), may be taxed in the other Contracting State, the first-mentioned State shall, subject to the provisions of paragraphs 2 and 3, exempt such income or capital from tax.

¹ These countries are: USA, Germany, Albania, Austria, UAE, Bahrain, Bangladesh, Belgium, Brazil, Czech Republic, Denmark, Estonia, Ethiopia, South Korea, South Africa, India, Netherlands, Britain, Ireland, Spain, Israel, Italy, Japan, Canada, Kuwait, Latvia, Lithuania, Lebanon, Luxembourg, Malaysia, Malta, Mexico, Norway, Uzbekistan, Pakistan, Poland, Portugal, Romania, Serbia-Montenegro, Singapore, Sudan, Thailand, Tunisia and New Zealand.

In the second paragraph, “where a resident of a Contracting State derives items of income which *may be taxed in the other Contracting State* in accordance with the provisions of Articles 10 and 11 (*except to the extent that these provisions allow taxation by that other State solely because the income is also income derived by a resident of that State*), the first-mentioned State shall allow as a deduction from the tax on the income of that resident an amount equal to the tax paid in that other State. Such deduction shall not, however, exceed that part of the tax, as computed before the deduction is given, which is attributable to such items of income derived from that other State”.

In the old version of OECD model treaty since the permanent establishment was based on “place of business”. Double taxation problem was eliminated. With the update, permanent establishment definition has changed which brought up the problem of double taxation one again. The Model updates it’s exemption method in order to eliminate this problem. Basic principal of this method that the resident state does not tax the income which is taxable in other state according to the contract.

MLI art. 5 provides 3 options to choose: A, B and C. Option A, states treaty provisions that would otherwise exempt or limits the tax rate on the income of a resident for the purpose of eliminating double taxation shall not apply where the other party applies the provisions of the treaty to exempt such income which may be taxed. Option B, states a party, otherwise exempt income derived by a resident for the purpose of eliminating double taxation because such income is treated as a dividend, shall not apply where such income gives rise to a deduction for the purpose of determining the taxable profits of a resident of the other party under the laws of said party. Option C, states in case a resident of a Contracting Jurisdiction derives income or owns capital which may be taxed in the other Contracting Jurisdiction in accordance with the provisions of a Covered Tax Agreement, the first-mentioned Contracting Jurisdiction shall allow as a deduction from the tax on the income of that resident.

When none of the options are chosen, the entirety of the article shall be considered opted-out (Bosman, 2017: p. 653). Since Turkey didn’t chose to apply any of the options, Turkey reserved the right for the entirety of this clause not to apply.

3.3. Article 8: Dividend Transfer Transactions

Article 8 of MLI titled as “Dividend Transfer Transactions”. This clause is linked to Article 10 of OECD model convention. In the recent 2017 update of Model Convention introduced a minimum holding period of 365 days to any ownership tests for dividends. Article 8 of MLI is designed accordingly. Article 8/3-a of MLI was not a minimum standard, therefore could be reserved outright or where existing holding period. In Turkey’s case, Turkey reserved the right for the entirety of art. 8 not to apply to its covered tax treaties.

This regulation was based on BEPS Action 6, Treaty Abuse. In the 2015 final report of this action, the importance of minimum holding period was explained: “*The primary reason for this resides in the desire to have a provision which is applicable as broadly as possible. To require the parent company to have possessed the minimum holding for a certain time before the distribution of the profits could involve extensive inquiries. Internal laws of certain OECD member countries provide for a minimum period during which the recipient company must have held the shares to qualify for exemption or relief in respect of dividends received. In view of this, Contracting States may include a similar condition in their conventions*”. (OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances: Action 6: 2015 Final Report, 2015: p. 70). According to this statement, regulating a holding period can help to avoid vague provisions and to determine beneficial owner with a more precise condition.

In the MLI provision it is stated that, “*the beneficial owner or the recipient is a company which owns hold or controls more than a certain amount of the capital, shares, stock, voting power, voting rights or similar ownership interest of the company paying the dividend*”. Similarly, according to Turkish Corporate Tax Code (CTC) article 7, controlled foreign company is a company established abroad with at least 50% of the organization and management controlled directly or indirectly by a Turkish resident company or person. Other than the percentage of control according to CTC art. 7, there are cumulative criterias to meet: CFC rules only applies if at least 25% of the gross income is comprised of passive incomes, or foreign company carries less than 10% tax rate in its country, or the annual gross revenue of foreign company exceeds the foreign equivalent of 100.000 TRY. In the 3th paragraph of the article, it states that the highest control percentage within the fiscal year will be taken in consideration. In other words, if a foreign company is controlled above 50% even for a day in a fiscal year, this company will be considered as CFC in Turkish tax system.

Although the reasoning behind the Turkey's reservation on MLI art.8 is not revealed, this widely different approach to CFC might be the cause. According to MLI, CFC only establish if the controlling person holds "the control" for 365 days, on the other hand in Turkish system, if a person holds the percentage for a day and one of the cumulative criterias is met, CFC rules apply. In both approaches the test applied on CFC rules is mainly focused on control percentage. In our opinion without the element of effective influence on the decision made on distribution of dividend, holding period time shouldn't be the main condition to determine if the person has the beneficial ownership.

3.4. Article 10: Anti-Abuse Rules for Permanent Establishments Situated in Third Jurisdictions

Article 10 of MLI is titled as "Anti-Abuse Rule for Permanent Establishments Situated in Third Jurisdictions". This clause is based on BEPS Action 6.

Action 6 which is on preventing the granting of treaty benefits in inappropriate circumstances, states the treaty shopping is generally involves persons who are residents of third states. In this article the cases where the income of an enterprise is considered by the residence-jurisdiction attributable to permanent establishment in a third state and is hence tax exempt are addressed (Valente, 2017: p. 224.). In this triangular case; within the scope of the regulation of BEPS Action 6, there is a risk of a person to transfer its properties to the third jurisdiction to benefit from much favorable tax treatment. With that the resident of the third state become "equivalent beneficiaries" and would have been entitled to equivalent benefits if they had invested directly in the source state (Broe&Luts, 2015: p. 130). To eliminate this problem this article states that if such income is not connected with active business conduct by the permanent establishment and is taxed at a very low rate or is not subjected to taxation in third state, bilateral treat shall not apply and this income will be taxed at source-jurisdiction.

The commentary of BEPS action 6 states, "*If the Contracting State of which the enterprise is a resident exempts from tax the profits of the permanent establishment located in the other Contracting State, there is a danger that the enterprise will transfer assets such as shares, bonds or patents to permanent establishments in States that offer very favourable tax treatment, and in certain circumstances the resulting income may not be taxed in any of the three States. To prevent such practices, which may be regarded as abusive, a provision can be included in the convention between the State of which the enterprise is a resident and the third State (the State of source) stating that an enterprise can claim the benefits of the convention only if the income obtained by the permanent establishment situated in the other State is taxed normally in the State of the permanent establishment*". In order to eliminate this risk, MLI provision stipulates the right of source state of income to tax the income of a permanent establishment if it is exempt from income tax in the jurisdiction where it has its headquarters and is eligible for reduced tax rates in the jurisdiction where the permanent establishment is situated.

Although as a possible source of income and a developing country, it should be more favorable for Turkey to apply this clause, Turkey reserves the right for the entirety of Article 10 not to apply. Reason for the reservation is not revealed by Turkish tax authority.

3.5. Article 11: Application of Tax Agreements to Restrict a Party's Right to Tax its Own Residents

Article 11 of MLI is titles as "Application of Tax Agreements to Restrict a Party's Right to Tax its Own Residents". This clause does not have a counterpart in OECD Model. This clause is based on BEPS Action 6.

It states that countries often include a saving clause in their tax treaties to preserve the right to tax their own residents. According to the Action 6 of BEPS, this allows country to tax their residents as if the treaty not exists. To unify the practices, MLI contains this "saving clause" in article 11. This clause clarifies that MLI does not restrict a regime's right to tax its own residents. This clause states this saving clause can be applied with the respect to certain provisions which are listed as 10 paragraphs. Turkey reserved it's right not to apply this clause.

Although the reasoning behind the Turkey's reservation on MLI art.11 is not revealed, Turkish Constitution art. 90 might be the reason. According to this provision "*International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.*". This provision states that international agreements concerning fundamental rights and freedoms are above the domestic law.

Although the reservation on this article causes a disadvantage for Turkey, the main reason may be explained the mismatch between the above article of Turkish Constitution and article 11 of MLI as a single thing that comes to our mind.

3.6. Article 14: Splitting-up of Contracts

Article 14 of MLI titled as “Splitting-up of Contracts”. This clause does not have a counterpart in OECD Model, yet it is linked to Article 5 of OECD Model.

According to Art. 14 of MLI, if there is a time period regulated to determine permanent establishment in the covered tax agreement, supervisory or consultancy activities of the same building site, construction or installation project identified as closely related to the enterprise will not start the period aforementioned again and within 30 exceeded days, they form a permanent establishment. This clause is based on BEPS Action 7. According to report, this clause brought up to eliminate the risk that enterprises may divide their contracts in parts to split up 6-month period and to avoid forming a permanent establishment (OECD, Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7, 2015: p. 45).

“Person closely related to an enterprise” defined in MLI Article 15. According to the clause, “a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises”. With that said if one possesses directly or indirectly more than %50 percent of the beneficial interest (including aggregate vote and value of the shares) in the other shall be considered as closely related.

Permanent establishment is an important condition to determine the taxpayer’s status in a country. For non-resident entities operating in Turkey, only the portion of profit that is repatriated from Turkey is taxable by Turkey. Therefore, it is important to analyze what are the conditions that create permanent establishment in Turkish tax system. In context of a business profit, a person must have a permanent establishment or permanent representative in Turkey (Article 7/1 of Income Tax Law, No. 193). Individuals who are residing in Turkey for an uninterrupted period of more than 6 months in any calendar year are deemed to be resident for taxation (Article 4 of Income Tax Law). This provision aligns with OECD model treaty, yet it doesn’t support the provision brought up by MLI art. 14. In our opinion, this difference between the MLI and existing Turkish tax law provisions might cause the reservation of Turkey.

3.7. Article 17: Corresponding Adjustments

Article 17 of MLI titled as “Corresponding Adjustments”. This clause is linked to the article 9 of OECD model convention. Both OECD Model and MLI are supposed to require compensatory or corresponding adjustment, if there is double taxation arising out of transfer pricing adjustments. This regulation is based on OECD action plan 14.

Although Turkey reserved this clause, this reservation was based on MLI 17/3-a. Which states that a party may reserve entirety of the article that already contain the provision described. Thus, Turkey provided the full list of the treaties this provision already exists in. Since that list includes all its bilateral tax treaties it can be said that this provision, even it is reserved, will apply to all of Turkey’s existing bilateral treaties.

4. ASSESSMENT AND CONCLUSION

Because of the nature of MLI, without two signatory parties, the instrument will not apply. Considering the reservations and notifications made by other countries and countries who chose not to sign, MLI takes a hit on effectiveness. In order to confirm that theory, Turkey can be given as an example. According to OECD’s MLI matching database (Retrieved on May 18th, 2019 from OECD Matching Database (<https://www.oecd.org/tax/treaties/mli-matching-database.htm>), even though Turkey listed 90 of its bilateral treaties, only 55² of those was a match therefore for nearly half of the treaties MLI will not apply. In a global scale, only 1527 bilateral tax treaties are matched in MLI procedure (Retrieved on May 29th, 2019 from <https://www.oecd.org/tax/treaties/mli-database-matrix-options-and-reservations.htm>).

Since there are more than 3000 bilateral treaties in the world on double taxation, only half of them will be affected by MLI and with the consideration of all the notifications and reservations. The number of affected provisions would be even more small. Another factor for the affects applicability of MLI other than the

² Australia, Austria, Belgium, Bulgaria, Canada, China, Cote d’Ivoire, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Kazakhstan, Kuwait, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Netherland, New Zealand, Norway, Pakistan, Poland, Portugal, Qatar, Romania, Russia, Saudi Arabia, Senegal, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Ukraine, United Arab Emirates and United Kingdom.

non-signatory countries is the reservation. Other than the mandatory clauses which are article 6 (Purpose of a Covered Tax Agreement), article 7 (Prevention of Treaty Abuse) and article 16 (Mutual Agreement Procedure); articles 3-26 are optional. When a country reserves its right not to apply or chose an option that does not chosen by the other jurisdiction, the clauses shall not apply to the bilateral tax treaty. Therefore, the reservations are an important subject to analyze to figure out in which aspect MLI will impact.

According to a study, developed countries are more likely to opted-out article 10, 11, 12 and 14, while developing countries are more likely to opted-out article 3 (Tandon, 2018: p. 13). Article 4, 10, 11, 12 and 14 are more likely to be chosen by developing countries. On the other hand, Turkey opted out article 4, 5, 8, 10, 11 and 14 as a developing country. Which does not fit neither of the pattern (Ateş, 2019). While it is stated the such clauses like article 12 and 14 are more likely to be in favor of a developing country (Tandon, 2018: p. 15), it is hard to say why a developing country may opted out them.

When analyzing the reservations made by Turkey, three conclusions can be made. Firstly, there is a reservation made because the provision already existed in Turkey's bilateral tax treaties. Secondly, there are few provisions opted-out because the domestic law of Turkey conflicts with the provisions regulated in MLI. Lastly, and as the most inexplicable, some of the provisions are opted-out while they are clearly more favorable for a developing country such as Turkey. While these reservations made by Turkey are provisional, scope of these choses made by Turkey is unclear since the Turkish tax administration didn't provide an official report or explanation.

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