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CHALLENGES IN APPLYING THE MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING

Master Thesis

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ADR – alternative dispute resolution

BEPS – base erosion and profit shifting

CTA – Covered Tax Agreement

EU – European Union

GAAR – general anti-avoidance rule

HMRC - Her Majesty's Revenue and Customs

IF – Inclusive Framework on BEPS

LOB - limitation on benefits

MAP – mutual agreement procedure

MLI – Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (Multilateral Instrument)

MNC – multinational company

OECD – Organisation for Economic Cooperation and Development

PPT – principal purpose test

SAAR – specific anti-avoidance rule

UNCTAD - United Nations Conference on Trade and Development

INTRODUCTION

The relevance of the research. The aggressive tax planning schemes and other pertinent challenges have long been on the agenda of global tax society. Globalization affected the international tax system leading to the risks of unequal and unfair treatment between the different states.[1]

Recent international tax scandals involving main multinational companies (hereinafter – MNCs) have challenged the existing tax regime by their tax planning arrangements. Furthermore, tax cases concerning Google, Apple and Amazon have become a turning point in creation of new tax order. The leaks like Panama Papers as well have revealed the reality of global business practice in relation to tax planning schemes conducted by the well-known corporations. The existing treaty framework has become obsolete and inflexible to address the urgent problems.[2]

The move towards a multilateral treaty is a highly innovative development in international tax law.[3] The task to elaborate a multilateral consensus on acceptable solutions to this problem was assigned to the OECD (hereinafter – the Organisation for Economic Cooperation and Development). The main concepts designed under the auspices of OECD were embodied in the "base erosion and profit shifting" (hereinafter – BEPS) project. It focuses on situations of so-called 'double non-taxation' and artificially created schemes for tax avoidance. The essence of the project is the international cooperation in combating the above-mentioned schemes of cross-border tax planning, the development of set of recommendations for national authorities and their subsequent implementation in the laws of states.[4]

The Multilateral Instrument (hereinafter – MLI) is one of few international tax conventions in the sphere of international tax regulation. Since the provisions of the Multilateral Instrument started to be implemented by the states, there is the need to analyse the Convention and the challenges it raised in practice.

The MLI provides a wide range of provisions that are aimed at addressing the BEPS practices. However, this research examines the two substantive clauses: the prevention of treaty abuse and dispute resolution mechanism. The first provision was decided to be analysed owing to

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[1] Piergiorgio Valente, "Geotaxation and the Digital: Janus in the Mirror", Intertax 47, 4 (2019), quoted in Cécile Remeur, "Understanding BEPS: From tax avoidance to digital tax challenges"(2019), 2. Accessed 9 May, 2020. https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642258/EPRS_BRI(2019)642258_EN.pdf.

[2] Reuven S. Avi-Yonah, Haiyan Xu, "A Global Treaty Override: The New OECD Multilateral Tax Instrument and Its Limits", Michigan Journal of International Law 39, 2 (2018): 161. HeinOnline

[3] Alexander Bosman, "General Aspects of the Multilateral Instrument", Intertax 45, 10 (2017): 659. HeinOnline.

[4] Andrew MC Smith, "The OECD's multilateral instrument - will it be an effective solution for New Zealand to counter multinational tax avoidance?", Journal of the Australasian Tax Teachers Association, 14,1 (2019): 2. Accessed 6 May, 2020.https://static1.squarespace.com/static/5e88791f0c333872e0b33272/t/5ee63bf83269e91ad63002e1/1592146939634/JATTA-2019-Andrew+MC+Smith.pdf

the fact it is a minimum standard as well as high level of application (particularly the 'principle purpose test' rule) comparing to other provisions.

The second set of provisions was chosen for analysis due to the fact that investments require certain and predictable tax environment. The unclear clauses and different application of the provisions lead to the increase in the number of tax disputes. Therefore, the existence of the efficient dispute resolution mechanism is of great importance.

Scientific research problem. The Multilateral Instrument is a new format and the fact of its adoption has become a "milestone in the evolution of the international tax regime".[5] However, it would be futile in case its provisions would not be effective enough to achieve its goal. The problem of this research can be formulated as follows: **does flexible nature of the prevention of treaty abuse and dispute resolution provisions provided by the Multilateral Instrument undermines its effectiveness; and what solutions could be taken to address the challenges raised?**

Scientific novelty and overview of the literature on the topic. Since the topic is quite new, a key problem with much of the literature regarding the Multinational Instrument is its lack or fragmentation. A few scholars focus on general aspects of MLI as its legal nature, structure, main peculiarities, for instance, Nathalie Bravo in her book "A Multilateral Instrument for Updating the Tax Treaty Network"[6] as well as Rita Szudoczky and Daniel Blum in their article "Unveiling the MLI: An Analysis of Its Nature, Relationship to Covered Tax Agreements and Interpretation in Light of the Obligations of Its Parties"[7]. Previous discussions have mostly been limited to the analysis of particular problematic issues of MLI provisions in isolation. Among these, the 'principle purpose test' (hereinafter – PPT) was examined by Robert J. Danon[8], Reinout Kok[9], Vikram Chand[10], etc. The issue of the compatibility of the PPT and European Union law was analysed by Denis Weber[11], the 'limitation of benefit' (hereinafter – LOB) rule was examined

[5] Reuven S. Avi-Yonah, Haiyan Xu, "A Global Treaty Override? The New OECD Multilateral Tax Instrument and Its Limits", 156.
[6] Nathalie Bravo, A Multilateral Instrument for Updating the Tax Treaty Network (Amsterdam: IBFD, 2020).
[7] Rita Szudoczky and Daniel Blum, "Unveiling the MLI: An Analysis of Its Nature, Relationship to Covered Tax Agreements and Interpretation in Light of the Obligations of Its Parties" in International and EU Tax Multilateralism: Challenges Raised by the MLI, ed. Ana Paula Dourado (Netherlands: IBFD, 2020)
[8] Robert J. Danon, "Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups", Bulletin For International Taxation 72, 1(2018):31-55.
https://serval.unil.ch/resource/serval:BIB_C4BF952C7C7F.P002/REF.pdf
[9] Reinout Kok, "Principle Purpose Test in Tax Treaties under BEPS 6", Intertax 44, 5 (2016): 406-412.
[10] Vikram Chand, "The Principal Purpose Test in the Multilateral Convention: An in-depth Analysis", Intertax 46, 1(2018): 18-44.
[11] Denis Weber, "The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) versus the EU Principle of Legal Certainty and the EU Abuse of Law Case Law", Erasmus Law Review 10, 1(2017): 48-59.
https://ssrn.com/abstract=3026302

by Błażej Kuźniacki[12]. The comparative analysis between the MLI and EU dispute resolution mechanisms was provided by Sriram Govind[13]. The issue related to the dispute resolution of tax disputes was examined by Sriram Govins and Laura Turcan[14], Jasmin Kollmann and Laura Turcan[15] etc.

On the contrary, this research focuses on the analysis of the essential provisions of the Multilateral Instrument, namely the prevention of treaty abuse and dispute resolution provisions, from the perspective of the flexible nature of Convention. Moreover, the effectiveness of MLI as to the flexible nature of the mentioned provisions would be assessed in broad and narrow contexts. In other words, the effectiveness in broad sense would depend on whether the aim of the OECD BEPS – measures is being generally achieved (considering the MLI merely as one of the tools available) whereas effectiveness in narrow sense would be determined by the fact whether the particular provisions of the MLI are sufficiently drafted to fulfill its mission as international convention.

The practical significance of the research. The Multilateral Instrument means considerable development to international tax regulation. The present research might have important implications for governments providing the analysis of the challenges that could be met in applying the MLI. Moreover, it could be useful in the way providing the recommendations for the governments suggesting modifications for the Convention concerned. In addition, the current study with respect to the analysis of the MLI provisions may be relevant for the undertakings, as the changes adopted through the Convention will significantly influence the business schemes and transactions.

The aim of the research is to determine the challenges caused by the flexible nature of prevention of treaty abuse and dispute resolution provisions proposed by the Multilateral Instrument in order to provide tools for the improvement of its effectiveness; and induce the legal doctrine and practice to find solutions.

The objectives of the research. The following tasks should be fulfilled in order to achieve the aim set by the Master Thesis:

[12] Błażej Kuźniacki, "Implementation and Application of the LOB Clause in BEPS Action 6/MLI: Legal and Pragmatic Challenges" in International and EU Tax Multilateralism: Challenges Raised by the MLI ed. Ana Paula Dourado (Amsterdam: IBFD, 2020)

[13] Sriram Govind, "The New Face of International Tax Dispute Resolution: Comparing the OECD Multilateral Instrument with the EU Dispute Resolution Directive", 27 EC Tax Review 6 (2018):309-324.

[14] Sriram Govind, Laura Turcan, "The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive", Bulletin for International Taxation 71, 3/4 (2017): 1-11. https://ssrn.com/abstract=3061903

[15] Jasmin Kollmann, Laura Turcan, "Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges" in International Arbitration in Tax Matters, ed. Michael Lang, Jeffry Owens (IBFD, 2015)

1) To examine the prerequisites affected the adoption of BEPS – measures, and in particular the Multilateral Instrument; and to analyse the multilateralism and flexibility as main features of the Multilateral Instrument in order to define its nature.
2) To analyse the effectiveness of prevention of treaty abuse provisions via examining the major issues of the PPT rule, relationship between the PPT and LOB, and other tools of flexibility provided by the MLI.
3) To analyse the effectiveness of dispute resolution provisions by examining the mutual agreement procedure and mandatory binding arbitration mechanisms within the MLI.
4) To define what changes should be provided (if any) to the provisions addressed with a view to improving the MLI application.

Methods used in the research. The data collection and data analysis methods are used to examine the text of the Convention and the state practice of implementation as well as contemporary scholar's articles and researches. As the central topic of the research is the Multilateral Instrument and the Explanatory Statement[16] provided for the interpretation, understanding the grounds of the emerged challenges in MLI application requires an understanding of its prerequisites and process of international tax reforms. The historical method will be helpful in that regard. Another important instrument used is the comparative method which is one of the most practical ways to analyze the challenges that the states will experience applying the provisions of the MLI and compare the practice of states in application procedure. The last but not the least is the logical-analytical method. The importance of the given instrument is obvious as it helps to examine the problematic aspects comprehensively in order to make clear and reasonable conclusions. The latter in turn will give the possibility to develop practical guidance.

The structure of the research. The first Chapter covers the general questions. In the fisrt subchapter, the prerequisites for consideration and adoption of BEPS measures, and in particular Multilateral Instrument are discussed. The second subchapter briefly examines the peculiarities of international tax regulation and analyzes the concept of multilateralism within the context of the Multilateral Instrument. And, finally, the third subchapter provides the general overview of the flexibility as one of the main peculiarities of Convention.

The second Chapter analyses the effeciency of the prevention of treaty abuse provision. The first subchapter analyses the interpretation of the PPT rule as regards its major challenging

[16] "Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting", OECD Publishing., Accessed 25 April, 2020. https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf

aspects: subjective and objective components as well as the burden of proof issue. In addition, the issue of compatibility between the PPT rule and the EU law is briefly discussed. The second subchapter examines the correlation between the PPT and LOB rule as well as the practice of their application. Additionally, the mechanisms of flexibility as to minimum standard, discretionary relief option and the provided reservations are briefly discussed. Finally, in the third subchapter, the overall evaluation of the minimum standard should be made.

The third Chapter deals with the effectiveness of the dispute resolution mechanism within the MLI. The first subchapter is devoted to the brief examination of the mutual agreement procedure (hereinafter – MAP) and the challenges it could raise. The second subchapter examines the mandatory binding arbitration option introduced by the MLI with respect to challenges the states could face in the process of application, in particular the questions of arbitral procedure, the panel composition, the arbitration decision and confidentiality question. Finally, the third subchapter provides certain changes that could be useful for improvement of MLI dispute resolution.

The defended statements:

1. The MLI is a sui generis international tax instrument owing to its specific nature: the bilateral multilateralism and the flexibility that is reflected in each aspect of the Convention.
2. In broad context, the OECD prevention of treaty abuse minimum standard is efficiently achieved through the different approaches of the states. However, in the narrow context, the prevention of treaty abuse provision (especially the PPT rule) is too broad and uncertain that without clear guidance could undermine the effectiveness of MLI.
3. In narrow sense, the dispute resolution mechanism within the MLI would not undermine effectiveness of Convention provided the clear guidance is adopted whereas, in the broad sense, there is an urgent need in the creation of an independent international framework for tax dispute resolution.

CHAPTER 1. BACKGROUND OF MLI CREATION

In this Chapter, we define the factors that have influenced the international tax regime in respect of creating the BEPS – measures and, in particular the Multilateral Instrument. Then we briefly take a look at the stages of international tax regulation and discuss a number of positions as regards the multilateralism in the context of the MLI. Finally, we made a general overview of flexibility as one of the main features of MLI.

1.1 Conditions for Adopting BEPS Measures and MLI

Prior to proceeding with the analysis of the two main features of MLI, the prerequisites of its emergence should be provided.

The evolution of globalization set trends of the world economic developments that show the current legal orders were not able to respond. This is the case for the international movement of capital, the increase in international transactions and interdependence between the national economies. In those conditions, the inequality of countries' development predetermines the economic, in particular tax competitive race among certain regions, fields and states.[17]

One of the illustrations of such a competition could be a situation when low-tax jurisdictions provide low or zero tax rates and poor audit for the non-residents trying to encourage investments. The simplification of business structure options on the international level using low-tax jurisdictions that provide low tax burden with the aim of tax avoidance or evasion could be the feature of the activity of the MNCs.[18] Thus, apart from globalization processes and developments in technologies, the emergence of MNCs as new actors on the international level have influenced the national tax systems bringing new challenges for the state's policies and regulations.

In this regard, the Inclusive Framework on BEPS Group (hereinafter – IF) observes that the international tax framework owing to new economic issues has substantially changed over the past several years. Consequently, the necessary measures were introduced in order to empower states preserve their revenue bases. The IF Group also points out that "[w]ith a conservatively

[17] Nicholas Shaxson, "The billions attracted by tax havens do harm to sending and receiving nations alike", International Monetary Fund, Accessed 15 March 2021.
https://www.imf.org/external/pubs/ft/fandd/2019/09/pdf/tackling-global-tax-havens-shaxon.pdf
[18] Ioannis Agamemnon Zachariadis, "Multinational enterprises, value creation and taxation: Key issues and policy developments", European Parliamentary Research Service (2019), 1.
https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637971/EPRS_BRI(2019)637971_EN.pdf

estimated annual revenue loss of USD 100 to 240 billion due to base erosion and profit shifting (BEPS), the stakes are high for governments around the world".[19]

The tax evasion losses caused by firms and individuals based in the United States are evaluated at about 100 billion dollars a year. In the European countries the costs of tax evasion are estimated at billions of euros.[20] In the United Kingdom the avoidance tax gap[21] was calculated by the HMRC[22] and is equivalent to around £1.7 billion for the 2018-2019 tax year: corporate taxes constitute approximately half of the avoidance tax gap (£0.9bn) whereas income taxes, national insurance contributions and capital gains are around £0.6bn.[23] The total tax gap of the EU (hereinafter – European Union) Member States is attributed to about €750 billion.[24]

In terms of corporate tax revenue losses, the total costs of tax havens for states are about $500-600 billion a year, the $200 billion of which are attributed to developing countries.[25] According to the UNCTAD statistics, the tax avoidance in developing countries could be estimated as $100 billion loss.[26]

Tax evasion by multinational corporations through low-tax jurisdictions becomes the reason for: (1) distortion of the market mechanisms as the national entities become less competitive comparing to MNCs, (2) the risk of budget stability as a result of losing tax returns and (3) lack of trust for fairness from the other taxpayers.[27]

Multinational companies allocate profit gained to other jurisdictions aimed at getting more favourable tax treatment and decreasing tax liability within a group. The activity of that nature is a great example of tax avoidance and was seen in the recent cases as Amazon, Apple, Fiat and some others.[28] The tax avoidance practices did not emerge yesterday. However, the recent

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[19] "Background Brief: Inclusive Framework on BEPS", oecd.org, Accessed 22 April 2021, 13. https://www.oecd.org/ctp/background-brief-inclusive-framework-for-beps-implementation.pdf

[20] "Fighting Tax Evasion", Accessed 10 March 2021. https://www.oecd.org/ctp/fightingtaxevasion.htm

[21] "The tax gap is the difference between the amount of tax that should, in theory, be paid to HMRC, and what is actually paid; provides a useful tool for understanding the relative size and nature of non-compliance. helps us to understand the reasons for losses in the system" as is indicated in the Measuring tax gaps 2020 edition.

[22] abbr. for Her Majesty's Revenue and Customs

[23] HM Revenue & Customs, "Measuring tax gaps 2020 edition Tax gap estimates for 2018 to 2019", Accessed 15 March 2021. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907122/Measuring_tax_gaps_2020_edition.pdf

[24] Richard Murphy, "The European Tax Gap: A report for the Socialists and Democrats Group in the European Parliament", Accessed 18 March 2021, https://www.socialistsanddemocrats.eu/sites/default/files/2019-01/the_european_tax_gap_en_190123.pdf

[25] Nicholas Shaxson, "The billions attracted by tax havens do harm to sending and receiving nations alike".

[26] "World Investment Report 2015: Reforming International Investment Governance", UNCTAD, 200, Accessed 29 March 2021, http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf

[27] Elena Neshovska Kjoseva, "The OECD Multilateral Instrument: New Momentum in the International Tax Law and Its Impact on the Macedonian Tax Law", Iustinianus Primus Law Review 11,11 (2020): 3.

[28] Tatjana Svažič, "Anti-BEPS Measures and Their Impact on Business Performance of Multinational Enterprises" Našegospodarstvo/Our economy 65, 4 (2019): 99. https://doi.org/10.2478/ngoe-2019-0023

cases underlined the existence of the problem and the importance of an urgent response. Therefore, the most fundamental reforms have been introduced just recently. And the BEPS measures are one of the most important steps in the tax avoidance sphere.

National jurisdictions step by step are trying to adapt to the new conditions in order to make economies more effective and prosperous. In such a chaotic situation MNCs use weaknesses of state policies, for instance, "market liberalization, deregulations, tax loopholes […] to minimize their tax obligations".[29] Such practices could allow the MNCs not only have political impact but also decrease their tax burden affecting both national tax systems and the world affairs.

The loopholes and uncertainties in national legislations allow using tax schemes blurring the line between legal tax planning and aggressive tax practices. Thus, combating international tax avoidance requires international cooperation and exchange of experience.

Economic relations, trade, investments and almost all other transactions involve international aspect. Therefore, at first the bilateral tax treaty network[30] regulated the issues of double taxation and tax avoidance. However, the existing bilateral treaties possess some level of inconsistency as to different anti-abuse measures adopted by the states. Modern challenges require new approaches as the old owns became outdated. Therefore, the coordinated universal approach was needed in order to prevent the BEPS practices. And one of the solutions was the creation of worldwide multilateral tool to strengthen the response of the states to existing situation.

The OECD Report released in 2013 aimed at emphasizing the relevance of the BEPS issue and provided the analysis concerning the MNCs activity, tax planning schemes and corporate income tax revenue.[31]

The OECD Action Plan published in 2013 determines response actions to BEPS, establishes time limit to implement actions and determines the sources and methods for implementation.[32] The OECD Action Plan consists of fifteen points whereas Action 15 provides for the development of the Multilateral Instrument. The OECD indicates the main important features of the Plan to address BEPS, in particular the Plan should reflect:

- cooperative, international and transparent actions whereas encouraging certainty and predictability,
- timing as actions should be taken in a reasonable time,

[29] Elena Neshovska Kjoseva, "The OECD Multilateral Instrument: New Momentum in the International Tax Law and Its Impact on the Macedonian Tax Law", 2.
[30] Jung-hong Kim, "A New Age of Multilateralism in International Taxation?", Seoul Tax Law Review 21(2), Korea Tax Law Assosiation (2015): 230.
https://ssrn.com/abstract=2733964
[31] "Addressing Base Erosion and Profit Shifting", OECD Publishing., 5.
https://dx.doi.org/10.1787/9789264192744-en
[32] Ibid., 11.

- methodology as the challenges require a comprehensive and effective approach comprising consultations with business and civil society.[33]

The Action Plan adopted by the OECD should have been activated by MLI. According to the OECD the aim of MLI is to optimize the implementation of BEPS measures. It was also stated that the creation of MLI is "desirable and feasible, and that negotiations [...] should be convened quickly". [34] The OECD parties have decided to form an ad hoc Group by allocating it a mandate for development of a Multilateral Instrument.[35] The negotiations on the MLI among around 100 jurisdictions were concluded in 2016. The MLI became effective on July 2018 including signatures of different jurisdictions and is still open for signing.[36]

David Kleist points out that "renegotiating such a large number of tax treaties could take years or even decades, meaning that the changes would gradually become effective over many years". He states that through renegotiations of bilateral treaties states could come to different solutions to implementation that could also cause some uncertainties.[37] That is why the international community came to the idea to create one international instrument amending the whole specter of treaties at once.

International challenges require international solutions.[38] BEPS measures were adopted with the aim to be applied in coordination by the majority of jurisdictions. As new standards require changes to the existing double tax treaties, the modification of each treaty on bilateral level separately includes such undesirable consequences as loss of time, money and administrative costs.

Moreover, apart from being useful for the national jurisdictions as regards solving the BEPS gaps, the MLI also aims at giving the MNCs some advantages as "transparency and predictability of international tax regime".[39]

Taking into consideration the abovementioned, the scholars agree that the emerging challenges have changed the international tax order significantly. The existing tax system presented by the bilateral treaty network was unable to face new tax planning schemes. As a result, the initiative of the OECD to develop the unique international convention aimed at tackling the

[33] "Action Plan on Base Erosion and Profit Shifting", OECD Publishing, 2013, 14-27. http://dx.doi.org/10.1787/9789264202719-en
[34] "Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: Final Report", OECD Publishing, 2015, https://dx.doi.org/10.1787/9789264241688-en
[35] Ibid., 11.
[36] "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting", OECD, Accessed 15 March 2021. https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm
[37] David Kleist, "The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS – Some Thoughts on Complexity and Uncertainty", Nordic Tax Journal 1 (2018): 32. https://doi.org/10.1515/ntaxj-2018-0001
[38] Reuven S. Avi-Yonah, Haiyan Xu, "A Global Treaty Override: The New OECD Multilateral Tax Instrument and Its Limits", 161.
[39] Ibid., 162

BEPS practices was supported by the states. Since the MLI is treated to be "a milestone in the evolution of international tax regime"[40], the majority of scholars expected the MLI to become a truly beneficial international instrument for all the stakeholders: states, taxpayers and the international community as a whole. Thus, in the following chapters the research is attempted to establish whether the initial expectations in relation to the effectiveness of MLI are met.

1.2 Multilateralism in the Context of MLI

One of the main issues needed to be discussed in this research is the specificity of the multilateralism as regards the MLI. However, the tax regulation periods are important to be mentioned at first.

The regulation of the international tax system could be illustrated through the three phases: purely national regulation, bilateral tax network domination and gradual moving to multilateral regime. Although the periods cannot be clearly defined by the time frames, in each of the three the particular tax regulation prevailed.

Firstly, taxation was regulated only on national level as taxes were considered only as the affairs of state and its sovereignty. While creating the national legislation the government might not reasonably consider the impact of other national rules. Transactions between the states became international that made them impossible to be regulated by the domestic rules effectively as the interaction leads to gaps, in particular double taxation.[41] In time, therefore, it was obvious that the unilateral actions were limited and for the states it would be difficult to regulate tax transactions with international aspect on their own.

Secondly, seeing that the national systems were not enough the bilateral rules were adopted by the states to regulate transactions between them. The bilateral tax treaty network has originated since the 19 century[42] whereas the first treaty regulated the double taxation is treated to be entered into between the Austro-Hungarian Empire and Prussia in 1899.[43] The effectiveness of the bilateral tax network regulating the relations between two jurisdictions is undeniable. As Elena Kjoseva states, the bilateral treaties were treated by the jurisdictions as "a 'safe zone' because, by signing […], countries do not lose their tax sovereignty, just sacrifice part of their tax powers, for

[40] Reuven S. Avi-Yonah, Haiyan Xu, "A Global Treaty Override: The New OECD Multilateral Tax Instrument and Its Limits", 156.
[41] Action Plan on Base Erosion and Profit Shafting, 9.
[42] Sunita Jogarajan, "Prelude to the International Tax Treaty Network: 1815-1914 Early Tax Treaties and the Conditions for Action", Oxford Journal of Legal Studies 31, 4 (2011): 680. https://www.jstor.org/stable/41418838
[43] Ibid.,690

a greater cause".[44] However, bilateral regulation depicts only the position of the two states and not the whole world community. Moreover, the aim of the bilateral treaty is to give advantages to entities with a headquarters in their own jurisdiction and not to promote benefits to the international tax order.[45] The emergence of the MNCs that operate in more than two jurisdictions showed that bilateral treaties were no longer solved the current problems. The issue of double taxation was replaced by the issue of double non-taxation that created new challenges for international tax regime.[46] Guillermo Hidalgo agrees stating that since bilateral tax network is not adequate to address double non-taxation, the governments agree to waive part of their tax sovereignty to "harmonize uniform world standards" tackling with harmful practices.[47] Thus, it was obvious that the bilateral treaty network was not enough to govern the recently formed international tax environment.

Thirdly, the regulation of the international taxation moved to multilateral approach. The League of Nations was the first organization which made attempts to create the multilateral treaty related to tax affairs. One of the first questions discussed was elimination and diminution of double taxation as a possible result of application by the states different national tax regimes to a certain profit.[48]

Besides, multilateral treaties are widely used on regional level. The great example is the EU framework. Although most of the fiscal issues are still under the power of the Member States, certain tax areas are delegated to the EU competence (for instance, sphere of indirect taxes as value added tax that is regulated through the secondary EU law). However, the direct taxation within the EU is a competence of Member States due to the sovereignty issue. Although some acts were developed on community level (Parent-Subsidiary Directive, Merger Directive and Interest and Royalties Directive), the regulation was not harmonized and could lead to international double taxation.[49] Another important instrument adopted by the EU Council was The Anti-Tax Avoidance

[44] Elena Neshovska Kjoseva, "The OECD Multilateral Instrument: New Momentum in the International Tax Law and Its Impact on the Macedonian Tax Law", 2.
[45] Victor Thuronyi, "International Tax Cooperation and a Multilateral Treaty", Brooklyn Journal of International Law 26, 4 (2001): 1653. HeinOnline
[46] Action Plan on Base Erosion and Profit Shafting, 13.
[47] Guillermo Sanchez-Archidona Hidalgo, "Reflections on Multilateral Tax Solutions in a Post-BEPS Context", Intertax 45, 11 (2017):720. HeinOnline.
[48] Kimberley Brooks, "The Potential of Multilateral Tax Treaties" in Tax Treaties: Building Bridges between Law and Economics, ed. Michael Lang et. al (IBFD, 2010): 219.
https://ssrn.com/abstract=2325643
[49] Marjaana Helminen, "The Nordic Multilateral Tax Treaty as a Model for a Multilateral EU Tax Treaty" (IBFD, 2014), 1.

Directive[50] (amended later[51]) with the minimum standard provisions that was aimed at addressing aggressive tax avoidance schemes. It was stated by the Council that "[i]n a market of highly integrated economies, […] a need for common strategic approaches and coordinated action, to improve the functioning of the internal market and maximize the positive effects of the initiative against BEPS" is of a great importance.[52]

Since the directives regulate the relations only between the Member States, the tax relations involving the third states were out of the scope. Moreover, for the anti-avoidance strategies to be effective, they have to be followed internationally and not only on the regional level. Therefore, the last step made was the work on the universal instrument with the general guidance and common understanding of global tax challenges. Such an instrument was planned to deal with the issues of week involvement of states, lack of common approach to interpretation and the need to adhere to collective objectives.

Multilateralism pursues consolidation of tax regimes[53], favours transparency and improves coordination among tax community. Some scholars indicate the advantages that the multilateral treaty possesses over the bilateral. Kimberley Brooks, considering the different approaches of other scholars, consolidate them dividing into three groups: "advantages in facilitating trade"[54], "advantages in preventing or reducing evasion and avoidance"[55] and "administrative advantages"[56].[57]

Due to current challenges related to the BEPS practices, the OECD was struggling to enforce general guidance for combating aggressive tax planning that was planned to be achieved through the Multilateral Instrument.

Therefore, the consideration of the peculiarity of the MLI with regards its multilateral nature should be discussed.

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[50] "Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market", EUR-lex, Accessed 6 April 2021, (ATAD 1), https://eur-lex.europa.eu/eli/dir/2016/1164/2020-01-01

[51] "Council Directive (EU) 2017/952 of 29 May 2017amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries", EUR-lex, Accessed 6 April 2021, (ATAD 2), https://eur-lex.europa.eu/eli/dir/2017/952/oj

[52] ATAD 1

[53] Kimberley Brooks, "The Potential of Multilateral Tax Treaties", 212.

[54] As to facilitation of trade, effectiveness of bilateral treaties is more seen when the two jurisdictions are involved whereas multilateral treaties could be useful in cases with three and more participants. In addition, the multilateral treaties promote a lot more jurisdictions to follow a unified common approach and to extend the network of treaties.

[55] As regards the second advantage group, multilateral treaty provides more transparent and coordinated way of cooperation including information exchange, decreasing the number treaty shopping cases and more effective way of solving international tax disputes.

[56]As to the administrative benefits, the scholars point out the reduction of administrative costs, lowering the inconsistencies related to interpretation as well as amending procedure and improvement of collaboration between tax authorities.

[57] Brooks, "The Potential of Multilateral Tax Treaties", 218-225.

In this regard, Guillermo Hidalgo considers the MLI in the light of "bilateral multilateralism" stating that the MLI is a "multilateral instrument with characteristics of bilateralism" as the bilateral treaty network that the MLI modifies does not cease to exist.[58]

Rita Szudoczky and Daniel Blum in their article "Unveiling the MLI: An Analysis of Its Nature, Relationship to Covered Tax Agreements and Interpretation in Light of the Obligations of Its Parties" point out the question of MLI nature in relation to the multilateralism or bilateralism is complicated and should be derived from the commitments of the parties to MLI provided by the Convention. Moreover, it is observed that the understanding of this issue is determined by the meaning contributed to the concepts: "multilateralism" and "bilateralism". In this line, in "substantive sense" although technically the MLI could be treated as a multilateral convention, in fact the commitments between the parties reflect the bilateral nature. Furthermore, considering the purpose of the MLI (to modify the system of double tax treaties), the Multilateral Instrument "essentially preserves the bilateral nature of international tax relations". Nevertheless, the authors emphasize that the MLI could be the further step in international tax cooperation and become the basis for future uniform multilateral norms.[59]

Thus, the concept of multilateralism is reflected in the MLI in specific manner. As Nathalie Bravo emphasizes, although the MLI provides "for bundles of bilateral rights and obligations tied together", the jurisdictions still share a "collective interest" in tackling the tax planning schemes through BEPS measures.[60] García Antón agrees concluding "MLI to be operating as a Janus-faced instrument whose dual nature (multilateral and bilateral) articulates a complex legal scenario".[61] Therefore, MLI does not create multilateral obligations between the states but rather bilateral in relation to the Covered Tax Agreements.

Considering the abovementioned, we agree with the scholars that the MLI could be partially qualified for both of the two approaches (bilateral and multilateral). The nature of MLI could be characterized by an ambivalent nature providing that although the MLI establishes the bilateral obligations and not the multilateral ones, its aim entails that all interested parties move in the one direction. This is a peculiarity that could contribute to its sui generis nature. Moreover, subsequent multilateral tax conventions that aimed at achieving the uniformity could be developed using the MLI as a foundation.

[58] Guillermo Sanchez-Archidona Hidalgo, "Reflections on Multilateral Tax Solutions in a Post-BEPS Context", 717.
[59] Rita Szudoczky and Daniel Blum, "Unveiling the MLI: An Analysis of Its Nature, Relationship to Covered Tax Agreements and Interpretation in Light of the Obligations of Its Parties", 159.
[60] Nathalie Bravo, "A Multilateral Instrument for Updating the Tax Treaty Network", 79.
[61] Ricardo García Antón "Substantive Multilateralism in the Context of the MLI" in International and EU Tax Multilateralism: Challenges Raised by the MLI, ed. Ana Paula Dourado (The Netherlands: IBFD, 2020), 29.

1.3 Flexibility as a main feature of MLI: general overview

Since this research focuses on the analysis of the two selected aspects of the MLI (prevention of treaty abuse and dispute resolution) from the perspective of flexibility, it is important to observe how the concept of flexibility is reflected in the Convention. Therefore, the general understanding of the second main peculiarity of MLI, namely its flexibility, should be given in this subchapter.

Reuven S. Avi-Yohan and Haiyan Xu conclude that the principal purpose of MLI is "to implement tax treaty-related BEPS measures in a swift, coordinated, and consistent manner across the network of existing tax treaties […] in a multilateral context without bilateral renegotiation of each agreement."[62] In other words, the main aim of MLI is to provide changes to the existing tax treaties avoiding bilateral costly and time consuming negotiations.

The MLI is extensive and complicated international instrument. The structure of MLI is composed of the following parts:

- Part I – Scope and Interpretation of terms (Art.1 and 2);
- Part II – Hybrid mismatches (Art. 3 – 5);
- Part III – Treaty abuse (Art. 6 – 11);
- Part IV – Avoidance of Permanent Establishment Status (Art. 12 – 15);
- Part V – Improving Dispute Resolution (Art. 16 – 17);
- Part VI – Arbitration (Art. 18 – 26);
- Part VII – Final Provisions (Art. 27 – 39). [63]

The Explanatory Statement determines the ways in which the flexibility is expressed in the Multilateral Instrument: (1) list of the particular tax agreements to which the MLI would apply; (2) flexible nature of the minimum standard provisions; (3) opting out mechanism by means of reservations provided for each provision; and (3) opting in mechanism presented by the optional and alternative provisions via notification procedure.[64]

One of the main reflections of flexibility in MLI is the requirement to specify the list of existing bilateral treaties to which the MLI would apply. The agreements provided in the list are defined as 'Covered Tax Agreements' (hereinafter – CTA). Thus, the parties to MLI are entitled

[62] Reuven S. Avi-Yonah, Haiyan Xu, "A Global Treaty Override: The New OECD Multilateral Tax Instrument and Its Limits", 160.
[63] "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting", OECD, Accessed 15 March 2021, https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf
[64] Explanatory Statement, para. 14.

not to include particular treaties to the scope of the Convention, for instance, in case the parties to the tax treaty decided to accomplish BEPS measures goals through renegotiation process[65].

The parties to MLI give their consent to modify the rights and obligations contained in existed bilateral treaties through the process of signing and ratifying the Convention. The Multilateral Instrument does not suspend the bilateral treaties so that the parties to the treaty would be able to modify other aspects not covered by the MLI.[66] The MLI changes the existing treaties in an international scope while operating alongside and acting as a "compass" for the Covered Tax Agreements with the aim of effective fulfillment of the treaty-related BEPS measures and common tax policy.[67]

As a result, this specific feature of MLI differentiates it from other international conventions as it was adopted not to substitute the existing double tax treaties but to adapt them to new challenges through modification. Therefore, both the MLI and the treaties will operate simultaneously. Such parallel function created a problem of conflicting provisions[68] that the drafters of the MLI are trying to solve through compatibility clauses that would define the correlation between the MLI provisions and CTA provisions "ex ante"[69]. Talking about compatibility clauses, Alexander Bosman states that within the MLI "each substantive provision in principle has its own compatibility clause". He adds that such clauses define that the MLI provisions prevail over the conflicting CTA provisions.[70]

Considering the structure, the provisions of Multilateral Instrument are divided into minimum standard and optional clauses. The jurisdictions which joined the MLI have to meet the minimum standard that is as follows:

- prevention of treaty abuse (Action 6)
- improvement of dispute resolution (Action 14).[71]

Although the minimum standard provisions are mandatory, the MLI provides options for jurisdictions with respect to the ways of achieving those standards. According to Action 6 Final Report, the minimum standard regarding the prevention of treaty abuse clause, for instance, could be satisfied in three ways: (1) PPT solely; (2) PPT plus LOB clause; or (3) LOB clause

[65] Explanatory Statement, para. 25-26.
[66] Ibid., para. 13.
[67] Reuven S. Avi-Yonah, Haiyan Xu, "A Global Treaty Override: The New OECD Multilateral Tax Instrument and Its Limits", 161.
[68] David Kleist, "The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS – Some Thoughts on Complexity and Uncertainty", 34.
[69] Nathalie Bravo, "A Multilateral Instrument for Updating the Tax Treaty Network", 153
[70] Alexander Bosman, "General Aspects of the Multilateral Instrument", 648-649.
[71] Explanatory Statement, para. 14.

"supplemented by a mechanism that would deal with conduit arrangements not already dealt with in tax treaties".[72]

Besides, the Multilateral Instrument provides also the opt-out and opt-in mechanisms.[73]

The aim of the opt-in mechanism is to give the jurisdictions a possibility to implement particular optional provisions to their double tax treaties.[74] Nathalie Bravo determines the two kind of optional provisions:

(1) Optional provisions that tackle a specific BEPS issue or complement a main BEPS measure. The LOB rule (namely "simplified LOB rule" provided in Art. 7(6) – 7(13) of MLI) could serve as an example since it is not part of minimum standard and cannot be applied separately but only in addition to PPT rule.

(2) Arbitration provisions are classified as the second type and would apply in case all the parties to CTA opted in to it. In this line, for the one of the parties to initiate the arbitration proceedings, the requirement of the acceptance of this optional provision by the other parties has to be met.[75]

Talking about non-mandatory provisions, the states could choose whether implement that kind of clauses or not. Generally, the optional provisions apply provided that the states choose the same positions.[76] Thus, apart from the obligatory minimum standard such mechanism of flexibility allows parties to choose certain clauses that they intend to implement to their CTA and consequently fulfill.

The opt-out tool allows signatories to make reservations in relation to the provisions of Convention. The MLI sets the "exhaustive list of reservations" with the exception of the arbitration clauses according to which parties are free "to make reservations of their own choice". In this sense, such mechanism of flexibility was used in order to achieve a greater involvement of states with different positions related to the international fiscal policies.[77] Although the authorized reservations are limited, they are provided in almost each provision giving the possibility to the parties not to apply the clause partly or entirely.

Nathalie Bravo points out, "[f]lexibility ensures the participation in multilateral treaties of states with diverse cultural, economic, political and legal backgrounds [but] also impairs the integrity of multilateral treaties, as parties can commit at different levels". In this regard, she points

[72] "Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project", OECD Publishing, Accessed 29 March 2021, para. 22. http://dx.doi.org/10.1787/9789264241695-en

[73] Nathalie Bravo, "A Multilateral Instrument for Updating the Tax Treaty Network".

[74] Action 15 - Final Report, para 53.

[75] Nathalie Bravo, "A Multilateral Instrument for Updating the Tax Treaty Network", 179-182.

[76] Alexander Bosman, "General Aspects of the Multilateral Instrument", 644.

[77] Bravo, "A Multilateral Instrument for Updating the Tax Treaty Network", 219-220.

out the high level of flexibility could impact the idea of the Convention in case its overall aim is undermined as a result of the abuse of tools used to achieve flexibility.[78]

Multilateralism is expressed in the MLI nature through the securing the collective interest that provides for the limited flexibility of the Convention, in particular list of authorized reservations, limited impact with respect to withdrawal from the Convention etc. Despite the fact the parties might "withdraw from the Multilateral Instrument at any time, the Covered Tax Agreements will remain modified after the withdrawal from the Multilateral Instrument becomes effective". So, the parties could withdraw from the Convention but not their commitment to tackle BEPS schemes. To withdraw from the latter the parties would be required to "renegotiate all the modified treaties"[79]. In this regard, flexibility of MLI is linked to its multilateral nature. In other words, while the states strive to the common goal in addressing the BEPS practices, their sovereignty is not limited to the extent of multilateral obligations (as states are still obliged under their bilateral treaties) that provides a certain level of flexibility

Considering the abovementioned, we absolutely agree with Nathalie Bravo on the risk that the unbalanced flexibility entail. Moreover, the nature of multilateralism and flexibility could be perceived on the basis of complementarity: the multilateralism preserves the desire to reach the common goal whereas the flexibility providing a large number of options ensures the high level of involvement among the different jurisdictions.

In conclusion, the efficiency of international tax order was disrupted by the failure of the bilateral tax treaty regulation adequately respond to the challenging BEPS practices. The MLI was designed as a solution for addressing the aggressive tax planning schemes.

As regards multilateralism as the first feature, the MLI could not be purely classified as neither bilateral nor multilateral instrument. The Convention is argued to be of dualistic nature that is understood as follows: (1) the MLI imposes the bilateral obligations between the parties to particular treaty modifying the existing network of bilateral treaties and (2) preserves collective engagement in addressing the BEPS practices. Moreover, the MLI could be treated as a useful framework for the future multilateral tax instruments attempting to reach uniformity.

Flexibility as the second peculiarity permeates the whole structure of the MLI and is reflected in: (1) the list of the CTA chosen by the party to which the MLI would apply; (2) options within the minimum standard; (3) opt - out mechanism reflected through reservations provided for each provision; and (3) opt – in mechanism reflected through the optional and alternative

[78] Nathalie Bravo, "A Multilateral Instrument for Updating the Tax Treaty Network", 170-171.
[79] Ibid., 270.

provisions in form of notifications. The MLI is treated to be a guiding light for the CTAs it modifies. Moreover, the parallel functioning of the MLI and the existing bilateral treaties demonstrates its unique character.

Multilateralism and flexibility being the main features of the MLI complement each other in the following way: multilateralism promotes the collective interest whereas flexibility encourages the high level of involvement. As a result, the MLI could be defined as being of a sui generis nature.

CHAPTER 2. FLEXIBILITY OF PREVENTION OF TREATY ABUSE PROVISION

In this Chapter, the effectiveness of the prevention of treaty abuse provision is analyzed. Firstly, we examine the interpretation of the PPT rule in the context of its main problematic concepts: subjective and objective elements as well as the burden of proof. Then, we briefly take a look at the position of the EU law in respect to the broad wording of PPT. Secondly, we analyse the relationship between the PPT and the LOB rule as well as the practice of their application. Then we briefly take a look at other mechanisms of flexibility as to minimum standard, discretionary relief option and the prescribed reservations. And, finally, the general assessment of the minimum standard should be provided.

2.1 PPT Provision as a Broad Concept

The minimum standard with respect to the prevention of treaty abuse provided by the MLI could be implemented in few ways as already has been mentioned in subchapter 1.3. The first approach is to "apply the PPT alone".[80] The second approach is to apply the LOB rule as an optional provision "as a supplement to" the PPT rule.[81] And the third way is to implement LOB rule plus anti-conduit measures.[82] Talking about the arrangements used in combination to the LOB provided by the third option, Robert Danon mentions "conduit arrangements, domestic anti-abuse rules […] judicial doctrines".[83] The fundamental condition for all three options is to satisfy the minimum standard required by the MLI through attaining the outcome initially conceived. Nonetheless, the preference by the OECD is given to the PPT rule for several reasons: it is a default option, it satisfies the minimum standard that is mandatory and due its correlation to the LOB rule.[84] Therefore, this subchapter focuses on the analysis of the PPT rule, in particular the wording proposed by the OECD.

According to the Article 7(1) of the Multilateral Instrument:

> Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and

[80] Explanatory Statement, para.102.
[81] Ibid., para.100.
[82] Ibid., para.109.
[83] Robert J. Danon, "Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups", 40.
[84] Błażej Kuźniacki, "The Limitation on Benefits (LOB) Provision in BEPS Action 6/MLI: Ineffective Overreaction of Mind-Numbing Complexity – Part 1", Intertax46, 1(2018):70.
https://www.researchgate.net/publication/326235459

> circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.[85]

One of the major issues as regards the PPT rule is the lack of clear and uniform guidelines for its interpretation. To obtain some guidance the scholars divide PPT rule into separate elements and analyse them for subsequent interpretation development. For instance, Robert Danon[86], Andres Moreno[87] and Svitlana Buriak[88] divide PPT rule into subjective and objective elements. The similar approach is taken by Reinout Kok[89] who uses the categories of subjective and objective tests while Denis Weber[90] defines the "reasonableness" and "principal purpose" tests. In addition, some scholars widen their research including the burden of proof issue related to the PPT rule.[91] Although the division of the elements provided by the scholars in their analysis differs, the certain similarity still exists. As we can see, the most popular division of the PPT rule is a division into subjective and objective components. However, while the similar approach to analyse the PPT rule from the perspective of subjective and objective elements is taken in current research, the consideration is also given to the issues of burden of proof allocation and compatibility to EU law.

Considering the subjective element, the following concepts will be analyzed: '*one of the principal purposes*' and 'if it is *reasonable* to conclude'.

Talking about 'one of the principal purposes' condition, the PPT rule should apply in case obtaining the treaty benefit was one of the principal motives. The main issue here is that there is no clear uniform understanding in respect of the scope covered by this term. Svitlana Buriak states that the PPT does not differentiate "abusive situations from non-abusive […] and, consequently, it targets all transactions that potentially might be but are not always abusive".[92] Therefore, this aspect of subjective element leads to a broader coverage of situations comparing to the terms "main" or "dominant" purpose that are applied in the context of the guiding principle and most of the domestic general anti-avoidance rules (hereinafter – GAARs). In this line, Moreno points out

[85] MLI, art. 7(1).
[86] Robert J. Danon, "Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups", 44.
[87] Andres Baez Moreno, "GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test: What Have We Gained from BEPS Action 6", Intertax 45, 6-7 (2017): 435
[88]Svitlana Buriak, "The Application of the Principal Purpose Test under Tax Treaties" in Tax Treaty Entitlement ed. Michael Lang et al. (Amsterdam: IBFD, 2019), 4.
https://ssrn.com/abstract=3746948
[89]Reinout Kok, "Principle Purpose Test in Tax Treaties under BEPS 6", 407.
[90] Denis Weber, "The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) versus the EU Principle of Legal Certainty and the EU Abuse of Law Case Law", 48.
[91] Vikram Chand, "The Principal Purpose Test in the Multilateral Convention: An in-depth Analysis", 21.
[92]Svitlana Buriak, "The Application of the Principal Purpose Test under Tax Treaties", 7.

that the scope of the guiding principle covers "transaction a main purpose of which was to secure a more favourable tax position […]; whereas the PPT makes its application conditional upon the fact that obtaining of a treaty benefit was one of the principal purposes of the transaction" that is much narrower comparing to the PPT rule.[93] The abovementioned situation could also lead to uncertainties as the PPT is treated to be a new distinctive GAAR comparing to the domestic ones. As a result, the lack of clear guidance explaining the initially conceived meaning could cause different interpretations in practice by the states.

Moreover, Reinout Kok criticizes the given notion stating that it would be easy for the tax authorities to rely on the criteria even in cases when both tax and commercial purposes of the same importance were behind the transaction.[94] Robert Danon agrees stating that the PPT rule could be treated as a broad provision that could result in the situation when tax authorities would deny treaty benefits to "bona fide business transactions".[95] Consequently, the literal application of the PPT rule could lead to the distortion of international tax system. In particular, it could put the lawful tax planning techniques at risk as most of the transactions or arrangements would be treated as having the tax motives behind them.

On the contrary, some scholars do not restrict themselves to the analysis of the literal wording of provision and highlight the importance of examining the practical illustrations introduced by the OECD. In this sense, Vikram Chand states that in case the examination of facts and circumstances "leads to the conclusion that the transaction/arrangement is undertaken for *bona fide purposes* i.e. it pursues genuine commercial/economic objective/motives, then the subjective element should not be satisfied […]. Therefore, the subjective element shall be interpreted in a *'restrictive manner'* in the sense that if the transaction or arrangement at stake has economic or commercial justifications that outweigh the tax advantage obtained, then this element is not fulfilled".[96] Marcus Gomes agrees stating that not to fall under the PPT rule, the "genuine business activities" should be carried out.[97]

Moreover, some thoughts were raised stating that discretionary relief could be a possible solution for considering "valid commercial reasons" by the competent authorities in particular cases.[98]

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[93]Andres Baez Moreno ,"GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test: What Have We Gained from BEPS Action 6", 435.
[94]Reinout Kok, "Principle Purpose Test in Tax Treaties under BEPS 6", 408.
[95] Robert J. Danon, "Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups", 47.
[96] Vikram Chand, "The Principal Purpose Test in the Multilateral Convention: An in-depth Analysis", 23.
[97] Marcus Lívio Gomes, "From the Guiding Principle to the Principal Purpose Test: Burden of Proof and Legal Consequences" in International and EU Tax Multilateralism: Challenges Raised by the MLI ed. Ana Paula Dourado (The Netherlands: IBFD, 2020), 256.
[98] Christina HJI Panayi, "The Compatibility of the OECD/G20 Base Erosion and Profit Shifting Proposals with EU law", Bulletin for International Taxation 70, 1/2 (2015), 19.https://ssrn.com/abstract=2697511

Considering the controversial issue of "one of the principal purposes" notion, the Action 6 Final Report provides several illustrations. The Example A and Example B are the illustrations of the treaty shopping when the PPT rule is applicable. For instance, Example A displays the situation when the company (resident of state T and payer of withholding taxes of 25% in state S) uses the tax treaty (concluded between states R and S) that grants the benefit of not paying the withholding tax on dividends through the arrangement of assigning the right to dividend payments to the independent financial entity (resident of states R). Example B has similar legal implications but this case illustrates the involvement of the other scheme, in particular the financial entity obtains "the usufruct of newly issued non-voting preferred shares".[99] Thus, the illustrations show that one of the principal purposes or even the principal purpose was to gain the benefit in relation to withholding tax clearly indicating the tax treaty abuse practices.

Conversely, the PPT rule would not apply with respect to the cases of the pure commercial and business motives that are illustrated by Example C and H. For instance, Example C illustrates the situation when company (resident of the state R) is planning to develop its business and is thinking of locating the production plant in a developing country with the aim to pay less production expenses. The company examines three jurisdictions to build its plant, each of which propose similar political and economic conditions. However, since the tax treaty was signed only with one of the states (state S), this particular circumstance influenced the decision of the company. Although the state decided on the basis of existence of the tax treaty benefits, this example shows that principal objective of the company could not be treated reasonably as a tax motive but rather business one related to the expanding of business and saving of production costs.[100]

Moreover, Example H shows the situation in which the multinational company (resident of states T) chooses to set subsidiary №1 in certain state (state R) based on the non-tax motives ("developed international trade and financial markets as well as an abundance of highly-qualified human resources"). The subsidiary is engaged in a wide range of commercial fields involving sufficient human and financial resources that demonstrates its active business behavior. In addition, one of the areas of its commercial activity is promotion of new manufactory premises in state S through setting the subsidiary №2 on the basis of equity contributions and granting loans. In return, subsidiary №1 obtains dividends and interests.[101] In this regard, Jasper Korving and Loes van Hulten point out that "actual activities and assets subsequently undertaken may influence the weight given to the likely business-versus-tax factors. [Meaning] having real business or substance

[99] "Prevention the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project", OECD Publishing, Accessed 29 March 2021, para. 14. http://dx.doi.org/10.1787/9789264241695-en
[100] Ibid.
[101] Ibid.

in the selected jurisdiction should help a taxpayer to pass the PPT."[102] Thus, this illustration shows that if the company transactions represent bona fide business activity and are not motivated by the tax treaty objectives, it would be beyond the scope of the treaty shopping abuses.

The abovementioned examples of transactions and arrangements provided by the Action 6 Final Report show that different facts and circumstances should be taken into account and be compared to establish abuse of treaty. Denis Weber concludes that PPT rule demands an "in-depth study of facts and circumstances, […] nothing may be based on assumptions".[103] The Action 6 Final Report prescribes that in case "an arrangement is inextricably linked to a core commercial activity, [so] it is unlikely that its principal purpose will be considered to be to obtain that benefit"[104]. In this sense, Robert Danon states that the literal formulation of the PPT rule distinguishes form the practical illustrations provided by the OECD that "reflect the contextual meaning of the PPT".[105] However, he argues that since a result of such difference there is a risk to undermine the legal certainty, the MNCs should be recommended to examine whether the PPT rule interpretation by the jurisdiction where they perform the business corresponds to the OECD understanding.[106] Moreover, Jasper Korving and Loes van Hulten, examining the practical illustrations, observe that they are "relatively straightforward" and they would not be useful in complex cases with the factual background that differs from the OECD template.[107] Moreover, the examples provided by the OECD were developed along with the MLI. In this sense, we consider that the new interpretive tool should be based on the relevant practice of application and interpretation conducted by the states. Such data, firstly, should be provided by the national tax authorities and courts. And then the reports including this information should be provided to the IF, for example, for further systematization.

Considering the concept of pure economic objective, the EU Commission in the Recommendation has considered the application practice of rules tackling the tax treaty abuse by the Member States. In this regard, the Commission proposed to Member States to include the notion of "genuine economic activity" into the PPT rule:

> Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that

[102] Jasper Korving and Loes van Hulten, "MLI: Testing the Principal Purpose", International Tax Review 29, 9 (2018): 50.
[103] Denis Weber, "The Reasonableness Test of the Principal Purpose Test Rule versus the EU Law", 50
[104] Action 6 - 2015 Final Report, para. 13.
[105] Robert J. Danon, "Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups", 50
[106] Ibid.
[107] Jasper Korving and Loes van Hulten, "MLI: Testing the Principal Purpose", 49.

> obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that *it reflects a genuine economic activity or that* granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.[108]

Analyzing the "one of the principal purposes" notion, Craig Elliffe points out another problematic term worth considering that is the concept of "purpose". He emphasizes, "the overall objective behind the transaction and not necessarily what the taxpayer intends" should be considered by the courts".[109] In this regard, the Example F of the Action 6 Final Report is relevant. Example F illustrates the situation where company №1 (resident of state T) has been grown for the last several years based on the merger and acquisition strategy. This company offered target company №2 (resident of state R) to buy all its shares as it was interested in its business field and patent developments licensed to the subsidiaries of this target company. The important thing to mention is that since state R entered into a wide range of tax treaties with the provisions of "no or low source taxation of dividends and royalties", these tax treaties provide the beneficial tax treatment for the transactions between the target company and its foreign subsidiaries.[110] This illustration shows that despite the fact the company would obtain the benefits of the tax treaties network, the overall purpose of the transaction should be considered, namely, the aim to develop the company group.

On the other hand, David Duff observes that "it is difficult to imagine that an arrangement or transaction could have purposes transcending and independent of the purposes of the parties involved". He also notes that the criteria grounded on the objectives of the arrangement or transaction "is not entirely objective but may take into account the specific circumstances of the persons who are parties to the arrangement or transaction".[111]

Therefore, although the distinction should be done between the concept of "purpose" and "intention", the motives of the individuals behind particular arrangements or transactions should be considered as well. However, in practice such a distinction could not gain a great importance as in each case all the relevant facts and circumstances (common purpose of transaction, motives

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[108] "Commission Recommendation (EU) 2016/136 of 28 January 2016 on the implementation of measures against tax treaty abuse (notified under document C(2016) 271)", EUR-lex, Accessed 3 April 2021, https://eur-lex.europa.eu/eli/reco/2016/136/oj

[109] Craig Elliffe, "The Meaning of the Principal Purpose Test: One Ring to Bind Them All?", World Tax Journal 11, 1 (2019): 23.
https://ssrn.com/abstract=3346660

[110] Action 6 - 2015 Final Report, para. 14.

[111] David G. Duff, "Tax Treaty Abuse and The Principal Purpose Test – 2", Canadian Tax Journal/Revenue Fiscale Canadienne 66, 4 (2018): 977.https://ssrn.com/abstract=3258024

of the taxpayer or even the interim actions) would be examined to decide whether the benefit was appropriately granted or not.

Robert Danon observes that the subjective element "one of the principal purposes" is "objectified by the reasonableness criterion" expressed in a provision by wording "if it is reasonable to conclude".[112] Talking about the criteria of reasonableness provided in the provision, there is also no clear standard for determination of its scope. The PPT rule applies if "it is reasonable to conclude, having regard to all relevant facts and circumstances" that a benefit provided by the tax treaty was "one of the principal purposes of any arrangement or transaction".[113] As Denis Weber states, the given definition consists of two tests: "reasonableness test and principal purpose test". He argues that these two components are "inextricably linked and […] must be applied jointly".[114] The Action 6 Final Report points out that "[w]hat are the purposes of an arrangement or transaction is a question of fact which can only be answered […] after an objective analysis of the relevant facts and circumstances".[115] Denis Weber also admits that the facts and circumstances should be understood as "reasonable (third) person would". He also claims, the facts and circumstances should be examined objectively and should be grounded on:

- "all relevant facts and circumstances
- which must be weighed
- in an objective analysis".[116]

The scholars also raise the question in relation to the objective element of PPT rule, namely the last part of the provision stating that "unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement".[117] In particular, it is important to understand what should be considered: the object and purpose of the relevant treaty provision or the whole treaty.

According to the Vienna Convention on the Law of Treaties, "a treaty 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".[118] In this line, Vikram Chand points out that isolated interpretation of the relevant treaty provision could make the PPT "redundant" as in practice when the taxpayer uses the tax scheme usually the formal requirements of particular

[112] Robert Danon, "Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups", 44.
[113] MLI, art. 7.
[114] Denis Weber, "The Reasonableness Test of the Principal Purpose Test Rule versus the EU Law", 49.
[115] Action 6 - 2015 Final Report, para 10.
[116] Weber, "The Reasonableness Test of the Principal Purpose Test Rule versus the EU Law", 50
[117] MLI, art. 7(1).
[118] "Vienna Convention on the Law of Treaties", legal.un.org, Accessed 5 April 2021, Art 31(1), https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

provision are met.[119] Reinout Kok agrees that object and purpose of the treaty provision should be understood "in light of the object and purpose of the treaty in general".[120] Moreover, Craig Elliffe points out that the national courts should "carefully consider both the object and purpose of the relevant provision in isolation, as well as […] in the context of the broader objectives […] of the tax treaty to, e.g. facilitate cross-border investment with genuine investment at an appropriate threshold".[121] Since the provisions were incorporated into the treaty to reach the overall aim of that particular treaty, the whole treaty as well as its general objective should be examined comprehensively.

However, the treaty could have extremely general goals and it would be important to consider the relevant provision itself as well not to lose the effectiveness of the PPT. In this sense, Svitlana Buriak states that although it is important to consider the whole treaty during interpretation, the emphasis should be brought to the object and purpose of the particular relevant provision.[122] In this regard, Example E illustrates the situation when the company held 24% of shares of another undertaking for last 5 years. However, after the tax treaty providing a benefit of a lower tax rate prescribed in the relevant article came into force, the company decided to raise its ownership to 25%.[123] Although the principal objective was to gain the benefit under the treaty, this transaction is treated to be compatible with object and purpose of relevant treaty article that is "an arbitrary threshold that provides benefits to investors who satisfy the requisite threshold of investment".[124] Thus, it is important to look at the objective of the relevant article of the tax treaty in order to decide whether providing the benefit is appropriate in particular circumstances.

As we can observe, considering the abovementioned, there is some level of uniformity among scholars. In our view, the first reference should be made to the particular treaty provision as it aims at regulating particular situations. However, the treaty as a whole should also be considered since provisions do not exist in isolation and are incorporated into the treaty that comprises common goals that should be achieved.

Another controversial issue considered by the scholars is the question related to the burden of proof. Vikram Chand highlights that the burden of proof under PPT could be treated as "unbalanced and unreasonable".[125]

Some authors connect the reasonableness test to the lowering of the burden of proof. Svitlana Buriak admits, the PPT rule provides merely the uncertain criteria of "reasonable

[119] Vikram Chand, "The Principal Purpose Test in the Multilateral Convention: An in-depth Analysis", 24.
[120] Reinout Kok, "Principle Purpose Test in Tax Treaties under BEPS 6", 409.
[121] Craig Elliffe, "The Meaning of the Principal Purpose Test: One Ring to Bind Them All?", 31.
[122] Svitlana Buriak, "The Application of the Principal Purpose Test under Tax Treaties", 16.
[123] Action 6 - 2015 Final Report, para 14
[124] Elliffe, "The Meaning of the Principal Purpose Test: One Ring to Bind Them All?", 31.
[125] Chand, "The Principal Purpose Test in the Multilateral Convention: An in-depth Analysis", 21

conclusion" in comparison with the guiding principle that demands the "clear evidence of the intention of taxpayer to obtain a tax benefit".[126] As Michael Lang observes, the requirement must be "merely 'reasonable' but not, for instance, compelling" and, as a result, the tax authorities are not required to "produce full evidence".[127]

On the contrary, Denis Weber disagrees with them. He states that reasonableness test is not a "weight of the burden of proof on the tax authorities" but rather analysis of tax authorities should be gained "through an objective analysis based on facts and circumstances" and "not based on assumption".[128]

As regards the practice providing the proof of motivation, Michael Lang states that it could not be important as the tax authorities could be inclined to "presume intention simply because of the presence of a benefit".[129] Erik Pinetz agrees with this point stating that the definition of the provision simplifies the way for the tax authorities to "assume abuse".[130] Denis Weber, on the contrary, disagrees stating that reasonableness test of PPT provides "an objective analysis of all relevant facts and circumstances". He also notes that in the OECD Commentary it is stated that "assessment based on an assumption or only on effect of an arrangement (tax benefit) is not *sufficient*".[131]

Considering the abovementioned, in practice of PPT application the lack of the burden of proof guidelines and the benchmark for the principal purpose element could increase the discretionary powers of tax authorities.

The shifting of burden of proof in respect of the court practice was examined by Vikram Chand. He argues that, firstly, in the course of examination tax authority would have to show the taxpayer had a tax reason and that reason was one of the principal purposes of exercising the transaction. Then the taxpayer should have a chance to decline the findings of the tax authority through showing the "non-tax purposes" or challenging in question of whether obtaining the tax benefit was one of the principal purposes. Secondly, in case the court recognizes that the benefit exists, the taxpayer should have a possibility to show such a benefit is in compliance with the object and purpose of the relevant tax treaty provision. The tax authority in turn could object the position of the taxpayer. And, finally, having examined all relevant facts and circumstances, the

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[126] Svitlana Buriak, "The Application of the Principal Purpose Test under Tax Treaties", 12

[127] Michael Lang, "BEPS Action 6: Introducing an Antiabuse Rule in Tax Treaties", Tax Notes International 74,7 (2014): 658
http://dx.doi.org/10.2139/ssrn.2500827

[128] Denis Weber, "The Reasonableness Test of the Principal Purpose Test Rule versus the EU Law", 51.

[129] Lang, "BEPS Action 6: Introducing an Antiabuse Rule in Tax Treaties", 658.

[130] Erik Pinetz, "Final Report of Action 6 of the OECD/G20 Base Erosion and Profit Shifting Initiative: Prevention of Treaty Abuse", IBFD Bulletin 113 (2016), quoted in Denis Weber, "The Reasonableness Test of the Principal Purpose Test Rule versus the EU Law", 51.

[131] Denis Weber, "The Reasonableness Test of the Principal Purpose Test Rule versus the EU Law", 51.

court would decide whether to apply the PPT rule or not. The author as well concludes that in case the findings of the tax authority could be treated as "not clear", the "benefit of the doubt" should be treated in favour of the taxpayer.[132]

To conclude, tax authorities could abuse the situation of lowering of the burden of proof. However, it is important to note that in case there is the judicial proceeding, their objectivity would be examined.

Another challenge the broad wording of the PPT rule could cause, as some scholars point out, is the risk of PPT non-compliance with the EU law. Although this research does not study this question in detail, it is important to mention several possible issues in this regard. Christine Panayi states that while the European Court of Justice would not probably consider the PPT rule (particularly in combination with the LOB) "more harshly than the much more pre-emptive and mechanical LOB test", there is a risk in relation to its broad and not adequately clear wording. [133] Moreover, the PPT wording "does not offer a taxpayer the opportunity to provide evidence of valid commercial reasons to demonstrate a legitimate business purpose [and] brings more uncertainty that could be accepted by the Court" that would be treated as in contradiction to the EU law.[134] Conversely, Denis Weber disagrees that the PPT would be determined by the CJEU to be "in contravention of the EU principles of legal certainty". However, he states that "[t]he only potential problem […] the PPT rule is broader (no artificiality required) compared to the GAAR in the Anti-Tax Avoidance Directive and […] Parent-Subsidiary Directive".[135] Thus, the following possible problems are disputed among the academics: (1) the impact of the PPT clause could be unclear and unpredictable, (2) the 'reasonableness test' is applicable without clear criteria, (3) lack of express indication of 'genuine economic activities' in the wording of the PPT clause, (4) shifting the burden of proof issue and (5) contradiction of the PPT to GAAR already provided by the EU legislation.

Some scholars try to give guidelines of PPT rule relying on the domestic GAARs. For instance, Reinout Kok[136] resorts to Dutch tax legislation whereas David Duff[137] refers to the practice of Canadian GAAR. However, in our view, the focus should be given to the further development of autonomous international understanding of the broad scope and concepts provided by the PPT rule provision. The domestic based interpretation could cause the different legal

[132] Vikram Chand, "The Principal Purpose Test in the Multilateral Convention: An in-depth Analysis", 21.
[133] Christina HJI Panayi, "The Compatibility of the OECD/G20 Base Erosion and Profit Shifting Proposals with EU law", 19.
[134] Oleksandr Koriak, "The Principal Purpose Test under BEPS Action 6: Does the OECD Proposal Fit the EU Legal Framework", (master thesis, Lund University, 2016), 32. Accessed 8 April, http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8880187&fileOId=8880188
[135] Denis Weber, "The Reasonableness Test of the Principal Purpose Test Rule versus the EU Law", 58
[136] Reinout Kok, "Principle Purpose Test in Tax Treaties under BEPS 6", 410-412.
[137] David G. Duff, "Tax Treaty Abuse and The Principal Purpose Test – 2", 947-1011.

implications in relation of PPT implementation by different jurisdictions. This would certainly lead to situation when the taxpayers and tax administrations would not have certainty and predictability. These circumstances would result in reluctant implementation of the PPT rule and shift to other options provided by the MLI provision. Thus, the effectiveness of the provision would be questioned.

Considering the abovementioned, the majority of the scholars agree that the provision determining the PPT rule is broad. It contains terms in its definition that could be treated controversial due to their understanding both by tax authorities and courts. As Craig Elliffe highlights, "lack of consistency in interpretation" could result in high litigation and administrative costs, uncertainty among businesses and risk of increase of reluctance in relation to the transboundary investments.[138] Therefore, it is crucial to provide the clear and uniform guidance for interpretation of the main important controversial terms that will give certain level of clarity and uniformity in relation to implementation process. However, comparing to previous interpretation tools the new one should be based on the recent practice of the states. For these purposes, the modern technologies could be useful, particularly the development of the special database where the states would submit the report containing the problematic issues regarding the tax treaty avoidance cases they face in practice. In this regard, the detailed rules should be adopted to regulate the mentioned procedure. Moreover, the administrative body should be created within the OECD that would monitor the process of exchange and storage, analyse the content of the reports and sort the relevant information. That could be a newly formed special agency or the mentioned tasked could be conducted by the Inclusive Framework. Moreover, the special algorithm could be designed to divide cases on the basis of the keyword – main problematic issue.

2.2 PPT and LOB correlation

In the previous subchapter, we examined the issues of the first self-sufficient option of the minimum standard, namely the case of application of the PPT rule alone. Since the second option provided by the MLI is the combination of PPT and LOB clauses, the important question needed to be examined is the correlation between the PPT and LOB rules as it could affect the practice of its application.

The LOB clauses were provided in a range of bilateral tax treaties of different states (for instance, the US, Japan, India and several others) before the LOB clause was proposed by the

[138] Craig Elliffe, "The Meaning of the Principal Purpose Test: One Ring to Bind Them All?", 5.

OECD.[139] The provisions of the LOB rule provided in the MLI are based on the 2016 US Model.[140] According to the OECD, the LOB rule as a SAAR would address wide range of "treaty shopping situations based on the legal nature, ownership in, and general activities of, residents of a Contracting State'.[141] The clause aims at "preventing treaty shopping" through rejecting treaty benefit to undertakings that are not involved at the "active conduct of business".[142] Thus, the LOB is treated as a SAAR due to which the benefit would not be granted to the taxpayer that fail to comply with the objective predefined requirements.

According to the MLI provisions, the options of LOB application are as follows (symmetrical and asymmetrical application):

(1) If state №1 decides to apply the LOB and state №2 does not → the LOB rule would not apply (the PPT rule would be applicable as a default rule symmetrically).
(2) If both state №1 and state №2 decide to apply the same method: PPT plus LOB → LOB would apply.
(3) If state №1 chooses to apply PPT in combination with LOB and state №2 chooses to apply PPT accepting the symmetrical application of LOB → LOB would apply.
(4) If state №1 chooses to apply PPT in combination with LOB and state №2 decides to apply PPT accepting the asymmetrical application of LOB →LOB would be applicable only by the state №1.[143]

Thus, according to the Article 7(7) of MLI, in principle, the LOB rule is applicable on the symmetrical basis. However, asymmetrical application is available in case all parties agree on such kind of application.

Whereas the LOB is considered to be a SAAR, the PPT rule provided by the BEPS Action 6 is a "genuine treaty GAAR".[144] The correlation between the PPT and LOB rule raises some concerns regarding the scope of their application. The two variations are considered in this regard: the situation with factual background falling within the scope of both rules and the situation beyond the LOB scope due to the fact the transaction or arrangement meets its criteria.[145]

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[139] Błażej Kuźniacki, "Implementation and Application of the LOB Clause in BEPS Action 6/MLI: Legal and Pragmatic Challenges", 267.
[140] Błażej Kuźniacki, "The Limitation on Benefits (LOB) Provision in BEPS Action 6/MLI: Ineffective Overreaction of Mind-Numbing Complexity – Part 1", 69.
[141] Action 6 - 2015 Final Report, para.19.
[142] David Kleist, "The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS – Some Thoughts on Complexity and Uncertainty", 37.
[143] Explanatory Statement, para. 101-102.

[144] Robert J. Danon, "Treaty Abuse in the Post-Beps World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups", 38.
[145] David G. Duff, "Tax Treaty Abuse and The Principal Purpose Test – 2", 962.

The wording of the PPT clause is controversial as one part ('notwithstanding the provisions of a Covered Tax Agreement') provides for the priority of the PPT rule without the possible restriction by the SAARs, whereas the other ('[…] in accordance with the object and purpose of the relevant provisions') is treated as in particular circumstances the preference should be given to SAARs, including LOB.[146] In this sense, Craig Elliffe admits that the PPT rule is developed to cover cases which LOB as a SAAR could not address and as a result PPT and LOB clauses should be applied supplementary.[147]

Considering the situation when both a SAAR and GAAR could be applicable to the same factual circumstances, Robert Danon agrees that the abovementioned issue should be solved based on the "*lex specialis derogate legi generali* principle: to the extent that the SAAR covers the factual situation at issue, the latter may not, in addition, be tested in light of a GAAR" meaning that GAAR would apply as of "subsidiary nature".[148]

Andres Moreno, considering the PPT provision in relation to the issue of correlation between the PPT and LOB rules, observes that the PPT clause should just apply to "arrangements leading to rule shopping whereas treaty shopping strategies should be considered to be covered comprehensively by the LOB provision(s)".[149]

Conversely, Robert Danon disputed such interpretation providing the following arguments: (1) there is no sign in the PPT provision indicating its restriction of the scope to the rule shopping; (2) the position of the OECD in Action 6 Final Report reflects the opposite understanding provided that the PPT rule is treated to encompass the conduit arrangements that are not covered by the LOB provision; (3) in case the PPT would apply only to rule shopping situations and not cover conduit arrangements, there would not be other treaty anti-avoidance rule to encompass those cases. He concludes, the wording of PPT should not be interpreted as covering the factual situations already encompassed by the LOB but rather address the cases that are beyond the LOB scope. Moreover, he points out the main issue here is "exact delineation of the scope of the SAAR".[150]

As of 20 April 2021, 74 jurisdictions chose to implement the PPT into the tax treaties to satisfy the minimum standard. On the contrary, only 13 jurisdictions decided to apply

[146] Michael Lang, "BEPS Action 6: Introducing an Antiabuse Rule in Tax Treaties", 658
[147]Craig Elliffe, "The Meaning of the Principal Purpose Test: One Ring to Bind Them All?", 7.
[148]Robert J. Danon, "Treaty Abuse in the Post-Beps World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups, 52.
[149] Andres Moreno, "GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test: What Have We Gained from BEPS Action 6", 441.
[150] Danon, "Treaty Abuse in the Post-Beps World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups, 53-54.

the LOB: Argentina, Armenia, Bulgaria, Chile, Colombia, India, Jamaica, Kazakhstan, Mexico, Russian Federation, Senegal, Slovak Republic, Uruguay.[151]

Moreover, according to the Second Peer Review Report on Treaty Shopping presented by the IF, while applying the PPT to certain tax treaties, several states indicate their desire to use bilateral negotiations to a wide range of treaties. Some of the examples are: Germany – to 33 jurisdictions, Switzerland – 44 and Norway – 13.[152]

Considering the abovementioned, the option of application of the LOB provided by the Convention is incorporated in form of the combination with the PPT rule. In this sense, it could be argued that the PPT and not the LOB was designed by the OECD to be the leading rule. The practice of application as well shows that the priority is given to the implementation of the PPT and not the LOB clause. Therefore, we agree with the majority of scholars on the point that the PPT and LOB rule should complement each other and the treaty abusive practices that do not fall under the scope of the LOB should be the subject of the PPT regulation. However, for the reasons of clarity and predictability it is important to define clearly the scope of the LOB rule though providing the guidance as to its borders. Therefore, the effectiveness of the second option in practice could be conditioned on the solving the issues raised resulting from the lack of the clear understanding of the balance between the PPT and LOB.

2.3 Other Opt – in and Opt – out Mechanisms

In the previous subchapters, we examined the challenges related to the first two options satisfying the minimum standard. This subchapter, firstly, is aimed at discussing briefly other opting – in and opting – out flexible tools, namely: the third way in achieving the minimum standard, discretionary relief option and the reservations available. And, secondly, the overall evaluation of the minimum standard should be given.

Considering the third way provided to satisfy the minimum standard ("a detailed LOB provision, supplemented by a mechanism that would deal with conduit arrangements not already dealt with in tax treaties"[153]), detailed LOB was not incorporated into the MLI for the reason "the detailed LOB provision requires substantial bilateral customization" that would be complicated

[151] "Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting", oecd.org, Accessed 22 April 2021, https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf
[152] "Prevention of Treaty Abuse – Second Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6", OECD Publishing, Accessed 22 April 2021, https://doi.org/10.1787/d656738d-en
[153] Explanatory Statement, para. 89.

within the framework of Convention.[154] As a result, the parties wishing to choose the third option could reserve the right not to apply the PPT under condition of striving to satisfy the minimum standard through bilateral negotiations.[155] Such an option provided by the MLI creates more uncertainties and could lead to a risk of different interpretation and application of this approach by the jurisdictions. In other words, the third option within the framework of the minimum standard makes the uniformity among the states even more distant.

Flexibility is also expressed through the optional discretionary relief tool prescribed by the Article 7(4) of the MLI. The benefit that was rejected due to the PPT rule could still be provided by the tax authority conditioned on consultations conducted with the tax authority of the other contracting state.[156] Furthermore, as was mentioned in the first subchapter Christina Panayi points out that discretionary relief option if it was incorporated into the CTA could be used by the tax authorities in certain situations involving the "valid commercial reasons".[157] In other words, although the PPT rule denies the treaty benefit, the tax authorities after consideration of the particular case could grant the benefit relying on the discretionary relief provision.

Since the decision is transferred to the discretion of tax authority, this clause could be problematic for several reasons. First, the clause does not specify the scope of the discretionary power. Second, there is no uniform interpretation as to the limits and examples of situations that could arise. Thus, the practical application of this clause by tax authorities represented by the different legal orders could lead to different understanding and as a result to different legal consequences.

Taking into consideration the reservations to prevention of treaty abuse minimum standard as flexibility mechanism, the states are allowed not to apply the clause in its entirety or partly to CTAs that:(1) satisfy the minimum standard which means it includes the PPT[158] or LOB rule[159] (the estimation of whether they meet the minimum standard is made on their own that subsequently is assumed to be controlled by the Inclusive Framework); (2) satisfy the minimum standard in other way which means the party to CTAs "intends to adopt a combination of a detailed limitation on benefits provision and either rules to address conduit financing structures or a principal purpose test" and "endeavor to reach a mutually satisfactory solution" to satisfy the minimum standard.[160]

[154] Explanatory Statement., para. 90.
[155] Ibid., paragraph 109.
[156] MLI, art. 7(4).
[157]Christina HJI Panayi, "The Compatibility of the OECD/G20 Base Erosion and Profit Shifting Proposals with EU law", 19.
[158]MLI, art 7(15)(b).
[159]Ibid., art 7(15)(c).
[160]Ibid., art. 15(a).

Thus, although the provision is subject of the minimum standard, still there are reasons precluding the general agreement on this matter: (1) the one of main influential states as the USA prefer the LOB rule over the PPT; (2) relying on the Article 7(15)(a) of MLI, the parties could avoid applying PPT through bilateral negotiations endeavouring to satisfy the minimum standard in other way; (3) opt-in mechanism providing the option of combined application of PPT and LOB could permit the asymmetrical application of LOB. Therefore, this discrepancy leads to lack of the unified position as regards addressing the treaty abuse schemes.[161]

The members of the Inclusive Framework are engaged in the review procedures in relation to the minimum standard implementation permitting to examine their national tax regimes and to detect the aspects that increase the BEPS risks. The IF provides that "the monitoring of the four minimum standards will ensure that all Members, as well as jurisdictions of relevance, will comply with the BEPS standards in order to ensure a level playing field".[162]

In case further changes to the CTA by the parties would retreat from the compliance with minimum standards provided by the MLI, the IF could respond promoting those states to further correspond to their adherence to prevent BEPS schemes.[163] It is important to mention here that the Inclusive Framework with regard to its functions could not enforce the states to any actions. Moreover, the commitments taken by the jurisdictions as to providing the reports is only of political nature and do not entail any legal effects. Therefore, the whole monitoring tool is based only on the good will of the states and their interest in tackling the abusive practices. However, on the other hand, the overall reports presented by the IF could be a useful tool in tracking the positions and practices of the jurisdictions involved.

Considering the analysis of prevention of treaty abuse provisions in the broad context, the effectiveness of MLI would depend on the fulfillment of the general aim of BEPS Action 6 to tackle the treaty abuse practices and the MLI would be considered only as one of the tools to promote that goal. In other words, if the minimum standard established by the OECD is satisfied by the jurisdictions through any of the options provided, then we could argue that the flexibility as an essential feature of MLI promotes its efficiency. Therefore, even if the minimum standard would be fulfilled to a great extent through the bilateral renegotiations as the third option of minimum standard prescribes and not refer to the coordinated process of modification proposed by MLI, the flexible nature of MLI still could be treated as maintaining its effectiveness.

Considering the analysis of prevention of treaty abuse provisions in the narrow context, the effectiveness of MLI would be dependent on the willingness of the states to implement the

[161] Ricardo García Antón, "Substantive Multilateralism in the Context of the MLI", 28.
[162] "Background Brief: Inclusive Framework on BEPS", oecd.org, Accessed 22 April 2021, https://www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf
[163] Nathalie Bravo, "A Multilateral Instrument for Updating the Tax Treaty Network", 269.

particular provisions given by the MLI. In other words, the question is whether the mission of MLI (modification of bilateral treaty network in "a synchronized and efficient manner"[164]) is effectively fulfilled. In this regard, the clear, effective and predictable provisions would define the relevance of the MLI as an international tax instrument. The analysis provided in this Chapter demonstrates the following: (1) the PPT rule that was designed as a leading rule is drafted in a broad and uncertain way; (2) the minimum standard option proposing to apply the PPT in combination with the LOB rule as well raise the issues of controversial correlation between the scopes of two rules; (3) the third option within the minimum standard providing for the bilateral renegotiations could lead to the avoidance of PPT application and result in a different interpretation and application of minimum standard. Thus, taking into consideration the abovementioned, such high level of the flexibility could undermine the effectiveness of MLI.

In conclusion, considering the analysis of the PPT rule as to its objective and subjective elements, burden of proof issue, we can conclude that the PPT is a broad concept. However, since it was designed as a GAAR to be able to tackle as many as possible tax treaty abusive practices, the rule could not be rigid.

Due to the broad nature of PPT, the issue of compatibility with the EU law arises. The following disputable problems are defined: (1) the lack of clarity and predictability in practice due to the broad nature of PPT rule, (2) the absence of the 'genuine economic activity' concept in the formulation of the PPT and (3) the reversal of the burden of proof.

It is important not to stick to the literal wording of the PPT rule. Although the illustrations provided by the OECD are of boilerplate nature and are treated to be too simple to correspond to real practical situations, they still are useful as regards the aim of interpretation for application by the states. The genuine economic objectives that the wording of the PPT lacks were specified within their framework.

Considering the efficiency of the second minimum standard approach, the balanced correlation between the PPT and LOB rules is required. We agree with the abovementioned scholars that the situations not covered by the LOB should fall under the scope of the PPT. The clear framework of the LOB rule should be developed for providing clarity and predictability.

The third way of satisfying the minimum standard is considered to entail additional basis for the discrepancy of the state practices as it provides for the bilateral renegotiations.

[164] "Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS", OECD Publishing, para. 8. Accessed 20 April 2021. https://www.oecd.org/tax/beps/beps-action-15-mandate-for-development-of-multilateral-instrument.pdf

The IF conducts monitoring as to the implementation of the minimum standard. However, the competence of the IF is political and does not provide any legal effect.

Finally, the examination of the effectiveness of the flexible nature of MLI is conducted in two perspectives: broad and narrow. In the broad context, the flexibility promotes the effectiveness of MLI as the provision fulfills the overall aim of the BEPS Action 6, namely addressing the tax treaty abusive schemes. In the narrow context, on the contrary, the flexibility could be treated as undermine the effectiveness of MLI as the provisions providing for the minimum standard were adopted in a broad, uncertain and unpredictable manner. However, the new interpretation tool based on the current practical application of the MLI provisions by the states could be a solution for the providing certain level of clarity and certainty. In this sense, the reports of the relevant recent practice prepared by the states could be uploaded to the specifically created database.

CHAPTER 3. FLEXIBILITY OF DISPUTE RESOLUTION MECHANISM WITHIN THE MLI

In this Chapter, the effectiveness of the dispute resolution provisions is analyzed. Firstly, we briefly take a look at the MAP minimum standard procedure and discuss the issues that could arise. Secondly, we examine the mandatory binding arbitration clauses and analyse the challenges regarding the main aspects, in particular the arbitration procedure, arbitral decision, appointment of arbitrators, confidentiality issue and the participation of taxpayer in the process. And, finally, several additional tools would be proposed for improvement of the MLI dispute resolution mechanism.

3.1 MAP Minimum Standard as a First Step in Dispute Resolution

Prior to proceeding with the analysis of one of the most controversial MLI provisions as mandatory binding arbitration, the brief overview of the MAP as the initial phase of the MLI dispute resolution should be given.

The disputes in the area of international taxation started to arise as a matter of routine. Due to strong correlation between the taxes and state sovereignty, the primary consideration was given to the national remedies. Nevertheless, as Sriram Govind points out "[c]ourts are overburdened leading to backlogs and delays, and unilateral solutions have proven ineffective to resolve cross-border tax disputes. Therefore, an effective and equitable international solution would be ideal".[165]

The taxpayers as well as tax administrations benefit from the tax certainty as it is one of the main features that promote the investments and as a result economic growth. According to the Progress Report on Tax Certainty, "actions to counter BEPS must be complemented with actions that ensure certainty and predictability for businesses and individuals. It was therefore necessary to develop robust dispute settlement resolution processes [so] that disputes are resolved in a timely, effective and efficient manner".[166] In this regard, Sriram Govind and Laura Turcan emphasise the great importance of the dispute resolution mechanisms "because they balance protection of the revenue base with the need for an attractive framework for foreign investment".[167]

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[165] Sriram Govind, "The New Face of International Tax Dispute Resolution: Comparing the OECD Multilateral Instrument with the EU Dispute Resolution Directive", 309.

[166] "2019 Progress Report on Tax Certainty", OECD Publishing, 2019. Accessed 27 April 2021. www.oecd.org/tax/tax-policy/g20-report-on-tax-certainty.htm

[167] Sriram Govind, Laura Turcan, "The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive", 1.

As regards Action 14 Final Report, the OECD has developed the mechanisms with the objective to enhance the effectiveness of mutual agreement procedure. The purpose was to decrease "the risks of uncertainty and unintended double taxation by ensuring the consistent and proper implementation of tax treaties, including the effective and timely resolution of disputes regarding their interpretation and application through the mutual agreement procedure".[168] As Jasmin Kollmann and Laura Turcan point out, "[t]he importance of the MAP stems from the fact that it provides taxpayers with an alternative to tax litigation, which can be cumbersome and uncertain, especially since it needs to be taken up in both the contracting states in order to provide an effective relief for double taxation [and] also entails a timing advantage, since the taxpayer is not obliged to wait until the taxation has been charged or notified to him in order to set the procedure in motion".[169]

Thus, it could be argued that creation of a dispute resolution tool within the MLI is aimed at benefiting the all stakeholders of the BEPS – measures. In particular, such mechanism could provide the additional instrument for the taxpayers to protect their rights regarding international taxation, for the jurisdictions to ensure the national tax systems are guarded from the BEPS practices and for the international community to create stable environment for the investment activities.

The initial goal indicated in Action 15 Final Report as regards the MAP was to create a genuinely multilateral dispute resolution procedure for solving disputes that involve more than two jurisdictions. It was planned to provide the MAP consultation among all relevant parties with the engagement of a taxpayer who conducts its activity in many jurisdictions.[170] However, as Nathalie Bravo points out the MLI (namely article 16) did not achieve such a multilateral goal, since obligations within the MAP procedure remain bilateral in nature. The bilateral nature of relations is attributed to mandatory binding arbitration as well.[171] Therefore, since the one of the main features of the MLI is 'bilateral multilateralism' (as was argued in the first Chapter), the cases involving more than two parties are not covered by the MLI dispute resolution mechanism.

The MAP provision, in particular article 16, represents the minimum standard that should be met by the jurisdictions. Sriram Govind divides the MAP into two stages: (1) unilateral phase (taxpayer makes the MAP request) and (2) consultations (in case competent authority could not

[168]OECD (2015), Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241633-en

[169] Jasmin Kollmann, Laura Turcan, "Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges", 23.

[170] "Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 -2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project", OECD Publishing, para 31. http://dx.doi.org/10.1787/9789264241688-en

[171] Nathalie Bravo, "A Multilateral Instrument for Updating the Tax Treaty Network", 76.

by itself resolve the issue, it is required to make effort to solve it through agreeing mutually with the other competent authority).[172]

At the unilateral stage, according to Article 16(1), if a taxpayer believes that "actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement", he may "present the case to the competent authority of either Contracting Jurisdiction […] within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Covered Tax Agreement ".[173] In this regard, Sriram Govind points out the competent authorities are granted "unfettered discretion as regards acceptance or rejection of a MAP case and no time limits is prescribed for such a decision".[174]

Considering the participation of taxpayers, "taxpayers' rights have been weakened in practice as they are generally not involved in the cross-border procedures carried out between states".[175] Moreover, Xueliang Ji states that "[t]he MAP process is controlled by the competent authorities, and taxpayers have little legal standing during the process".[176]

The question of the contents of the request arises since the MLI does not provide the detailed instruction. Sriram Govind states that non–mandatory guidance designed by the OECD and the UN could be useful in this line, in particular Manual on Effective Mutual Agreement Procedures and Guide to the Mutual Agreement Procedure respectively. The reason for that is inclusion of the guidelines regarding the "contents of the request, timelines for acknowledgment of receipt and further acceptance of rejection, information to be provided, withdrawal etc."[177]However, the nature of such instruments clearly illustrates that the practice of their application would depend only on the willingness of the states as there is no obligation to adhere to these rules. Thus, the important issue would be the inclusion of the "relevancy requirement"[178] as regard the information requested by the competent authorities.

Another issue is related to the scope of the cases that is limited to as the taxpayer in entitled to request the MAP only in particular situations, namely cases when taxation is not compatible with the CTA.

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[172] Sriram Govind, "The New Face of International Tax Dispute Resolution: Comparing the OECD Multilateral Instrument with the EU Dispute Resolution Directive",311-314.
[173] MLI, Art. 16(1).
[174] Sriram Govind, 313.
[175] Philip Baker, Pasquale Pistone, Carlos E. Weffe, The IBFD Yearbook on Taxpayers' Rights 2020: Observatory on the Protection of Taxpayers' Rights (IBFD, 2021), 15.
[176]Xueliang Ji, "The Changing Paradigm of International Tax Dispute Settlement: What Are the Promises and Challenges of Mandatory Arbitration for China?", Oregon Review of International Law 21 (2020): 132
[177] Sriram Govind, 312.
[178] Sriram Govind, Shreya Rao, "Designing an Inclusive and Equitable Framework for Tax Treaty Dispute Resolution: An Indian Perspective", Intertax 46, 4 (2018): 333.
https://ssrn.com/abstract=3136294

At the consultation stage, "[t]he competent authority shall endeavour […] to resolve the case by mutual agreement with the competent authority of the other Contracting Jurisdiction".[179] In this sense, Sriram Govind states that MAP clause indicates neither the time period for the competent authorities during which the agreement should be tried to be reached nor the requirement of notifying the taxpayer in case they are unable to agree. The author also admits that although the period of MAP could be limited by the mandatory binding arbitration procedure, the arbitration is an optional clause and it also could be extended for indefinite period.[180] In this line, Jasmin Kollmann and Laura Turcan point out that the MAP is "a time-consuming procedure with no guaranteed outcome for the taxpayer".[181]

The argument for the effectiveness of MAP as the minimum standard provision could be the monitoring that is carried out by the peer review[182] mechanism. However, still the nature of this mechanism is political and does not produce any legal implications.

Another issue regarding the MAP is the question of the taxpayer participation in the process. As Jasmin Kollmann and Laura Turcan state, "[it] leads to limited legal protection [since taxpayer] is not considered to be a party to the proceedings and therefore has restricted powers to support his decision". The authors also point out that limitation on the ability of the taxpayer to be a party to the MAP could result in the "lack of transparency" of the process and this could be treated as one of the main disadvantages of the MAP.[183]

Thus, the first problematic issue is the wording of the provision ("shall endeavour" or "may consult") that clearly indicates that competent authorities are only obliged to make efforts in respect of negotiations and have no obligation to resolve the dispute. Secondly, the lack of time frames and mechanism of taxpayer notifications that could protract the MAP process. Finally, the issue is the political nature of the tool that controls whether the minimum standard is satisfied. In other words, the MAP procedure does not require any result, only the commitment to take efforts. And in case the competent authorities would not be interested in the resolving the dispute, this process could take years.

In addition, the competent authorities "shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Covered a Tax

[179] MLI, Art. 16(2).
[180] Sriram Govind, "The New Face of International Tax Dispute Resolution: Comparing the OECD Multilateral Instrument with the EU Dispute Resolution Directive",314.
[181] Jasmin Kollmann, Laura Turcan, "Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges", 25.
[182] "BEPS Action 14 on More Effective Dispute Resolution Mechanism – Peer Review Documents, OECD/G20 Base Erosion and Profit Shifting Project", OECD Publishing. https://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf
[183] Jasmin Kollmann, Laura Turcan, "Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges", 27.

Agreement" and "may consult together for the elimination of double taxation in cases not provided for in the Covered Tax Agreement".[184] Thus, the competent authorities are entitled to initiate the MAP in cases there are uncertainties as to understanding of the provisions or issues that arise when the states use the relevant provisions in practice.

However, the mentioned option provided by MLI could not lead to the development of the uniform common vision of the MLI provisions as the real nature of such resolution would be bilateral and would be relevant only for the two states concerned. In this sense, Alexander Bosman states, "[s]ince the MLI does not create a highest international judicial body dealing with MLI matters, conflicts regarding the interpretation of the MLI will ultimately be resolved by the highest courts in each participating state". And such situation, in his view, could create a risk of "diverging and possibly conflicting interpretations of the MLI provisions".[185]

Moreover, different states use the possibility to choose the permitted reservations in relation to the MAP minimum standard. In particular, some states could decide to opt out permitting the request within the MAP be directed only to the jurisdiction where the taxpayer is a resident (or a national in cases related to "non-discrimination based on nationality) if this jurisdiction "will implement a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction".[186] The states could apply such restrictions only if their bilateral actions satisfy the minimum standard.

Joseph Morley point out that generally "the provisions of Part V of the MLI are required by signers of the MLI unless the CTA is covered by otherwise comparable dispute resolution measures".[187] Thus, in case the minimum standard demanded by the Action 14 is met by the instruments provided by the bilateral treaties, the use of the MLI provisions would not be necessary. This could result in different practice of states and would definitely not contribute to the unified approach.

Considering the abovementioned, the MAP as mandatory minimum standard is alleviated by the flexible nature of the MLI. In other words, the flexibility is reflected through the following aspects:

(1) the formulation of the obligation of the states ('shall endeavour') aimed at promoting best efforts and not the final result;

[184] MLI, Art. 16(3)
[185] Alexander Bosman, "General Aspects of the Multilateral Instrument", 646.
[186] MLI, Art. 16(5)(a).
[187] Joseph Morley, "Why the MLI Will Have Limited Direct Impact on Base Erosion Profit Sharing", Northwestern Journal of International Law&Business 39, 2 (2019): 244.
https://scholarlycommons.law.northwestern.edu/njilb/vol39/iss2/4

(2) high level of freedom given to the tax authorities in their decisions (as to the time frames, the data requested from the taxpayer and no obligation to notify the taxpayer concerning the status of the request);
(3) lack of obligatory monitoring – only political commitments;
(4) lack of involvement of the taxpayer into the process;
(5) mechanism of reservations.

Thus, despite the fact the MAP is a minimum standard provision, its flexible nature dictates the specificity of this dispute resolution tool. Although the high level of MAP flexibility could be justified by the nature of MLI, it possesses several deficiencies as lack of clarity and predictability regarding the time period, information requested by the tax authorities and taxpayer position that could be addressed by the guidance.

3.2 Mandatory Binding Arbitration as Opt-in Dispute Resolution Mechanism

In the previous subchapter, we discussed the first phase of the dispute resolution tool provided by the MLI. Since being one of the main disputable issues, the mandatory binding arbitration is needed to be analysed in this subchapter.

According to Progress report on tax certainty, "the mere existence of including an arbitration provision in the text of a tax treaty incentivises competent authorities to reach an agreement during the MAP phase. […] However, some counties still appear to have strong reservations about mandatory and binding arbitration".[188]

As Jasmin Kollmann and Laura Turcan state, "[w]hen determining potential investment locations, tax considerations are of paramount importance. It is therefore important to ensure certainty and predictability of the application of tax treaty rules. Improving the effectiveness of MAPs and tax treaty arbitration is thus an essential complement to address this issue. Therefore, the implementation of an efficient, timely, mandatory and objective system of dispute resolution for tax controversies could prove to be an important asset for countries wishing to attract investors."[189]

[188] "2019 Progress Report on Tax Certainty".
[189] Jasmin Kollmann, Laura Turcan, "Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges", 69.

As of 25 April 2021, 30 jurisdictions have opted for arbitration that will be applicable in case both parties to the CTA chose to apply it.[190] This number is estimated at about 33% of all signatories.[191]

As Nathalie Bravo states, the substantive provisions of MLI are designed according to the same structure except the provisions of mandatory binding arbitration. She points out, "articles 18 through 26 are designed to operate as a single cohesive provision. An apparent reason for [this] is that it provides rules relevant for different steps of the mandatory binding arbitration procedure, which require many more details as well as more tailor-made exceptions than the tax-related BEPS measures established in the other substantive provisions of Multilateral Instrument".[192]

The optional nature of the mandatory arbitration procedure is based on the following reasons: (1) only few jurisdictions among all states joining the MLI decided to apply disputes to mandatory binding arbitration after they were not be solved by the MAP; (2) there is no agreement on the various peculiarities of procedure among the jurisdictions who chose to proceed to mandatory binding arbitration after the MAP.[193]

The mandatory binding arbitration provisions were designed as opt-in and not opt-out clause because otherwise the states needed to spend more time to negotiate and reach a consensus. In this regard, Nathalie Bravo points out that in case the mandatory binding arbitration would be adopted as an opt-out tool, there would be a risk the jurisdictions that does not agree with the provision would apparently reserve the right not to use this option or would not sign the MLI in case the reservations provided by the MLI would not permit them to avoid the application of mandatory binding arbitration.[194]

Considering the optional nature of the mandatory binding arbitration, the Part VI would be applicable only in case all parties to a CTA choose that option and make notifications. As Nathalie Bravo states, "all parties need to embrace the mandatory binding arbitration provisions so that one of the parties can start an arbitration procedure against the other".[195]

In addition, arbitration stage is considered as a next step after the MAP. According to the 2017 OECD Model Commentaries on Article 25(5), in case the competent authorities agree on all disputed issues, there is no necessity in the arbitration even if a taxpayer does not treat the resolution achieved by the competent authority as correct one. Thus, the arbitration cannot be used

[190] "Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting", oecd.org, Accessed 25 April 2021 https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf
[191] "2019 Progress Report on Tax Certainty"
[192] Nathalie Bravo, "A Multilateral Instrument for Updating the Tax Treaty Network", 93-94.
[193] Ibid., 178.
[194] Ibid., 184.
[195] Ibid., 182.

as independent alternative to MAP.[196] As Brian J. Arnold emphasizes, "[t]ypically, in a MAP where the competent authorities cannot agree, the result will be unrelieved double taxation. Therefore, forcing the competent authorizes to agree through arbitration provides taxpayers with certainty and will often [not always in a way the taxpayer expect] eliminate double taxation, to the benefit of taxpayers".[197] Therefore, arbitration phase is treated as an "extension" of MAP aimed at promoting the efficiency of the MAP procedure as in case the competent authorities fail to agree, the solution would be found through arbitration.[198] As Jasmin Kollmann and Laura Turcan state, "[since] it is not an independent judicial dispute resolution mechanism, but merely a supplement of the MAP, arbitration is subject to the same restrictions as the MAP".[199] Thus, in case the competent authorities do not accept the request of the taxpayer for the MAP, the taxpayer could not use the mandatory binding arbitration option.

In case MAP does not result in a resolution of dispute within two years from the date specified in MLI (in particular, clauses that indicate the terms as regards two situations: when competent authorities decided to request or not to request the additional information from the taxpayer)[200], "any unresolved issues arising from the case shall, if the person so requests in writing, be submitted to arbitration in the manner described in this Part".[201]

However, the timeframe indicated could be prolonged in case "both competent authorities agree that a person directly affected by the case has failed to provide in a timely manner any additional material information requested".[202] Moreover, the competent authorities have a freedom through mutual agreement to decide on the "mode of application of the [arbitration] provisions […], including the minimum information necessary for each competent authority to undertake substantive consideration of the case".[203] In this regard, Sriram Govind and Laura Turcan state that since "[e]ven the time limits for initiation of arbitration are linked to satisfaction on receipt of information by the competent authorities", this could result in " 'fishing expeditions' possible on the part of the tax authorities" who could request the information that would not be in fact necessary.[204]

[196]Brian J. Arnold, "The Scope of Arbitration under Tax Treaties" in International Arbitration in Tax Matters, ed. Michael Lang and Jeffrey Owens (IBFD, 2015): 112.
[197]Ibid,, 114.
[198]OECD Model Convention 2017 Commentaries on Art. 25(5), para. 64.
[199]Jasmin Kollmann, Laura Turcan, "Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges", 39.
[200] MLI, Art. 19(8)-19(9)
[201] Ibid., Art 19(1)
[202] Ibid., Art. 19(3)
[203] Ibid., Art. 19(10).
[204] Sriram Govind, Laura Turcan, "The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive", 3.

In addition, the tax authorities could agree on different rules to regulate the issues discussed above, including the agreement on the different time frame.[205] In this sense, Sriram Govind and Laura Turcan point out that the possibility to expand the period for arbitration request for indefinite time "undermines the deterring effect of arbitration and thus hinders the quicker resolution of MAP cases".[206]

The example showing the case when the states choose to apply different set of rules to the arbitration procedure between them could be the case of Australia and Belgium. The states concluded the 'memorandum of understanding'[207] where they agreed on the rules to govern their relations regarding the Part VI of MLI that is expressed in the MLI arbitration positions[208] of the both states.

Thus, the competent authorities are given a high level of discretion:(1) there is no indication of information type that is needed to be provided by the taxpayer, (2) the minimum necessary information as well as its adequacy level is determined by the competent authorities, (3) the arbitration process could be delayed by the competent authorities through requests of information, and (4) competent authorities could choose other rules governing the questions of timeframes and "mode of application" of Part VI in total. All these conditions make the provisions not uniform and unpredictable.

Considering the arbitration procedure, the MLI provides two types: "a 'final offer' arbitration process (otherwise known as 'last best offer' arbitration)"[209] and "independent opinion" option[210]. In the first approach that is a default option, the arbitration panel chooses one of the resolutions proposed by the both competent authorities regarding "each issue and any threshold questions".[211] In the second approach, the arbitration panel decides the issue on the basis of information provided by the competent authorities analysing the CTAs, domestic laws and other sources in case they were expressly indicated by the competent authorities on the mutual basis. In this case, the decision of the arbitrators should "indicate the sources of law relied upon and the

[205] MLI, art. 19(1), 19(10).
[206] Sriram Govind, Laura Turcan, "The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive", 3
[207] "Memorandum of Understanding on the Mode of Application on the Implementation of Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting between the competent authorities of Australia and the Kingdom of Belgium". https://www.ato.gov.au/law/view/document?DocID=MOU/Belgium&PiT=99991231235958
[208] "Australia – MLI Arbitration Profile as of 30-03-2021". https://www.oecd.org/tax/treaties/beps-mli-arbitration-profile-australia.pdf
"Belgium – MLI Arbitration Profile as of 30-03-2021". https://www.oecd.org/tax/treaties/beps-mli-arbitration-profile-belgium.pdf
[209] Explanatory Statement, para. 242
[210] Ibid, para. 245
[211] MLI, Art. 23(1).

reasoning which led to its result".[212] In both types of procedures the arbitration decision is adopted by the 'simple majority' and has no 'precedential value'.

According to the positions of the states, the priority has been given to the 'final offer' procedure[213], among them some states[214] agree to accept 'independent opinion' option in case the other contracting state chose it.[215]

As Sriram Govind and Laura Turcan state, "[a]lthough 'baseball arbitration' has clear advantages, such as simple and faster procedures, encouraging the competent authorities to produce reasonable proposals and the absence of delays, [it] may give rise to an issue with regard to the principle of legality and the principle of equality in constitutional law. As [it] permits decisions purely based on monetary values, identical cases in one state could result in diametrically opposing decisions […]. This may result in judicial challenges to arbitral awards."[216]

In addition, the 'final offer' arbitration procedure could be beneficial also in terms of costs as the states would not need to spend large sums of money for long procedure and the lawyers engaged in the process. Moreover, this approach could be treated by the states as less harmful to their sovereignty as the arbitrators would not provide the fully distinct opinion but just would choose between the proposed options provided by the tax authorities. However, the main drawback of the 'final offer' process is the lack of the independent decisions created by the arbitral panel that in long term could contribute to the uniform understanding and resolution of similar cases. Moreover, the 'final offer' alternative could not be adequate to apply to complex international tax disputes. In this respect, therefore, it could be proposed to provide more authority to the arbitration panel so as the arbitrators could conduct their own examination. The option could be the combined type of procedure that would be based mostly on the 'final offer' alternative, particularly choosing the best resolution of tax authorities but allow arbitration panel to change it making more effective.

Moreover, the competent authorities could mutually decide to choose different rules to regulate the arbitration process that even more contributes to the higher level of freedom of the states.

Furthermore, Sriram Govind and Shreya Rao state that the MLI provides the option "to make an open-ended reservation" regarding arbitration process that permits the states to apply

[212] MLI., Art. 23(2)
[213] As of 25 March 2021, 21 jurisdiction chose the 'final offer' whereas 9 – 'independent opinion'.
[214] For example, Finland, France, Germany, Ireland, Liechtenstein, Luxembourg, Netherlands.
[215] "Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting", oecd.org, Accessed 25 April 2021https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf
[216]Sriram Govind, Laura Turcan, "The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive", 3.

arbitration clauses only to a particular kind of cases.[217] Reuven S. Avi-Yonah and Yaiyan Xu agree stating that "[p]arties enjoy great autonomy and flexibility on the choice of arbitration rules [as they] may also formulate their own reservations with respect to the scope of cases eligible for arbitration subject to acceptance by the other Parties, despite the defined reservations included in Pat VI".[218] As regards the reservations to the scope of cases allowed for arbitration resolution in practice, the most common cases among states are related to: application of domestic anti-avoidance rules, serious penalties (as fraud, tax evasion and criminal offence) and situations that are considered by the competent authorities of both jurisdictions as not suitable for arbitration.[219]

The termination of arbitral procedure could be in two situations: (1) the competent authorities mutually agree on the resolution or (2) the request is withdrawn by the taxpayer.[220]Thus, the conditions of termination only prove the supplementary nature of the arbitration in relation to the MAP as the tax authorities are entitled to agree on the issue even after the arbitration has begun.

As we can see, the provisions as regards the arbitration procedure propose a wide range of options for the states: while the MLI provisions provide for the two kinds of procedure, the competent authorities have a free choice to decide on different procedural rules to govern the arbitration procedure between them. Such a flexible nature of the variety of arbitration rules for proceedings could probably lead to the diverse practice of dispute resolution among the states which chose to apply arbitration clauses. Moreover, even if states decide to apply one of the options of arbitration procedure proposed by the MLI, there is a risk that the arbitration would not be conducted in case states do not select the same approach.

Another problematic aspect that could cause issues is the arbitration decision. The decision provided by the arbitral panel "shall be implemented through the mutual agreement [and] and shall be final". Although the arbitration decision should also be "binding on both Contracting Jurisdictions", there are several important exceptions: (1) if a taxpayer "does not accept the mutual agreement that implements the arbitration decision […] the case shall not be eligible for any further consideration by the competent authorities";[221] (2) if the courts of one of the parties to CTA decided on the invalidity of the arbitration decision, the result would be the situation as if there

[217] Sriram Govind, Shreya Rao, "Designing an Inclusive and Equitable Framework for Tax Treaty Dispute Resolution: An Indian Perspective", 323.
[218] Reuven S. Avi-Yonah and Haiyan Xu, "A Global Treaty Override? The New OECD Multilateral Tax Instrument and Its Limits", 164.
[219] "Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting", oecd.org, Accessed 25 April 2021, https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf
[220]MLI, Art. 22.
[221]Ibid., Art. 19(4)(b)(i)

was no request for arbitration;[222] or (3) if the taxpayer continues the court examination on the issue resolved by arbitration panel through mutual agreement in a court or tribunal.[223]

Moreover, competent authorities could choose a different resolution in the period of three months after the delivery of arbitral decision.[224] Sriram Govind and Laura Turcan point out that due to the exceptions mentioned above, "binding nature of arbitration is significantly reduced […] This may result in the remedy losing its desired scope and effect".[225]Thus, such flexibility as to the finality of the arbitration decision could undermine the very aim of the binding dispute resolution as arbitration. Therefore, one of the measures to balance the broad flexibility could be the requirement for the competent authorities to provide the reasoning in case they decide to derogate from the decision adopted by the arbitral panel.

Considering the confidentiality of arbitration procedure, the parties could also opt-in for the confidentiality option.[226] According to Article 23(5), "the competent authorities of the Contracting Jurisdictions to a Covered Tax Agreement shall ensure that each person that presented the case and their advisors agree in writing not to disclose to any other person any information received during the course of the arbitration proceedings from either competent authority or the arbitration panel"; and in case the persons concerned violate the relevant provision and disclose the information, the procedure shall be terminated.[227] In this respect, according to Explanatory Statement, the confidentiality provision would be applicable to CTA even in case only one party to CTA decided to opt in.[228] The MLI provides the possibility to make reservation in relation to the confidentiality clause[229] in case the party believes it would be unnecessary so that it would not be applicable. On the contrary, the other party which believes that ensuring the confidentiality is important for her could completely opt out from mandatory binding arbitration clause with the party that chose not to agree to keep information confidentially.[230] As we can see, the abovementioned provision provides a high level of flexibility as parties could adhere to confidentiality rule, reserve the right not to apply it or even opt out from the entire mandatory binding arbitration clause. Therefore, even if the states opted for arbitration clauses but their positions do not match in relation to the confidentiality requirement, the arbitration would not be applicable to their CTAs. In addition, the flexibility is also maintained due to the fact that the

[222] Ibid., Art.19(4)(b)(ii)
[223] Ibid., Art. 19(4)(b)(iii)
[224] MLI, Art. 24.
[225] Sriram Govind, Laura Turcan, "The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive", 4.
[226] MLI, Art 23 (4)
[227] Ibid., Art 23(5)
[228] Explanatory Statement, para. 250.
[229] MLI, Art. 23(6).
[230] Explanatory Statement, para. 251

provision of non-disclosure could apply not only to all the CTAs but also to particular agreements chosen by the parties.

Due to the confidential nature of the arbitration procedure, the decisions are not published. As Sriram Govind and Laura Turcan point out, the lack of option to publish the opinions of arbitral panel is an obstacle to the homogeneity regarding the state tax positions on a global scale. Moreover, it would be complicated to encourage other states to opt for arbitration, since achieved results would be impossible to justify due to absence of published opinions.[231] In addition, as Gaetan Zeyen points out, due to the absence of transparency "arbitration could lose its 'legitimacy' and be regarded as a tool introduced by the international business community […] to 'bypass' the [ordinary domestic] administrative and judicial procedures".[232]

However, such situation could be resolved using the short abstracts containing summary of facts and main arguments of the arbitral panel. In this respect, the EU Arbitration Directive could be an interesting example in respect of publishing decisions, in particular "in the form of abstracts summarizing the key aspects".[233] The publication of the decisions, especially those that are related to the interpretation of CTAs and MLI, could contribute to transparency, and the transparency in turn would promote predictability. Moreover, although there is a lack of precedential value of arbitration decisions, their publication could pave the way for the common vision as to the general concepts and uniform understanding.

Considering the appointment of arbitrators, the panel should be consisted of three members. The two arbitrators are appointed by the competent authorities (one from each tax authority) whereas the third member ('Chair') is appointed by the already chosen two members of the panel.[234] However, "the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a national of either Contracting Jurisdictions" could be involved in the process of appointment in two cases: (1) the competent authority did not manage to select an arbitrator within the specified timeframe or (2) the two arbitrators selected by the parties did not manage to appoint the 'Chair' within the specified timeframe.[235] In this sense, Sriram Govind states that despite the usefulness of the introduction of the procedural rules governing the appointment of arbitration panel into the MLI, "providing default appointment rights to an official of the OECD may not be seen well by

[231]Sriram Govind, Laura Turcan, "The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive", 3.
[232]Gaetan Zeyen, "When Taxation Meets Arbitration: Recent Initiatives to Introduce and Promote Arbitration in International and European Taxation", Intertax 45,11 (2017): 731.
[233] Sriram Govind, Laura Turcan, 10.
[234] MLI, Art. 23(1)-23(2).
[235] Ibid., Art. 20(3)-20(4).

developing countries".[236] This could be explained by the fact the OECD is treated as representing more developed states comparing to the UN which protects the positions of developing countries.

As regards the requirements prescribed in the MLI provisions, the members of the arbitration panel should each possesses the "expertise and experience in international tax matters" and be "impartial and independent".[237] The introduction of the mentioned requirements for the arbitrators into the MLI could be treated as a good step towards ensuring fair process. However, Jasmin Kollmann and Laura Turcan state that the issue of arbitrators' appointment is a problematic one as "there is no standard set of qualifications for prospective MAP arbitrators".[238]

Sriram Govind and Laura Turcan observe that the adopted MLI rules could be considered as "not adequate to ensure independence without inclusive, broad definitions of the terms and with no one to ensure that these criteria are met". They also propose to demand "a declaration or an affidavit from the arbitrators appointed with regard to their independence, which may be enforceable against them in domestic courts in case of misrepresentation".[239]In addition, the requirements for the arbitrators could be provided in more detail through the guidance. Although such rules would be of recommendatory nature, it would still provide the states with additional already developed option giving more uniformity.

Moreover, the competent authorities could decide on the different rules regulating the appointment of members of arbitration panel that again could expand the variety of the regulation options chosen by the states. In particular, in relation to the questions of the timeframes for appointment, requirements needed to be satisfied by the arbitrators to be appointed and situations when the parties do not manage to appoint the arbitrators.

Several scholars have provided the following proposals as to the formation of arbitration panel. Michael Lang proposed to create "a list of arbitrators under auspices of the U.N. and OECD [that] could be a starting point to promote and facilitate arbitration". Jeffrey Owens proposed to create a "self-standing arbitration panel under the auspices of the UN and OECD [that] could also create a panel of independent arbitrators that would be balanced in terms of experience, nationality and background on a pro bono basis".[240] Sriram Govind and Sheray Rao as well propose to create an "institutional framework for arbitration under the auspices of the United Nations" within which the arbitrators would be selected. Moreover, the authors suggest forming the panel in the

[236] Sriram Govind, "The New Face of International Tax Dispute Resolution: Comparing the OECD Multilateral Instrument with the EU Dispute Resolution Directive", 316.
[237]MLI, art 20(2)
[238]Jasmin Kollmann, Laura Turcan, "Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges", 45.
[239]Sriram Govind, Laura Turcan, "The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive", 4.
[240]Jasmin Kollmann, Petra Koch, AlicjaMajdanska, Laura Turcan, "Arbitration in International Tax Matters", Tax Notes International 77, 13 (2015): 1194

international tax law sphere through dividing it into "two pools – one pool comprising net capital exporting country representatives and one pool comprising net capital importing country representatives".[241] Taking into consideration the changes possible within the BEPS-measures framework, particularly the MLI, we believe that it could be useful to provide the list of arbitrators(including experts from different regions)designed by both the OECD and UN through the guidance tool adopted as a recommendation. Such a solution could be a 'win-win' strategy, on the one hand, due to its non-mandatory nature as it would not require the long process of acceptance and adoption by the states. And, on the other hand, it could facilitate the jurisdictions (that already joined the arbitration option) to find the experts for the arbitration process while also encourage the other jurisdictions (especially developing countries) to opt in for the arbitration promoting the confidence in the arbitration panel.

The flexible nature of the arbitration provisions could also be explained by the doubts of the developing states to join this option. The reasons why developing states are reluctant to opt in for arbitration clauses: (1) arbitration proceedings in respect of the tax disputes demand "highly-skilled" professionals (staff training could entail high costs that could be burdensome for developing countries); (2) the need for substantial expenditures for arbitration fees.[242]

Sriram Govind and Sheray Rao determine the following concerns of the developing and emerging states (India is taken as an example): "how lack of expertise in developing countries would result in an unfair advantage […], how the neutrality and independence of arbitrators would be difficult to guarantee, how mandatory arbitration would be expensive […], and how it is not in the interest of a state to limit its tax sovereignty through arbitration".[243] Analysing the experience of India as a representative of developing states, the authors points out the "even-handedness" as the major issue India worries about. Despite the fact the international tax regulation seeks to equality, there is still the distinction between the positions of developed, developing and emerging economies as regards particular important spheres. Developing states are interested in enhancing the source states' right for taxation whereas the developed economies attempt to strengthen "residence based taxation norms that suit capital exporting countries". In this regard, to solve this issue, the authors propose to provide the guidance related to the formation of the arbitration panel by way including the representatives from different states.[244]

[241] Sriram Govind, Sheray Rao, "Designing an Inclusive and Equitable Framework for Tax Treaty Dispute Resolution: An Indian Perspective", 333.
[242] Xueliang Ji, "The Changing Paradigm of International Tax Dispute Settlement: What Are the Promises and Challenges of Mandatory Arbitration for China?",134.
[243] Sriram Govind, Sheray Rao, 326.
[244] Ibid., 331.

Conversely, as regards the sovereignty argument, Spyridon E. Malamis points out that considering the experience of the international investment and trade relations between the states, the states already agreed "to sacrifice part of their political control […] in order to protect their longterm interests in the globalized economy". Moreover, the author admits that since the states have already restricted the part of their sovereignty in relation to unilateral actions regarding taxation by signing bilateral tax treaties, their will to accept the competence of the independent institution to monitor their international obligations could be treated as logical, deliberate decision and not the violation of their sovereignty powers. Therefore, the author concludes that the true cause of the reluctant implementation of independent international tax dispute resolution mechanism is the fact that states believe that "such a sacrifice of their political control in tax disputes would not grant them with sufficient political and financial advantages to cover the potential losses".[245] Thus, to tackle the doubts of the states regarding the beneficial nature of international dispute resolution, particularly mandatory binding arbitration, the time as well is an important aspect to show the efficiency of the provided mechanism and promote trust among the countries.

In this sense, there is a proposal to provide "training programs" within the international dispute resolution tool for expert from developing states.[246] The mentioned measure could be used as a basis for creation a training program within the MLI dispute resolution mechanism to promote arbitration among developing counties and try to solve the expert qualification and high costs challenges.

The taxpayers are not involved in the arbitration process. The MAP provisions "missed out the opportunity to permit active taxpayer participation in the arbitration process".[247] Engaging the taxpayers to the dispute resolution proceedings could be useful with respect to the provision of evidence that facilitate their protection. Such an involvement could be made in the form of "oral statement".[248] In addition, the taxpayers could be allowed to provide "written submissions" as well. The mentioned right is already available under the OECD Sample Mutual Agreement on Arbitration and EU Council Directive on tax dispute resolution mechanisms in the European

[245] Spyridon E. Malamis, "The Future of OECD Tax Arbitration: The Relevance of Investment Treaty and WTO Dispute Settlement Practice in Promoting a Gradual Evolution of the International Tax Dispute Resolution System", Intertax 48, 11 (2020): 968.
[246] Jeffrey Owens, Arno E. Gildemeister, and Laura Turcan, "Proposal for a New Institutional Framework for Mandatory Dispute Resolution", Tax Notes International 82, 10 (2016): 1007.
[247] Sriram Govind, Laura Turcan, "The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive", 4.
[248] Ibid, 145.

Union. Such an option could eventually increase the trust of taxpayers in the tax dispute resolution mechanisms.[249]

As Brian J. Arnold points out that although both MAP and arbitration are launched by the initiative of the taxpayer, "once initiated, both are state-to-state processes controlled by the competent authorities".[250] In this sense, Spyridon E. Malamis compares the investment and tax international disputes. The author states that the investor-state disputes are cause by the "first aggressive move" of the state through the breach of the "provision of the relevant BIT [bilateral investment treaty] against the interests of an investor – who has access to arbitration 'as a shield'" whereas tax disputes are caused by the "first seemingly aggressive move" on the part of the taxpayer who decided to use the aggressive tax planning schemes.[251] Therefore, from the taxpayer position, their involvement in the process would lead to stronger protection as it would create the possibility to present the case and defend their rights. In other words, the taxpayers would be heard. However, such modification could be reluctantly accepted by the states.

Still arbitration could be a good way to resolve disputes comparing to MAP as it could remedy the deficiencies in resolution of disputes. First, arbitration could be considered more independent and less biased comparing to MAP as proceedings within the MAP are fully under control of the competent authorities. Second, mandatory binding arbitration could encourage competent authorities not to protract and resolve disputes faster within the MAP that interferes less into the sovereignty of states. Third, there are more benefits for the taxpayer in case of rendering the arbitral decision: taxpayer could not follow the arbitral decision and proceed to local remedy if dissatisfied with the decision; the arbitral decision would be binding for both competent authorities that would have to achieve an agreement on mutual basis to implement the decision.[252]

Moreover, flexible nature of dispute resolution within the MLI framework makes it beneficial for the states to join the Convention. In this regard, Spyridon E. Malamis concludes that the nature of the process and final decision of dispute resolution mechanism (1) "safeguards [states'] political interest" even in case a taxpayer would decide to abuse the arbitration option and (2) "enhances states' good diplomatic relations [providing] incentive to reach an amicable resolution".[253]

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[249] Sriram Govind, Sheray Rao, "Designing an Inclusive and Equitable Framework for Tax Treaty Dispute Resolution: An Indian Perspective", 334.
[250] Brian J. Arnold,"The Scope of Arbitration under Tax Treaties", 117.
[251] Spyridon E. Malamis, "The Future of OECD Tax Arbitration: The Relevance of Investment Treaty and WTO Dispute Settlement Practice in Promoting a Gradual Evolution of the International Tax Dispute Resolution System", 970.
[252] Xueliang Ji, "The Changing Paradigm of International Tax Dispute Settlement: What Are the Promises and Challenges of Mandatory Arbitration for China?",147-148.
[253] Spyridon E. Malamis, 972.

As Sriram Govind and Laura Turcan point out, procedural rules provided in the MLI are more detailed comparing to previous OECD and UN Models and the MLI "creates a workable, multilateral framework for treaty dispute resolution". In addition, the efforts of OECD are commendable since particular aspects, such as the choice in relation to the arbitration type, the clause regarding the appointment of arbitrators provided in detail and specified time frames, "definitely improve the framework and provide taxpayers with much greater certainty". However, on the other hand, they admit that "there is room for refinement" to be even more effective.[254]

Taking into consideration the abovementioned, the flexibility is reflected in each aspect of the mandatory binding arbitration clause provided by the MLI:

(1) arbitration is an optional provision and the states are not bound to resolve the disputes under Part VI;
(2) arbitration is not a separate tool but rather further step of MAP;
(3) the MLI provides the two alternatives of the arbitration procedure ('final offer' and 'independent opinion');
(4) the arbitration decision is characterized by the broad limitations as to its binding nature;
(5) the confidentiality requirement depends on the position of the states and asymmetrical choice of states could even cause the entire opting-out from the Part VI;
(6) the appointment of arbitrators as there are no detailed rules as to the requirements;
(7) although each provision of arbitration provides for the rules governing certain aspect, the competent authorities are given a possibility to choose their own different rules to regulate the dispute resolution within the framework of arbitration. Therefore, a broad discretion is given to the states, particularly in terms of type of arbitration procedure, timing, appointment of arbitrators and the "mode of application" in general.

Although the mentioned level of flexibility could lead to different positions of the states, the provisions were designed in such a way to satisfy as many diverse interests as possible to promote the higher level of involvement among the jurisdictions. The current practice of application illustrates that only one third of the signatories decided to opt for the arbitration. The reason for that, as we discussed above, is the lack of trust (especially it is a case of developing states) due to the low level of transparency and predictability. Still the arbitration within the MLI could be a feasible dispute resolution stage provided the abovementioned challenges would be solved through the proposed tools as recommendatory guidelines and training programs.

[254] Sriram Govind, Sheray Rao, "Designing an Inclusive and Equitable Framework for Tax Treaty Dispute Resolution: An Indian Perspective", 333.

3.3 Further Improvements for MLI Dispute Resolution

In the previous subchapters, we analysed the nature and challenges of the existing dispute resolution within the MLI. This subchapter is aimed at discussing the proposals that could improve the dispute resolution mechanism within the MLI as well as the proposals as regards new international dispute resolution system for tax disputes.

As was mentioned in the first two subchapters, despite the shortcomings of the current dispute resolution mechanism within the MLI, it fulfills its function. However, still several changes could be discussed: the introduction of alternative dispute resolution (hereinafter – ADR), the use of modern technologies within the process of dispute resolution and adoption of protocol amending the MLI.

Considering the ADR, it is gaining popularity as it promotes cooperative nature of dispute resolution. Moreover, the advantage of such tools is their flexible nature that does not overburden either the tax authorities or the taxpayers.[255] This research would discuss the two ADRs: mediation and conciliation.

One of the suggestions is the creation of mediation within the multilevel dispute resolution mechanism forming the part of MAP. Such a mechanism would be characterised as followed: in case the issue was not resolved through the negotiations between the competent authorities of states within the specified time, the parties would address the issue concerned to mediation. And, finally, in case mediation would be unsuccessful in achieving any result within a specified time, the arbitration would be considered as an optional final stage to solve the issue.[256] In this regard, Sriram Govind and Laura Turcan point out that "the addition of a third-party, independent mediator who would require the competent authorities to meet to resolve their differences and arrive at an objectively satisfactory conclusion without much in the way of a time delay would have been a much desirable option".[257]

Moreover, it is argued that such a flexible non-binding mechanism could help to reach an agreement and as a result to increase the efficiency of the MAP. In addition, mediation could be as "a precursor to arbitration" as long as developing jurisdictions gain experience and trust in mandatory binding arbitration option.[258] Proposal regarding the mediation is interesting and could

[255] Jasmin Kollmann, Laura Turcan, "Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges", 66.
[256] Juliane Groper, "The Mutual Agreement Procedure in International Taxation: The Need for Procedural and Administrative Rules" (Munchen: Utz Verlag, 2020), 153.
[257] Sriram Govind, Laura Turcan, "The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive",4.
[258] Sriram Govind, Shreya Rao, "Designing an Inclusive and Equitable Framework for Tax Treaty Dispute Resolution: An Indian Perspective", 324.

provide several advantages as, for instance, the parties obtain full control over the process that is confidential. In this sense, the sovereignty of the states is highly protected and it could promote flexibility that is one of the main features of MLI resulting in the involvement of greater number of jurisdictions.

However, on the contrary, the mediation could have the drawbacks that could undermine the aim of its implementation into the MLI. First, the high discretion of competent authorities in the process could lead to a deadlock in case parties are unwilling to reach a settlement. Moreover, mediation does not assume a binding decision. Considering the optional nature of arbitration, if the states did not decide to apply arbitration clause, there would be no sense in the mediation phase as it could lead to the same outcomes as the MAP phase. In addition, it would be required to provide the efficient and clear procedural rules for conducting the mediation as time frames and issue related to the competent experts experienced in mediation (even could be proposed a list of mediators) that would result in time and cost expenses.

Second option, in particular conciliation, could be considered regarding the same effects. The only exception in this type of ADR is that the conciliator as the third independent person actively directs the parties to the common agreement. Furthermore, the conciliator generally should be an expert in the sphere of the dispute resolution as his role is also to develop the best option for both parties.[259]In this sense, the issue of providing the guidance for the conciliation procedure and the requirements for candidates for conciliation within the resolution of tax disputes is even more important than in mediation.

Sriram Govind and Sheray Rao state that many doubts of the developing states, in particular sovereign power of states, concern "the binding nature of arbitration" whereas other as "costs and even-handedness would extend to non-binding dispute resolution mechanisms as well". Therefore, it is important to consider the mentioned reasons in case the states decide to introduce such dispute resolution options.[260] Moreover, the authors propose to add a mandatory mediation as a tool with the time limit of one year after the competent authorities were unable to reach an agreement under the MAP but before the arbitration stage. And as regards the procedure, the proposition is to conduct it using the technologies.[261]

Therefore, we consider that although the introduction of mediation and conciliation into the MLI could provide for more flexibility, it could undermine the effectiveness of the Convention providing even more challenges to resolution of the international tax disputes. Thus, it would be

[259] Alessandra Sgubini, Mara Prieditis& Andrea Marighetto, "Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective" (2004). https://www.mediate.com/articles/sgubiniA2.cfm
[260] Sriram Govind, SherayRao, 326.
[261] Ibid., 332-333.

more beneficial to include the mediation or conciliation stage into the new independent institutional framework for tax dispute resolution.

Considering the improvement through technologies, since the technologies have developed substantially and the phenomenon of the digital economy is not new for current international relations, the MAP and arbitration provided in the MLI could be improved by way of using modern technological modifications that could benefit both the taxpayers and tax authorities. In this regard, Juliane Groper points out that the technological developments could decrease the financial and time costs though providing the relevant data to all parties. In addition, where it would be appropriate to engage and inform the taxpayer. Considering the example of Canada – US experience, the author also admits that during the arbitration procedure the panel need not meet physically and could use other types of communication as, for example, online conferences. Such a remote tool could be beneficial for developing states as it could decrease the expenses on arbitration (for instance, travelling costs, etc).[262]

Thus, the experience of the US and Canada could be useful as an example on which the states could rely. Since the technologies are being introduced even on the national level into judicial and administrative spheres, they would definitely facilitate the international dispute resolution mechanism that involve jurisdiction from different parts of the world.

Digitalization could be introduced into both MAP and arbitration stage. As regards the MAP, (1) the taxpayer could launch the process online; (2) the system would inform the taxpayer about additional requests of tax authorities and about the status of the request (the start of the MAP or the denial); (3) the system would determine the schedule, time frames and progress in the case that could be monitored online; (4) introduction of the "data room" based on the example used in M&A due diligence process (immediate access to the same data among all parties concerned: the taxpayer, both tax authorities).[263]

As regards the arbitration stage, the technologies could be employed to the following aspects: (1) the selection procedure of arbitrators that would be based on certain designed standard (the system would recommend appropriate candidates from the list and connect them with the tax authorities); (2) the arbitration process since the access to the data room with all necessary information would be provided to the arbitral panel; (3) the arbitration decision since the system could "archive" particular documents related to the arbitration process and short edited abstracts

[262] Juliane Groper, "The Mutual Agreement Procedure in International Taxation: The Need for Procedural and Administrative Rules", 156.
[263] Ibid., 157.

of decisions as well as "facilitate keyword research" as to the particular matters for the future cases.[264]

Moreover, considering the criterion for selecting the arbitrators, the candidates could be selected based on field of expertise, representation of certain region (that would help to understand the specificity of the political, legal and social background and could be positively considered by the developing states), experience etc. In addition, in case the priority would be given to transparency comparing to confidentiality, the access could be provided to the arbitration panel in order to look through previous abstracts of decisions (main facts and reasoning) classified based on the disputed issue that could contribute to the unified interpretation.

One of the most important benefits, according to Juliane Groper, is that "[the technology] facilitates the standardization of the process and helps to get everyone on the same page". Moreover, the author points out that the developing states that do not possess much confidence in the MAP and arbitration would be informed about "what documents are required, what the next steps are and have equal access to the pool of arbitrators".[265]

Thus, the digitalization of dispute resolution mechanism could benefit all the parties concerned: taxpayers, tax authorities, states and even third parties as arbitrators. The application of technologies could promote clarity, predictability and openness as regards the time frames, requirements and the process as a whole. Moreover, the costs and time could be saved owing to the technological improvements. In addition, such a digital modification could be a great solution in terms of COVID-19, since there are restrictions as to the crossing the borders, extra costs for tests and living expenses in case of mandatory isolation period.

However, the important thing here would be the development of a clear and detailed regulation since the introduction of technologies entails the issue of data protection due to the exchange and storage of confidential information that could not be in the public domain. And, above all, the particular software should be designed administering by the special body.

Considering the viability of amending the MLI through the protocol, this option could be controversial as it entails several obstacles. Firstly, as regards the amendment procedure, "any [p]arty may propose an amendment to this Convention by submitting the proposed amendment to the Depositary" and for the examination of that amendment "[a] Conference of the Parties may be convened".[266] In this regard, Nathalie Bravo states that the provisions of MLI encompass "the initiation of the amendment procedure [and] do not set forth the adoption procedure of an amendment, including the number of votes needed to adopt an amendment, […] the entry into

[264] Juliane Groper, "The Mutual Agreement Procedure in International Taxation: The Need for Procedural and Administrative Rules", 158
[265] Ibid., 159.
[266] MLI, Art. 33.

force procedure, that is, whether ratification will be a requirement […] and, if ratification will be required, what number of parties to [MLI] must ratify the amendment before it enters into force [as well as] the effects of an amendment on the text of the instrument".[267] The author also states that since the articles of MLI do not provide the mentioned rules, they should be agreed "at the time the conference of the parties takes place".[268] Thus, the first issue is the lack of regulation as regards the modification procedure of the MLI.

Secondly, the issue could arise on the stage when the party refers to the depository with a request to arrange the conference of the parties. The conference of the parties would take place only in case "the request would be supported by one-third of the parties within six calendar months".[269] Therefore, there is a risk that the proposition regarding the amendments would be denied even not negotiated by the states.

In addition, according to Article 38(3), "[a] party to this Convention is not bound by a protocol unless it becomes a party to the protocol in accordance with its provisions". In this regard, there are two question to be discussed. The first one is related to the nature of the protocol. Since the protocol would change the substantial provisions related to minimum standard MAP provision and mandatory binding arbitration option, it would affect the provisions of CTAs. Thus, the development of the protocol would require the whole process of negotiations, adoption and ratification. This could be a long-term and costly process owing to necessity of balancing the sovereignty concerns and global interest to make the protocol flexible enough not to undermine its efficiency.

The second concern is the risk of asymmetrical application when part of the states would sign the protocol amending the MLI (and the new provisions would be in place) whereas the others would not and continue to apply the MLI initial provisions. The major problem regarding this issue could be the situation when the Convention would become impossible to apply between the two states that adhere to different rules. Therefore, the option of adopting the protocol gave rise to wide range of uncertainties that could eventually undermine the effectiveness of MLI.

As regards creation of a new international dispute resolution framework, it is worth mentioning that the OECD has made significant steps in relation to the dispute resolution. However, as Sriram Govind and Laura Turcan emphasize, "the reality is that in a global environment, global solutions are required".[270] In this regard, the multilateral convention regarding

[267] Nathalie Bravo, "A Multilateral Instrument for Updating the Tax Treaty Network", 280.
[268] Ibid., 281.
[269] MLI, Art. 31(3)
[270] Sriram Govind, Laura Turcan, "The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive", 11.

the international dispute resolution in tax matters could be adopted. The convention would provide rights and obligations to the states and would be of multilateral nature.

The proposed convention could be created within the UN framework or within the new institution created with the specific aim related to the international tax disputes resolution. The institution would provide the detailed rules governing the dispute resolution process, time periods, selection and appointment of arbitrators and mediators, the nature of decisions and other important aspects. The possible dispute resolution system could be the following: (1) the MAP stage, (2) mediation or conciliation stage, (3) arbitration. All three stages would be mandatory with the specified time frames and requirements. The arbitration decision would be of the binding nature. In addition, in case the priority would be given to the 'independent opinion' type of arbitral decision, the appellate body could be created to provide the possibility of reviewing the arbitral decision. The institution would also provide the list of experts who could act as mediators and arbitrators to facilitate the dispute resolution for the states. The main drawback in this line would be a long process of negotiations among the states due to their difference. However, in case such an international instrument would be signed, it would be a significant step as it would dramatically change the existing international dispute resolution framework.

In conclusion, considering the MAP mechanism, the flexibility is resulted in the following issues: (1) the MAP does not require any result but rather best efforts of the tax authorities; (2) the broad discretion of the tax administrations resulting from the lack of clear rules as to the time frames and requirements for the information requested by the competent authorities and (3) unpredictability of the resolution due to the lack of the obligation for the tax authorities to notify the taxpayer about the status of the request.

Considering the mandatory binding arbitration, the flexibility caused the following challenges:(1)the low level of involvement among the states due to the optional and supplementary nature of the arbitration provisions; (2) the risk of different practices among the states resulting from the high level of freedom: although each clause of arbitration provides for the rules governing certain aspect (including alternative options), the competent authorities are given a broad discretion to choose their own different rules in terms of type of arbitration procedure, timing, minimum necessary information, appointment of arbitrators and the "mode of application" in total; (3) broad limitations to the binding nature of the arbitration decision; (4) the diverse application or even the risk of non-application of arbitration provisions because of asymmetrical choices caused by different positions as to the confidentiality requirement; (5) the low trust in arbitration due to the lack of detailed rules as to the requirements for arbitrators; (6) the lack of

uniform understanding, application and predictability of dispute resolution mechanism resulting from the non-public nature of the arbitral decisions.

Taking into consideration the nature of MLI, the MAP and mandatory binding arbitration could be treated as a feasible dispute resolution mechanism provided the mentioned challenges would be addressed by the recommendatory guidance. The guidelines should provide detailed requirements for the arbitrators, the list of arbitrators developed within the OECD and UN (involving representatives of different regions) and the training programs for experts from developing countries to promote clarity, transparency, predictability and confidence in dispute resolution mechanism within the MLI.

The recommendatory nature of the guidance could be a more effective approach owing to the following: (1) it would not require long process of negotiation and adoption by the states and (2) it could clarify the problematic challenges and encourage the states to opt for arbitration (especially developing countries) promoting the confidence in the process.

Considering the further improvements, ADRs (mediation and conciliation) are not considered to be appropriate for the MLI since they could result in less efficiency of the Convention due to the non-binding nature and the need for additional costs, administrative resources and development of the detailed provisions. On the contrary, the ADRs could be an effective additional tool for the new multilateral convention for tax disputes resolution.

As regards the modern technologies, they could be introduced into both the MAP and arbitration stage within the MLI that would benefit all stakeholders of the dispute resolution mechanism. The technological improvements would enhance certainty, predictability and transparency regarding the whole process of dispute resolution provided the special developed software would be regulated by the clear rules to ensure the data protection.

As regards amending the MLI through the protocol, this proposal entails several risks that could undermine the effectiveness of the Convention: the rules govern the amendment process of MLI partially, the adoption of protocol would require the full procedure of negotiations, signing and ratification resulting in a long-term and costly process and the possible asymmetrical choice as to the application leading to the conflicts between the provisions of MLI and the amending protocol.

As regards the new international tax dispute resolution framework, it could be created on the basis of the multilateral convention within the UN framework or new established institution. Although such an instrument would entail the long and complicated process of adoption, it could become a fundamental change in tax dispute resolution area.

Thus, although in the narrow sense the MLI dispute resolution could be treated as effective owing to the further improvements incorporated into the guidance, in the broad sense there is a need for creation a completely new international tax dispute resolution framework.

CONCLUSIONS

1. Since the bilateral treaty network was proved to be unable to address the BEPS challenges, the OECD has adopted the MLI as a tool to tackle the aggressive tax planning practices.

Multilateralism and flexibility are determined as the two major peculiarities of the MLI. As regards the multilateralism, we agree with the scholars on the dualistic nature of the MLI: although the MLI establishes the bilateral obligations between the parties to particular tax treaty that it modifies, it promotes sharing the collective interest among the states aimed at tackling the BEPS schemes. As regards the flexibility, it permeates the entire framework of the MLI: (1) application only to the chosen CTAs; (2) various approaches in satisfying minimum standard (3) opting – in tool reflected via optional and alternative provisions and (4) opting – out tool reflected via reservations. The two features supplement each other as follows: due to the multilateralism the states could endeavour to the common objective of addressing the BEPS, whereas owing to the flexibility the more states with different positions could join the Convention.

Considering the special nature of the two main features of MLI, we decided to consider the Multilateral Instrument as a sui generis international convention.

2. In the narrow context, the flexible nature of the prevention of treaty abuse provisions could be considered to undermine the effectiveness of MLI due to the broad, uncertain and unpredictable nature of minimum standard. The mentioned risks could be caused by the following: (1) the PPT as the first minimum standard option while being provided in the MLI as a leading rule, is drafted as a broad and uncertain concept; (2) the second minimum standard option designed as a combination of PPT and LOB raises the challenges regarding the relationship between the scopes of two rules; (3) the third option satisfying the minimum standard entails the bilateral renegotiations that could result in various interpretation and application of minimum standard or even the situation when the PPT would become futile. However, the risks could be mitigated through the new guidance tool providing the interpretation based on current application of prevention of treaty abuse provision by the jurisdictions.

In the broad context, the flexible nature of the provisions enhances the effectiveness of MLI since the Convention performs the main task of the BEPS Action 6, particularly addressing the tax treaty abusive practices. Therefore, even in case the minimum standard would be satisfied mostly by bilateral renegotiations, the MLI would be considered as preserving its effectiveness being one of the OECD tools aimed at achieving anti – BEPS goals.

3. From the narrow perspective, the dispute resolution mechanism provided by the MLI is effective enough to resolve disputes related to the Convention considering the balance of

flexibility and viability. Although both the MAP and arbitration provisions possess drawbacks, the dispute resolution could be considered as designed to preserve the aim of the MLI. The proposal to adopt the protocol to MLI amending the existing dispute resolution system is attractive. However, it entails risks that could cause further challenges: only partial regulation of the amendment process of MLI without clear rules governing each stage, the protocol would require the full procedure of adoption leading to the lasting and costly procedure and the possible asymmetrical application resulting in the conflict between the provisions of MLI and the amending protocol.

Therefore, we consider that for now the best solution to introduce improvements could be the development of the detailed guidance covering most problematic issues of dispute resolution. In particular, as regards the MAP the main problematic issues are: (1) lack of the requirement of the result but only best efforts of the tax authorities; (2) broad discretion of the tax authorities as to the clear timeframes and information request requirements; (2) unpredictable nature of the dispute resolution owing to the lack of requirement for the tax authority to notify the taxpayer about the status of the request. As regards the mandatory binding arbitration, the major controversial questions are the following: (1) risk of various practice among jurisdictions as result of the broad discretion of the tax authorities to choose their own rules for arbitration procedure, timing, minimum necessary information, appointment of arbitrators and the 'mode of the application' as a whole despite the rules provided by the MLI; (2) broad limitations to the binding nature of the arbitration decision; (3) high level of freedom as to the confidentiality requirement; (4) low trust in arbitration caused by the lack of detailed rules as to the requirements for arbitrators; (5) lack of unified interpretation, application and predictability of dispute resolution mechanism caused by the non-publicity of the arbitral decisions.

Moreover, the dispute resolution could be improved by introduction of the technological modification. Although the guidance would operate as a recommendatory tool, it would provide for more clarity, unified vision of the essential aspects and trust avoiding the long process of the approval by the states.

From the broad perspective, the current dispute resolution mechanism in relation to tax disputes, including addressing BEPS practices, require substantial reformation. In this regard, the proposals of creating the international tax dispute resolution framework could be relevant. Such a mechanism could be established on the basis of the multilateral convention. The major challenge would be the process of adoption as it would involve long negotiations to meet the consensus among the all participants. However, in case being signed, it could become an effective powerful instrument in the international tax area.

RECOMMENDATIONS

1. It is important to develop clear and unified guidelines for interpretation of the main important controversial terms regarding the prevention of treaty abuse provisions that would provide clarity and uniformity in relation to implementation process. The new interpretation guidance should be based on the recent practice of the jurisdictions. For these purposes, the use of modern technologies would be beneficial. In particular, developing the database where the states would upload their reports containing the problematic aspects regarding the situations they face in practice. In this regard, the detailed regulation should be adopted, particularly governing the form of report, the information that should be provided, the time frames for submitting, the data protection if necessary etc. Moreover, the special algorithm could be designed to classify reports on the basis of the keyword – main problematic issue. In addition, the administrative body should be established within the OECD that would control the procedure of exchange and storage of data, analyse the content provided in the reports and select the relevant information. This body could be a newly established special agency or the mentioned functions could be carried out by the Inclusive Framework.

2. As long as there is no new framework for international tax dispute resolution, the OECD could develop the detailed guidance to clarify the main aspects of MAP and arbitration, in particular, proceedings, selection of arbitrators, arbitral decision etc. The guidance tool should be of a recommendatory nature. The non-mandatory nature of guidelines could be supported by the fact it would not require the long process of approval by the states. Moreover, it could encourage the states not yet members of the MLI (especially developing countries) to join the arbitration enhancing the clarity and confidence.

3. The following helpful tools could be designed:

(1) List of arbitrators that are experts in international tax law designed by both the OECD and UN (ensuring there would be representatives from different regions to promote participation of the developing countries).

(2) List of requirements for the members of the arbitration panel (more detailed comparing to MLI provisions) could be included into the guidance tool. In addition, the introduction of the written statement for arbitrators regarding their independence and impartiality could be a useful instrument.

(3) Plan with the purpose to show the relevance of including the technologies into the MAP and arbitration procedure, to promote such inclusion among the states and to propose the detailed provisions that would introduce the technological aspects to the MLI dispute resolution provisions.

(4) Training programs within the MLI dispute resolution mechanism to promote arbitration among developing counties and try to solve the expert qualification and high costs challenges.

4. Technological improvements of the MAP and mandatory binding arbitration. The following modernisation could be made: (1) the introduction of the online procedure (beginning with the request of tax payer and finishing with the adoption of the decision) though the specifically designed software; (2) introduction of virtual 'data rooms' where all interested parties could share information; (3) selection and appointment of arbitrators using software (the algorithm based on the different criteria as field of expertise, representation of certain region, experience would suggest the appropriate arbitrator); (4) storage of case briefs and division of the cases by category regarding the disputed issue in case the confidentiality requirement would be reduced.

5. The new international tax dispute resolution framework could be a further step. It could be created within the UN or even within the specifically established institution. The basis for the mentioned dispute resolution framework should be the multilateral convention governing all aspect of the proposed mechanism. The proposed stages of dispute resolution system could be as follows: (1) the MAP; (2) mediation or conciliation; (3) arbitration; (4) appellate body. The first three stages should be obligatory providing certain prescribed time period and other limits. The nature of arbitration decision should be binding. In addition, the possibility of appeal could be prescribed conditioned on the restricted circumstances. The arbitral panel could be created either institutionally or as ad hoc, and in the latter case the list of arbitrators and mediators should be developed. Although there is a risk of long procedure of adoption, but in case this goal would be achieved – it would be a significant step in the international tax dispute resolution.

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ABSTRACT

The adoption of Multilateral Instrument was a significant step in the international tax regulation. However, the Convention would be futile in case its provisions would not be effective enough to achieve the set purpose. Since the provisions of the Multilateral Instrument started to change the bilateral tax treaty network, there is the need to analyse the Convention and the challenges it raises in practice. Therefore, this research is aimed at determination of the challenges caused by the flexible nature of prevention of treaty abuse and dispute resolution provisions and answers the following question: does a flexible nature of the prevention of treaty abuse and dispute resolution provisions provided by the Multilateral Instrument undermines its effectiveness; and what solutions could be taken to address the challenges raised?

The research analyses effectiveness of the provisions from the two perspectives: (1) whether the overall aim of the OECD BEPS package is fulfilled and Multilateral Instrument is treated as merely one of the mechanisms used for that purpose (broad perspective) and (2) whether the certain provisions of Multilateral Instrument are sufficiently drafted to achieve its mission as an international convention (narrow perspective). On that basis, the recommendations are provided for further improvements.

Key words: Multilateral Instrument (MLI), flexibility, principle purpose test (PPT), mutual agreement procedure (MAP), mandatory binding arbitration.

SUMMARY

CHALLENGES IN APPLYING THE MULTILATERAL CONVENTION TO IMPLEMENT TAX TREATY RELATED MEASURES TO PREVENT BASE EROSION AND PROFIT SHIFTING

Daryna Movchan

This Master Thesis is aimed at determination of the challenges caused by the flexible nature of the Multilateral Instrument regarding the prevention of treaty abuse and dispute resolution provisions with a view to provide tools for the improvement of its effectiveness. Therefore, the following objectives are pursued: to examine conditions for adoption of Multilateral Instrument and to analyse the main features of MLI (multilateralism and flexibility); to analyse the effectiveness of prevention of treaty abuse provisions; to analyse the effectiveness of dispute resolution provisions; to define what changes should be provided to the provisions addressed with a view to improving the application of MLI.

The research is divided into two parts. The first one, Chapter 1, focuses on general questions regarding the reasons for adoption of MLI and its two main features (multilateralism and flexibility). The second part is more specific and examines the effectiveness of the substantive problematic provisions of MLI with regard their flexibility from the two perspectives: narrow and broad. Precisely, Chapter 2 analyses the prevention of treaty abuse provision whereas Chapter 3 examines the dispute resolution, in particular mutual agreement procedure and mandatory binding arbitration.

In this research we consider the MLI as a sui generis international tax instrument owing to its specific features: bilateral multilateralism and flexibility that is reflected in each provision. The prevention of treaty abuse clause is effective enough to fulfill the overall aim of the OECD BEPS package from the broad perspective. However, from the narrow perspective, the broad and uncertain nature of the minimum standard (particularly the broad PPT concept, the unclear relationships between the PPT and LOB as well as the existence of third way to reach the minimum standard involving bilateral negotiations) could undermine the effectiveness of MLI. Owing to the adoption of the clear guidance, the dispute resolution mechanism within the MLI would not undermine its effectiveness from the narrow perspective. On the contrary, from the broad perspective to become relevant and effective tool in the international tax dispute resolution sphere, including the BEPS practices, the independent international framework for tax dispute resolution should be created.

In the view of the foregoing, considering the effectiveness of the Multilateral Instrument from the narrow perspective, we recommend to provide a clear and detailed recommendatory tool for each of the discussed problematic provisions to improve the efficiency of the Convention.