Linde
www.lindeverlag.at

Blum | Seiler (Eds)

PREVENTING TREATY ABUSE

Series on International Tax Law, Michael Lang (Ed)

LL.M.
INTERNATIONAL TAX LAW VIENNA

Blum/Seiler (Eds)

Preventing Treaty Abuse

Series on International Tax Law
Univ.-Prof. Dr. Dr. h.c. Michael Lang (Editor)

Volume 101

Preventing Treaty Abuse

edited by

Daniel W. Blum

Markus Seiler

LI·m·
INTERNATIONAL TAX LAW VIENNA

Linde

Zitiervorschlag: *Author* in *Blum/Seiler* (Eds), Preventing Treaty Abuse (2016) page

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

Hinweis: Aus Gründen der leichteren Lesbarkeit wird auf eine geschlechtsspezifische Differenzierung verzichtet. Entsprechende Begriffe gelten im Sinne der Gleichbehandlung für beide Geschlechter.

ISBN 978-3-7073-3542-2 (Print)
ISBN 978-3-7094-0837-7 (E-Book-PDF)
ISBN 978-3-7094-0838-4 (E-Book-ePub)

1210 Wien, Scheydgasse 24, Tel.: 01/24 630
www.lindeverlag.at

Druck: Hans Jentzsch & Co GmbH
1210 Wien, Scheydgasse 31

Dieses Buch wurde in Österreich hergestellt.

PEFC zertifiziert
Dieses Produkt stammt aus nachhaltig bewirtschafteten Wäldern und kontrollierten Quellen
www.pefc.at

Gedruckt nach der Richtlinie „Druckerzeugnisse" des Österreichischen Umweltzeichens, Druckerei Hans Jentzsch & Co GmbH, UW Nr. 790

Series Editor's Preface

The postgraduate program in International Tax Law at WU (Vienna University of Economics and Business) is available either as a one-year full-time or a two-year part-time program. Students attend not only a vast number of courses, for which they prepare papers and case studies, and sit numerous examinations, but they also write their Master's theses. These theses are a prerequisite for the academic degree "Master of Laws (LL.M.)".

The program follows a scheme under which the Master's theses of one particular program all look at various aspects of the same general topic. The previous general topics were "Electronic Commerce and Taxation" (1999/2000 full-time program), "Partnerships in International Tax Law" (2000/2001 full-time program), "Transfer Pricing" (1999/2001 part-time program), "Exemption and Credit methods in Tax Treaties" (2001/2002 full-time program), "Permanent Establishments in International Tax Law" (2002/2003 full-time program), "Non-discrimination Provisions in Tax Treaties" (2001/2003 part-time program), "Triangular Cases" (2003/2004 full-time program), "Tax Treaty Policy and Development" (2004/2005 full-time program), "Source versus Residence in International Tax Law" (2003/2005 part-time program), "The Relevance of WTO Law for Tax Matters" (2005/2006 full-time program), "Conflicts of Qualification in Tax Treaty Law" (2006/2007 full-time program), "Taxation of Artistes and Sportsmen in International Tax Law" (2005/2007 part-time program), "Fundamental Issues and Practical Problems in Tax Treaty Interpretation" (2007/2008 full-time program), "Dual Residence in Tax Treaty Law and EC Law" (2008/2009 full-time program), "Taxation of Employment Income in International Tax Law" (2007/2009 part-time program), "The EU's External Dimension in Direct Tax Matters" (2009/2010 full-time program), "History of Tax Treaties" (2010/2011 full-time program), "Permanent Establishments in International and EU Tax Law" (2009/2011 part-time program), "International Group Financing and Taxes" (2011/2012 full-time program), "Limits to Tax Planning" (2011/2013 part-time program), "Exchange of Information for Tax Purposes" (2012/2013 full-time program), "Tax Policy Challenges in the 21st Century" (2013/2014 full-time program), "Global Trends in VAT/GST and Direct Taxes" (2013/2015 part-time program) and "Non-Discrimination in European and Tax Treaty Law: Open Issues and Recent Challenges" (2014/2015 full-time program). The respective Master's theses were published in edited volumes.

The general topic for the 2015/2016 full-time program was "Preventing Treaty Abuse". A common subject not only encourages students to discuss their theses with one another, but also permits supervision of the students in accompanying courses. Jacques Sasseville introduced the students to the subject matter at the beginning of the program. Daniel W. Blum and Markus Seiler held seminars in which the structure of the papers and the intermediary results were critically analyzed. It was with great commitment that they supported the students who were preparing their Master's theses. Their numerous suggestions helped to improve the quality of the Master's theses and, as a consequence, the quality of the present volume. In my function both as the scientific director of the postgraduate program and the editor of this series I would not only like to thank those two colleagues for their excellent engagement and efforts but also to express my gratitude to them.

I am also grateful to the students themselves. They pursued the program with great enthusiasm. This postgraduate program not only gave them the opportunity to talk to academics and scientifically qualified interns from all over the world and to acquire a wealth of knowledge, but they also learned to tackle and solve complex issues using a structured approach. The Master's theses now available bear witness to this. I hope that the results of these papers will both influence the scientific discussion and be of use to tax practitioners.

Vienna, August 2016 *Michael Lang*

Editors' Preface

The present volume comprises the Master's theses of the full-time students attending the 2015/16 class of the postgraduate LL.M. program "International Tax Law" at WU (Vienna University of Economics and Business). The general topic this year was "Preventing Treaty Abuse", a topic which – thanks to its pivotal role in the OECD's Base Erosion and Profit Shifting (BEPS) project – has recently gained great attention in the tax world and is bound to become even more important in the years to come, when the OECD proposals are going to be implemented.

The intention behind choosing "Preventing Treaty Abuse" as the general topic for the master theses of the 2015/2016 LL.M. class was to assemble a collection of contributions which explore not only the very fundamentals of the abuse concept found around the globe, but also to analyze the existing measures to counter abuse under domestic and tax treaty law and to provide a profound analysis of the newly proposed anti-abuse measures of the BEPS action plans. The topics therefore cover a wide range of both topical policy and legal issues in relation to treaty abuse and its prevention. The majority of contributions analyze the proposals put forward by the OECD in BEPS action items 6 and 7, e.g. the insertion of a Limitation-on-benefits clause or a principal purpose test. However, also a closer look has been taken at the historical roots of the phenomenon of treaty abuse and its prevention. It is analyzed which lessons can be learnt from the US tax treaty policy and which effects the intensified fight against treaty abuse will have from a Non-OECD member state perspective. Also the question which impact the fundamental freedoms enshrined in primary EU law might have on anti-avoidance rules is studied. Finally, the relation between domestic and treaty based anti-avoidance is analyzed in great detail, identifying the methodical problems of ensuring a sound and abuse safe legal framework.

The topics we have chosen required the students to rise to a huge challenge. Some students had to deal with problems that have not yet gained much attention in literature. Others were required to analyze issues that, in contrast, have already generated many decisions by courts as well as scholarly comments in literature. Either way, great effort was needed to meet the requirements we imposed on the students. It was our task and our pleasure to provide the students with critical support at all stages of their research and during the writing of their theses'. Motivating them to develop their own ideas, to go the extra mile in their research and

then present their achievements was likewise demanding and rewarding. We would like to thank the students for their commitment and congratulate them on the successful completion of their studies.

In addition, we would like to express our sincere gratitude to the Linde publishing house for the opportunity to publish this volume. Having Linde as a partner means great support and the professional cooperation needed to make a project such as the one at hand a success. Sincere thanks are also given to Ms Margaret Nettinga, who contributed to the completion of this book by revising the Master's theses from a linguistic point of view.

Vienna, August 2016

Daniel W. Blum
Markus Seiler

List of Authors

Rahul Batheja

Rahul Batheja is a Chartered Accountant who qualified in 2010. He is a graduate in Commerce. He worked at Ernst & Young in India from 2010 to 2015. Currently, he is working as Tax Manager at Ernst & Young in Singapore.

Ashley Bergmans

Ashley Bergmans was born in Belgium in 1992. In 2013, she obtained a bachelor's degree in law from Hasselt University. Following this, she obtained a master's degree in law in 2015 from KULeuven with a specialization in tax law. After completing the LL.M. in International Tax Law at WU, she will be working as a tax advisor at KPMG Belgium in the Brussels office.

Ansh Bhargava

Ansh Bhargava is currently pursuing his second master's degree in international tax law, this time at the Institute of Austrian and International Tax Law and Vienna University of Economics and Business (WU) in Vienna, Austria. He received his first master's degree in international taxation from the University of Florida Levin College of Law in Gainesville, Florida. Previous to his master's degree, he received his degree in law from O.P. Jindal Global University, Jindal Global Law School in 2014, where he graduated with honours. Currently, he is working as a Strategic Consultant with Taxmann Publications, which is the leading publisher of tax and corporate laws in India.

Maria Carla Bravo Calimag

Maria Carla Bravo Calimag completed her Bachelor of Science in Accountancy at Assumption College, Makati City, Philippines. She holds a license to practice as an Accountant in the Republic of the Philippines and received the title Certified Public Accountant on June 8, 2005. From 2005 to 2008, she worked as a corporate accountant in an oil and gas company and telecommunication in the Philippines. Then, from 2008 to 2015, she became a tax accountant at one of the big four auditing firms in Singapore.

Manuel Augusto Carrión Camayo

Manuel Carrión received a degree in law from the Pontificia Universidad Católica del Perú (PUCP) in the Republic of Peru. He has been working as a tax consultant

since 2009. He also has been a teaching assistant in different tax courses at the Pontificia Universidad Católica del Perú, such as International Tax Law and Custom Law. Currently, he is an associate lawyer at Zuzunaga, Assereto & Zegarra Abogados in Lima, Peru.

Isadora A. G. Carvalho Algorta

Isadora A. G. Carvalho Algorta completed her B.A. in Law at the Mackenzie University, Sao Paulo in 2012 and she has a major in tax law from the Brazilian Institute of Tax Law. She attended the European and German Law Training at Ludwig-Maximilians-Universität München. She worked as a lawyer and tax consultant at the Lacaz Martins, Pereira Neto, Gurevich and Schoueri Law Firm, Sao Paulo for six years. In 2015, she performed an international internship in a law firm in Germany. She is member of the Brazilian Institute of Tax Law and currently she is working at the United Nations Department of Economic and Social Affairs.

David Dominguez

David Dominguez is a Colombian international tax lawyer. He has been working since 2008 in international tax advisory. In 2009, he received his JD with the highest honors from the Pontificia Universidad Javeriana, achieving top-tier results in the BAR Admission Exam. He also received the post-graduate degree in tax law from Universidad de los Andes in 2011. David wrote his contribution to this book as part of the LL.M. in International Tax Law 2015-2016 at Vienna University of Economics and Business (WU).

Sriram Govind

Sriram Govind is an India qualified tax lawyer who graduated from Symbiosis Law School, Pune, India in 2013. Following graduation, Sriram worked with the the law firm, Nishith Desai Associates in Mumbai as a senior member of the international tax practice for over two years. His expertise includes tax treaty law and tax policy, tax structuring for complex cross-border transactions and tax controversies. Sriram plans to start his doctoral studies later this year at the Institute of Austrian and International Tax Law of WU, Wien under the Doctorate in International Business Taxation (DIBT) program and to also work with the Institute as a research and teaching associate during that time.

Chamelia Gunawan

Chamelia Gunawan received a bachelor degree in Business Law from Pelita Harapan University in 2007, a bachelor degree in Economics from the Indonesia Open University in 2015 and a master degree in Business Law from the University of Indonesia in 2009. She is qualified to practice as advocate, tax consultant and tax attorney in Indonesia. She has been working as a corporate lawyer since 2006 and

currently, working as an associate lawyer at Adnan Kelana Haryanto & Hermanto Law Firm in Jakarta. Additionally, she taught at Pelita Harapan University in 2007 and now she is a part-time lecturer at universities in Jakarta.

Romi Irawan

Romi Irawan was born in Medan (Indonesia) in 1982. He received his bachelor's degree in financial management from Faculty of Economics and Business University of Indonesia and his master's degree in corporate finance from Faculty of Economics and Business Gadjah Mada University. In 2012, he obtained certificates in Principles of International Taxation and Principles of Corporate and International Taxation (Transfer Pricing) from the Chartered Institute of Taxation – UK. Currently, he is working as a partner of transfer pricing services at Dannydarussalam Tax Center in Jakarta, handling all areas of transfer pricing.

Tanvi Pramod Jagtap

Tanvi Pramod Jagtap was awarded the professional degree of Chartered Accountant in January 2014. She has completed her double graduation from Pune University. In 2012, she received the degree in commerce, and graduated with honors. In 2015, she further completed her second graduation, this time in the area 'law'. She has worked with EY Pune from 2011 to 2013 as an intern and from 2013 to 2015 as a tax consultant.

Barnabás Márk Kerekes

Barnabás Márk Kerekes completed his studies in financial economics at the Corvinus University of Budapest and in commerce at Budapest Business School. He is a certified tax advisor and a chartered accountant in Hungary. Following completion of the WU International Tax Law LL.M., he will continue to work as a senior consultant at PricewaterhouseCoopers in Vienna.

Slobodanka Kolundžija

Slobodanka Kolundžija graduated from the Faculty of Law, University of Belgrade, in 2011, where she also acquired her master's degree in business law in 2012. From 2012 until 2015, she worked as a tax advisor in Deloitte Serbia, focusing mainly on international tax issues. After graduating the WU LL.M. programme, she will re-join the Deloitte Serbia office.

Flavia Martins

Flavia Martins has nine years' experience working as an in-house tax specialist for large mining and nuclear energy companies and also has experience in law offices in the tax litigation and consulting fields. She graduated with a Bachelor of Arts in Law degree from the Pontifical Catholic University of Rio de Janeiro (PUC/Rio) in 1999. In 2015, she received a Master of Laws (LL.M.) degree in Corporate Law from IBMEC, in Rio de Janeiro, Brazil, with first-tier results.

Juliana Martins Skolimovski Gaia da Silveira

Juliana Martins Skolimovski Gaia da Silveira completed her B.A. in Law at the Universidade de São Paulo (USP) in 2010. She completed a post-graduate degree in Tax Law at the Instituto Brasileiro de Direito Tributário (IBDT) in 2013. She has being working in tax litigation since 2006 and, currently, she is a tax lawyer at the Brazilian law firm Mundie Advogados.

Francisco Javier Molina Pérez de Castro

Francisco Javier Molina is a lawyer who graduated from the Universidad de Chile's Law School and who holds a Magister in Tax Law degree from the Universidad Adolfo Ibáñez, both in Santiago de Chile. He has worked since 2008 in Molina, Ecclefield, Lagos y Compañía as a lawyer and now he is a partner in that law firm where he heads the tax practice.

Sara Nenadić

Sara Nenadić was born in Belgrade, Serbia in 1989. She obtained a degree at the Faculty of Law, University of Belgrade where she graduated with honors in 2013. Sara started her career as an intern at PwC in 2012 where she spent six months; after that she worked as an intern in Japan Tobacco International for another six months. From 2013 until 2015, she was employed in the Tax Department of the Ministry of Finance of the Republic of Serbia.

Larissa Polesi Lukjanenko

Larissa Polesi Lukjanenko graduated as Bachelor of Arts in Law at Pontíficia Universidade Católica de São Paulo (PUC/SP) in 2012. She passed the Brazilian bar exam in 2013 and has been working as a tax lawyer and advisor at Mattos Filho Advogados since then, dealing with domestic and international taxation. In 2015, she received a degree as Master of Laws (LL.M.) in corporate law at Instituto de Ensino e Pesquisa – INSPER, in São Paulo, before starting the LL.M. Program in International Tax Law at WU/Institute for Austrian and International Tax Law, in Vienna, also in 2015.

Katja Rajala

Katja Rajala graduated as Master of Laws from the University of Helsinki in 2012. She is an associate in the Tax & Structuring Practice Group at Dittmar & Indrenius, a leading Finnish business law firm based in Helsinki.

Catalina Rocha Saavedra

Catalina Rocha is a lawyer who graduated from the Universidad Externado de Colombia. She is currently enrolled in the International Taxation Program at the Vienna University of Economics and Business (WU). Catalina has worked in the

private sector providing assistance on tax and compliance issues, domestic and international, for companies in Colombia since 2012.

Martha Isabel Rodriguez Daniels

Martha Isabel Rodriguez Daniels completed her B.A. in Law at the Universidad Externado de Colombia in (2013) and her Masters in tax law in the (IE) Instituto de Empresa de Madrid (2014). She has worked as a lawyer in the tax field for three years and has been involved in academic work and research with her Alma mater. Currently, she is a student in the LL.M. of International Taxation program at the Vienna University of Economics and Business (WU) and will be part of the international tax team of Ernst & Young in Germany.

Luca Taglialatela

Luca Taglialatela was born in Naples, Italy in 1981; he received a degree in business and economics (with honours) from the Naples Frederich II University in 2004. Since 2008 he has been working as a tax consultant/public chartered accountant and auditor and has been studying international and Italian tax legislation by participating in several tax masters programmes and courses. During his career he worked both for some of the leading Italian tax consulting firms and for multinational groups handling complex tax issues. He is now an international tax advisor specialized in residence and citizenship planning.

Daniela Vicente Armelin

Daniela Vicente Armelin is a Brazilian tax lawyer. She graduated as Bachelor of Law from the Pontifical Catholic University of Sao Paulo in 2012. In the last five years, she has worked at PwC Brazil – Legal Services (Loeser e Portela Advogados) in the tax consultancy team.

Maria Cecilia Villareal Regalado

Maria Cecilia Villareal Regalado completed her Juris Doctor degree at the Ateneo de Manila University in the Philippines, and graduated with honours. She has been working in the field of corporate and international tax advisory, previously with Ernst & Young in the Philippines and briefly with KPMG in Singapore. She is now a tax director at R.G. Manabat & Co. (KPMG in the Philippines).

Federico Zari Malacrida

Federico Zari Malacrida was born in Lugano in 1985. He completed his studies in law at the University of Geneva in 2009 and two years later he was called to the Geneva Bar and to all Swiss courts. He then worked as a research and teaching assistant to Professor Xavier Oberson at the University of Geneva. Upon completing his LL.M. program in Vienna, he will join as an associate Gaggini & Partners, a leading law firm in the southern (Italian-speaking) area of Switzerland.

Contents

Meaning and Concept of "Treaty Abuse" in DTA Law

Federico Zari Malacrida

I. Introduction

Double taxation is a taxation principle referring to income taxes that are paid twice on the same source of earned income.[1] Double taxation can be avoided unilaterally if one of the states involved withdraws its tax claim.[2] On behalf of the state of residence, this unilateral move is often achieved pursuant to a method developed under Anglo-American law whereby the state of residence, if it is not simultaneously the source state, allows a credit for the tax levied in the source state up to an amount equal to its own tax charge.[3] In contrast, some countries avoid double taxation unilaterally through exemptions.[4] As a rule, however, unilateral measures are insufficient to avoid double taxation satisfactorily, because they usually are neither comprehensive nor mutually consistent.[5]

Since the end of the nineteenth century, individual states have consequentely entered into bilateral agreements for the avoidance of double taxation.[6] The first tax treaties were concluded in the middle of the nineteenth century primarily among the various states of Germany and the Austro-Hungarian Empire.[7] However, the first "modern" tax treaty is generally considered to be the Austria-Hungary-Prussia tax treaty (1899).[8]

In this context, the "skeleton" of the majority of present-day tax treaties, referred to as a "model" tax treaty, was adopted in 1928 by the Group of Experts under the aegis of the League of Nations.[9] The main purpose of countries in concluding tax treaties was, and is, to facilitate international trade and investment by removing obstacles in the form of double, primarily juridical, taxation.[10] However, the consequences of the growing network of bilateral tax treaties were not limited to these effects.[11]

Together with the interaction of foreign and domestic tax systems, the globalization of economies, technological developments, the reduction in barriers to international trade and the development of sophisticated financial products, the expanded treaty network increased opportunities for international tax planning and tax avoidance.[12]

1 See http://www.investopedia.com/terms/d/double_taxation.asp; Michael Lang, *Introduction to the Law of Double Taxation Conventions* (Vienna: Linde, 2013) pp. 27–28.
2 Klaus Vogel in: Klaus Vogel (ed.) *Double Taxation Conventions,* 3rd edition (London: Kluwer, 1997), m.no 16.
3 Klaus Vogel in: Klaus Vogel (ed.) *Double Taxation Conventions,* m.no 16.
4 Klaus Vogel in: Klaus Vogel (ed.) *Double Taxation Conventions,* m.no 16.
5 Klaus Vogel in: Klaus Vogel (ed.) *Double Taxation Conventions,* m.no 16.
6 Klaus Vogel in: Klaus Vogel (ed.) *Double Taxation Conventions,* m.no 16.
7 Volodymyr Vitko, 'The Use of Tax Treaties and Treaty Shopping: Determining the Dividing Line', *Bulletin for International Taxation* (2012) p. 2.
8 Volodymyr Vitko, *Bulletin for International Taxation* (2012) p. 2.
9 Volodymyr Vitko, *Bulletin for International Taxation* (2012) p. 2.
10 Volodymyr Vitko, *Bulletin for International Taxation* (2012) p. 2.
11 Volodymyr Vitko, *Bulletin for International Taxation* (2012) p. 2.
12 Volodymyr Vitko, *Bulletin for International Taxation* (2012) p. 2.

The tax law doctrine and legal acts contain a lot of similar concepts, such as tax abuse, tax avoidance, tax evasion, treaty shopping etc., the meanings of which are very difficult to distinguish.[13]

Such a variety of similar concepts without clear definitions leads to legal uncertainty and ambiguity.[14] It is important to recognize that the principle of legal certainty is the starting point in the application of the law.[15] Therefore, a taxpayer will want to be sure that before entering into certain tax mitigation schemes, his arrangements will not be treated as abusive.[16]

Great controversy exists among tax scholars with respect to whether tax authorities may prevent the improper use of DTAs.[17] Faced with the fact that taxpayers may evade or avoid taxes, tax authorities started developing measures to ensure effective tax collection.[18]

There are several ways to enact and implement anti-avoidance rules. They can be imposed by domestic legislation, bilateral and multilateral agreements, by courts, or by the enforcement, interpretation and policy of the domestic authorities.[19] Hence, most states have specific legislative anti-avoidance provisions; some have a general anti-avoidance rule; and, in most countries, the courts have developed judicial anti-avoidance doctrines.[20] On the other hand, some states have general or specific anti-avoidance provisions included in their tax treaties or, in some cases, they interpret the tax treaty in light of its purpose, according to Article 31 (1) of the Vienna Convention.[21] Finally, some states use both options concurrently.

The Committee on Fiscal Affairs (CFA) of the OECD, as far back as 1977, expressed concern as to the improper use of tax treaties by a person, whether or not a resident of a contracting state, acting through a legal entity created to obtain treaty benefits that would not otherwise be directly available to that person.[22] Nine years later, the CFA issued a report dealing with the most important situa-

13 Edvinas Lenkauskas, 'The Borderlines between the concept of tax avoidance and other similar concepts', *Social Science Research Network* (2014) p. 1.
14 Edvinas Lenkauskas, *Social Science Research Network* (2014) p. 1.
15 Edvinas Lenkauskas, *Social Science Research Network* (2014) p. 1.
16 Edvinas Lenkauskas, *Social Science Research Network* (2014) p. 1.
17 Michael Lang, *Introduction to the Law of Double Taxation Conventions* p. 64.
18 Annet Wanyana Oguttu, 'The Role of International Cooperation in Preventing Tax Evasion: A Critique on "Assistance in the Collection of Taxes" – A South African Perspective', *Bulletin for International Taxation* (2014) p. 1.
19 Christine Alves Alvarrenga, 'Preventing Tax Avoidance: Is There Convergence in the Way Countries Counter Tax Avoidance?', *Bulletin for International Taxation* (2013) p. 348.
20 Brian J. Arnold, 'Tax Treaties and Tax avoidance: The 2003 Revisions to the Commentary to the OECD Model', *Bulletin for International Taxation* (2004) p. 244.
21 Daljit Kaur, Kamesh Susarla, 'Anti-Tax Avoidance Developments in Selected Asian Jurisdictions', *Bulletin for International Taxation* (2011) p. 256.
22 Daljit Kaur, Kamesh Susarla, *Bulletin for International Taxation* (2011) p. 256.

tion of this kind,[23] i.e. where a company in a treaty state acts as a conduit for channelling income economically accruing to a person in another state who can thereby take advantage "improperly" of the benefits provided by a tax treaty.[24] Such a situation is referred to as "treaty shopping".[25]

In 2003, the CFA decided to actively support countries in countering tax abuse by incorporating anti-avoidance provisions into the Commentaries on the OECD Model and by establishing: (1) that one of the purposes of tax treaties is to prevent tax avoidance, and (2) that domestic anti-avoidance rules do not conflict with tax treaties.[26]

The aim of this contribution is to give a clear answer to some of the most important and controversial meanings in the context of DTA law. It will also present and analyse, before the conclusion, all the different measures to counter "abuse" of tax treaties that states may implement in domestic law or in tax treaties, not without mentioning the relationship that exists between these domestic measures and tax treaties.

II. Relevant concepts in DTA law

A. Introduction

The principal purpose of tax treaties, as stated in the Commentary on the OECD Model, is to "promote, by eliminating international double taxation, exchanges of goods and services, and the movement of capital and persons".[27] Additionally, the OECD Commentary on Article 1 provides that "it is also a purpose of tax conventions to prevent tax avoidance and evasion."[28]

While the tax avoidance purpose of tax treaties is now clearly stated in the Commentary, in the tax law doctrine and legal acts there are a lot of similar concepts, such as tax abuse, tax avoidance, tax evasion, treaty shopping, etc., the meanings of which are very difficult to distinguish from each other.[29] Such a variety of similar concepts without clear definitions leads to the legal uncertainty and ambiguity.[30]

In order to bring clarity to the discussion, it is useful to first highlight some further interpretations of these meanings.

23 OECD Report on 'Double Taxation Conventions and the use of Base Companies' adopted by the Council of the OECD on 27 November 1986.
24 Volodymyr Vitko, *Bulletin for International Taxation* (2012) p. 2.
25 Volodymyr Vitko, *Bulletin for International Taxation* (2012) p. 2.
26 Volodymyr Vitko, *Bulletin for International Taxation* (2012) p. 2.
27 OECD Commentary on Article 1, paragraph 7.
28 Brian J. Arnold, *Bulletin for International Taxation* (2004) p. 248.
29 Edvinas Lenkauskas, *Social Science Research Network* (2014) p. 1.
30 Edvinas Lenkauskas, *Social Science Research Network* (2014) p. 1.

B. Tax evasion

The Greek philosopher Plato stated that "when there is an income tax, the just man will pay more and the unjust less on the same amount of income".[31] Unjust responses to the payment of tax can be in the form of tax evasion or tax avoidance.[32] Tax evasion includes activities (e.g. the falsification of tax returns and books of account) that are deliberately undertaken by a taxpayer to illegally free himself from the tax that the law charges on his income.[33]

Therefore, tax evasion can best be regarded as a form of fraud, because it merely consists of diminution of tax revenue by not disclosing the information required by law and may thus be described, for the purpose of this contribution, as a criminal offence.

On the other hand, it is interesting to note that tax treaties have a long title, which refers to "the avoidance of double taxation and the prevention of fiscal evasion".[34] On first sight, one might think that the tax treaty was only concerned with combating tax evasion and only with criminal conduct by taxpayers.[35] According to Professor Philip Baker QC,[36] however, the formulation of this long title has a history, and goes to the period before the Second World War when the distinction between tax avoidance and tax evasion was not so carefully made.

In practice, the exchange of information provisions in tax treaties, for example, are more commonly used to counter tax avoidance than tax evasion.[37] In contast, where criminal tax fraud is involved, different international instruments for co-operation in the investigation and prosecution of criminal offences (such as mutual assistance conventions relating to co-operation in criminal matters) are more usually used as a basis for administrative assistance.[38]

C. Tax avoidance

As regards tax avoidance, there seems to be no accepted universal definition of the term. This is because of the different interpretation and scope that this meaning has in each country and context.[39]

31 Annet Wanyana Oguttu, *Bulletin for International Taxation* (2014) p. 1.
32 Annet Wanyana Oguttu, *Bulletin for International Taxation* (2014) p. 1.
33 Annet Wanyana Oguttu, *Bulletin for International Taxation* (2014) p. 1.
34 Philip Baker, 'Improprer Use of Tax Treaties, Tax Avoidance and Tax Evasion', *Paper on Selected Topics in Administration of Tax Treaties for Developing Countries for the United Nations* (2013) p. 5.
35 Philip Baker, *Paper on Selected Topics in Administration of Tax Treaties for Developing Countries for the United Nations* (2013) p. 5.
36 Philip Baker, *Paper on Selected Topics in Administration of Tax Treaties for Developing Countries for the United Nations* (2013) p. 5.
37 Philip Baker, *Paper on Selected Topics in Administration of Tax Treaties for Developing Countries for the United Nations* (2013) p. 5.
38 Philip Baker, *Paper on Selected Topics in Administration of Tax Treaties for Developing Countries for the United Nations* (2013) p. 5.
39 Larisa Gerzova, Oana Popa, 'Compatibility of Domestic Anti-Avoidance Measures with Tax Treaties', *Bulletin for International Taxation* (2013) p. 421.

For example, the OECD Commentary uses, interchangeably, throughout the text, the concepts of "tax abuse" and "tax avoidance" and also the concepts of "anti-abuse provisions" and "anti-avoidance provisions" but does not define any of these terms. On the other hand, the European Court of Justice sometimes uses the concept of "tax avoidance" when it means "tax evasion".[40] Therefore, there seems to be a Babylonian confusion in that respect.[41]

While the Oxford English Dictionary defines tax avoidance as "the arrangement of one's financial affairs to minimize tax liability *within the law*", in turn, the OECD Glossary states that, "tax avoidance is generally used to describe the arrangement of a taxpayer's affairs that is intended to reduce his tax liability and that although the arrangement could be strictly legal it is usually in contradiction with the intent of the law it purports to follow."[42]

While the expression 'tax avoidance' may be used to refer to 'acceptable' forms of behaviour, such as tax planning, or even abstention from consumption, it is more often used in a pejorative sense to refer to something considered 'unacceptable', or 'illegitimate' (but not in general 'illegal').[43] In other words, tax avoidance is often within the letter of the law but against the spirit of the law.[44]

As a consequence, for the purpose of this contribution, tax avoidance may be described as the reduction of tax liability by legal means; but contrary to the spirit of the law and not subject to criminal sanctions.[45] Its scope may vary from country to country, depending on public opinion and the attitudes of government, the courts.[46]

D. Tax abuse

The above features of tax avoidance are closely linked to tax abuse.[47] Tax law is drafted in order to bring revenue to the state. However, tax legislation is usually not neutral for business.[48] The legislator makes policy choices when imposing taxes and some types of legal entities or forms or business activity are taxed more favourably than others.[49] A certain degree of 'inequality' appears somehow intrinsic to taxation. In fact, the legislator intentionally aims to stimulate the business of

40 Tom O'Shea, 'Tax avoidance and abuse of EU Law', *The EC Tax Journal* (2010-11) p. 77; see also Michael Lang, 'The General Anti-Abuse Rule of Article 80 of the Draft Proposal for a Council Directive on a Common Consolidated Corporate Tax Base', *European Taxation* (2011) p. 225.
41 Michael Lang, *European Taxation* (2011) p. 225.
42 See http://www.oecd.org/ctp/glossaryoftaxterms.htm.
43 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 349.
44 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 349.
45 Adam Zalasinski, 'Some Basic Aspects of the Concept of Abuse in the Tax Case Law of the European Court of Justice', *Intertax* (2008) p. 159.
46 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 349.
47 Adam Zalasinski, *Intertax* (2008) p. 159.
48 Adam Zalasinski, *Intertax* (2008) p. 159.
49 Adam Zalasinski, *Intertax* (2008) p. 159.

certain undertakings.[50] Tax administrations normally welcome the use of such legislative 'tax stimulation' by taxpayers.[51] However, sometimes it has unintended effects and the most aggressive use of legislative 'tax stimulation', frequently by means of certain artificial arrangements, is regarded as tax abuse.[52] However, it can also be characterized as tax avoidance.[53]

It is interesting to note that within this context, civil law countries generally regard this behaviour as tax abuse.[54]

On the other hand, as regards DTA provisions between contracting states, it should be pointed out that the definitions vary considerably. Although DTAs provide relief, they may multiply taxation regimes, which may be more differentiated than in absence of any DTA.[55] It must be underlined that all these legal sources, although not directly imposing taxes, contribute to the multiplication of taxation regimes and thus create more opportunities for abusive behaviour by taxpayers.[56]

Tax abuse and tax avoidance are therefore specific tax concepts, and they operate within tax legislation only.[57] Both concepts refer to artificial arrangements set up by taxpayers in order to explore inequalities intrinsic to, primarily, domestic tax legislation.[58] They apply to literal compliance with tax laws, which results in achieving financial and legal consequences contrary to the *ratio legis* of the relevant tax legislation.[59]

Hence, it seems clear that the concepts avoidance and abuse refer, for the purpose of this contribution, to the same taxpayer behaviour and may involve the same factual situations.[60] The two terms can thus be considered synonyms.

E. Treaty shopping

The term 'treaty shopping' is thought to have originated in the US.[61] The analogy was drawn with the term 'forum shopping', which described the situation in US civil procedure whereby a litigant tried to 'shop' between jurisdictions in which he expected a more favourable decision to be rendered.[62]

50 Adam Zalasinski, *Intertax* (2008) p. 159.
51 Adam Zalasinski, *Intertax* (2008) p. 159.
52 Adam Zalasinski, *Intertax* (2008) p. 159.
53 Adam Zalasinski, *Intertax* (2008) p. 159.
54 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 349.
55 Adam Zalasinski, *Intertax* (2008) p. 159.
56 Adam Zalasinski, *Intertax* (2008) p. 159.
57 Adam Zalasinski, *Intertax* (2008) p. 159.
58 Adam Zalasinski, *Intertax* (2008) p. 159.
59 Adam Zalasinski, *Intertax* (2008) p. 159.
60 Adam Zalasinski, *Intertax* (2008) p. 160.
61 Reuven S. Avi-Yonah, Christiana HJI Panayi, 'Rethinking Treaty-Shopping Lessons for the European Union', *Working Paper No. 182 University of Michigan Law School* (2010) p. 3.
62 Reuven S. Avi-Yonah, Christiana HJI Panayi, *Working Paper No. 182 University of Michigan Law School* (2010) p. 3.

According to prevailing opinion,[63] the term 'treaty shopping' "indicates a situation in which a person who is not entitled to the benefits of a tax treaty makes use of, in the widest meaning of the word, an individual or legal person to obtain treaty benefits that are not available directly". Is it interesting to note that the term 'treaty shopping' has never featured in any versions of the OECD Model.[64] Nor has it been properly defined or explained in the OECD Commentary. Rather, the emphasis is always on eliminating treaty shopping and the measures that can be taken against it.[65] Most of the references to treaty shopping are references by default; i.e. when discussing anti-treaty shopping provisions.[66]

What is it about this kind of tax planning that makes it objectionable?

Treaty shopping, especially using a 'conduit', is perceived as improper use of tax treaties by both the OECD and the UN.[67] The OECD states that treaty shopping is undesirable for the following reasons:

a) treaty benefits negotiated between two states are economically extended to persons resident in a third state in a way unintended by the contracting states; thus, the principle of reciprocity is breached and the balance of sacrifices incurred in tax treaties by the contracting parties altered;
b) income flowing internationally may be exempted from taxation altogether or be subject to inadequate taxation in a way unintended by the contracting states. This situation is unacceptable because the granting by a country of treaty benefits is based, except in specific circumstances, on the fact that the respective income is taxed in the other state or at least falls under the normal tax regime of that state;
c) the state or residence of the ultimate income beneficiary has little incentive to enter into a treaty with the state of source, because the residents of the state of residence can indirectly receive treaty benefits from the state of source without the need for the state of residence to provide reciprocal benefits.[68]

It seems safe to assume that the views held by the OECD are widely shared by those countries that are opposed to treaty shopping, such as Finland, Italy or the United States, for example.[69]

63 Volodymyr Vitko, *Bulletin for International Taxation* (2012) p. 2; Stef van Weeghel, *The Improper Use of Tax Treaties,* (London: Kluwer Law International, 1998) p. 117.
64 Reuven S. Avi-Yonah, Christiana HJI Panayi, *Working Paper No. 182 University of Michigan Law School* (2010) p. 3.
65 Reuven S. Avi-Yonah, Christiana HJI Panayi, *Working Paper No. 182 University of Michigan Law School* (2010) p. 3.
66 Reuven S. Avi-Yonah, Christiana HJI Panayi, *Working Paper No. 182 University of Michigan Law School* (2010) p. 3.
67 OECD Committee on Fiscal Affairs, 'International Tax Avoidance and Evasion, Four Related Studies, Issues in International Taxation Series', No. 1 (1987) p. 90; United Nations, Ad Hoc Group of Experts on International Co-operation in Tax Matters, Fourth meeting, Geneva, 30 November–11 December 1987, 'Prevention of abuse of tax treaties', United Nations Secretariat (1987) p. 96.
68 United Nations Economic and Social Council,'Treaty Abuse and Treaty Shopping' (2006) pp. 8–9.
69 United Nations Economic and Social Council,'Treaty Abuse and Treaty Shopping' (2006) pp. 8–9.

According to Professor Garcia Prats, it may, however, be useful to distinguish the concept of "treaty abuse" from that of "treaty shopping" by stating that the term "treaty shopping" – in other words, searching for a more favourable treaty – should not be equated with treaty abuse.[70]

Therefore, for the purpose of this contribution and following Professor Garcia Prats' reasoning, the conclusion that a situation is abusive – or that an individual is benefiting from the application of a double taxation treaty in an abusive fashion – requires and implies verification of the occurrence of an indirect, rather than a direct, breach of a provision through a violation of its object, spirit or purpose, something that is difficult to determine *a priori*.[71]

III. Measures to counter "abuse" of tax treaties

A. Introduction

In most countries, taxes cannot be avoided or reduced through abuse.[72] This is because anti-abuse measures have been introduced in the domestic legislation of countries, in tax treaties or both options were used concurrently.[73] Also, existing domestic general anti-abuse measures (like the abuse of law concept) have, with different levels of success, been invoked under tax treaties.[74] Below a number of different approaches used by countries to prevent and address the improper use of tax treaties are summarized. These include:

- specific anti-abuse rules found in domestic law;
- general anti-abuse rules found in domestic law;
- specific anti-abuse rules found in tax treaties;
- general anti-abuse rules found in tax treaties;
- the interpretation of tax treaty provisions;
- judicial doctrines that are part of domestic law.

These various approaches are examined in the following subsections.

B. Domestic anti-abuse measures

1. Overview

In line with paragraph 9.2. of the Commentary on Article 1 of the OECD Model, many countries consider that an abuse of their tax treaties should be characterized as an abuse of their domestic laws by which the taxes are assessed. Accord-

70 United Nations Economic and Social Council,'Treaty Abuse and Treaty Shopping' (2006) p. 9.
71 United Nations Economic and Social Council,'Treaty Abuse and Treaty Shopping' (2006) p. 9.
72 Michael Lang, *Introduction to the Law of Double Taxation Conventions* p. 64.
73 Bart Kosters, 'Tax Planning, Treaty Shopping and the Tax Administration's Response', *Bulletin for International Taxation (Asia-Pacific)* (2009) p. 13.
74 Bart Kosters, *Bulletin for International Taxation (Asia-Pacific)* (2009) p. 13.

ingly, these countries take the view that the abuse of a tax treaty may be curbed through domestic anti-abuse measures and in particular SAARs, GAARs or judicially developed doctrines.[75]

2. Specific anti-abuse rules found in domestic law

It is possible for countries to adopt in their domestic law specific anti-abuse rules ('SAARs') that prevent particular types of improper use of tax treaties. SAARs have increased significantly in recent decades.[76] Domestic tax laws contain a plethora of SAARs with international scope. These provisions address, for example, emigration of companies and individuals, redemption of pension entitlements, controlled foreign companies (CFCs) residing in low-tax jurisdictions, payments to companies that are non-resident or resident in low-tax jurisdictions, etc.[77]

The most prevalent provisions addressing the transfer of residence are those that entail fictitious residence upon the transfer of residence abroad and exit taxes.[78] The fictitious residence provisions generally take the form of a fiction that a company incorporated under the law of a country continues to be tax resident in that country even where the effective management is relocated to another country, but sometimes, where the residence is based on incorporation, continued residence is based on effective management staying behind, as an anti-avoidance measure.[79] Brazil, for example, has a fiction of continued residence for emigrated individuals (for 12 months following the emigration).[80]

Exit taxes have different forms. In a number of countries a taxpayer is deemed to have disposed of all assets just prior to ceasing to be a resident.[81] That rule may apply to individuals, individuals who conduct a business, and to corporate bodies. In certain cases the exit charge may relate to specific assets, such as a substantial interest in the share capital of a company (e.g. the Netherlands) or pension rights (e.g. Belgium, the Netherlands), or a combination of assets (e.g. Denmark).[82] Finally, some countries, such as Switzerland, Poland or Peru, do not have exit taxes.[83]

75 E.g. in Australia, Canada, Denmark, France, Germany, Israel, Italy, Japan, the Netherlands, the United States, etc; Luc de Broe, Nathalie Goyette, Philippe Martin, Roy Rohatgi, Stef van Weeghel, Phil West, 'Tax Treaties and Tax Avoidance: Application of Anti-Avoidance Provisions', *Bulletin for International Taxation* (2011) p. 385.

76 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 21.

77 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 23; Lydia G. Ogazon Juarez/Ridha Hamzaoui, 'Common strategies against Tax Avoidance: A Global Overview', (Amsterdam: IBFD Tax Research Series, 2015) p. 21.

78 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 23.

79 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 23.

80 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 23.

81 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 23.

82 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 23.

83 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 23.

The most prevalent rules addressing the offshore income of base companies are embodied in CFC legislation.[84] These rules have two basic formats. They either attribute income earned by a CFC to the shareholder of that entity (the "look-through" approach) or deem the shareholder to have received dividends from the entity (the "deemed dividend" approach).[85]

Other provisions addressing offshore income are what is known as switch-over clauses, in which the exemption for foreign dividend or branch income is replaced by a credit for foreign tax if the income is passive and/or lowly taxed or flat denial of an exemption without a credit in the case of low-taxed foreign subsidiaries.[86]

Thin capitalization rules play also an important role, although earnings stripping rules and rules limiting the deduction of interest payments to a percentage of assets seem to occur more frequently.[87] Certain jurisdictions, for example Belgium, restrict the deductibility of expenses paid to non-residents if they are resident in countries with low or no taxation or in countries with a preferential tax regime.[88]

Are specific domestic anti-abuse provisions consistent with the tax treaty practice and policy advocated by the OECD?[89]

A common problem that arises from the application of many of these specific domestic anti-abuse rules to arrangements involving the use of tax treaties is possible conflicts with the provisions of tax treaties.[90] After the 2003 OECD Model changes, the Commentary concludes that domestic law anti-abuse rules do not conflict with treaties.[91] However, where two contracting states take different views as to whether a specific anti-abuse rule found in the domestic law of one of these states conflicts with the provisions of their tax treaty, the issue may be addressed through mutual agreement procedure having regard to the following principles.[92]

Generally, where the application of provisions of domestic law and the provisions of tax treaties produces conflicting results, the provisions of tax treaties are intended to prevail.[93] This is a logical consequence of the principle *pacta sunt servanda* which is incorporated in Article 26 of the Vienna Convention.

84 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 24.
85 Lydia G. Ogazon Juarez/Ridha Hamzaoui, 'Common strategies against Tax Avoidance: A Global Overview', (Amsterdam: IBFD Tax Research Series, 2015) p. 21.
86 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 24.
87 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 24.
88 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 24.
89 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 25.
90 See the contribution of Sriram Govind in this volume.
91 OECD Model Commentary on Article 1, paragraph 22 (1).
92 UN Model Commentary on Article 1, paragraph 14.
93 UN Model Commentary on Article 1, paragraph 14.

Hence, the application of these rules had the effect of increasing the tax liability of a taxpayer beyond what is allowed by a tax treaty; this would conflict with the provisions of the treaty and these provisions should prevail under public international law.[94]

However, such conflicts will often be avoided and each case must be analysed based on its own circumstances.

First, a treaty may specifically allow the application of certain types of domestic SAARs.[95] For example, Article 9 of the OECD Model Convention specifically authorizes the application of domestic transfer pricing rules in the circumstances defined by that article. Second, many tax treaty provisions depend on the application of domestic law. This is the case, for instance, for the determination of the residence of a person, the determination of what is immovable property and of when income from corporate rights might be treated as a dividend.[96] In many cases, therefore, the application of domestic anti-abuse rules will impact how the treaty provisions are applied rather than producing conflicting results.[97] Third, the application of tax treaty provisions in a case that involves an abuse of these provisions may be denied on a proper interpretation of the treaty.[98] In such a case, there will be no conflict with the treaty provisions if the benefits of the treaty are denied under both the interpretation of the treaty and the domestic SAARs.[99]

Domestic SAARs, however, are often drafted by reference to objective facts, such as the existance of a certain level of shareholding or a certain debt-equity ratio.[100] In such cases, a proper interpretation of the treaty provisions that would disregard abusive transactions only will not allow the application of the domestic rules if they conflict with provisions of the treaty.[101]

As a consequence, because these SAARs prevent the enjoyment of the tax advantage that would otherwise be granted by the tax treaty, they can be seen as a form of tax treaty override.[102] However, the two countries concerned may agree that the advantage should not be enjoyed, and explicitly state in the tax treaty that treaty benefits will not be enjoyed where the SAAR applies.[103]

94 UN Model Commentary on Article 1, paragraph 15.
95 UN Model Commentary on Article 1, paragraph 17.
96 UN Model Commentary on Article 1, paragraph 18.
97 UN Model Commentary on Article 1, paragraph 18.
98 UN Model Commentary on Article 1, paragraph 18.
99 UN Model Commentary on Article 1, paragraph 19.
100 UN Model Commentary on Article 1, paragraph 19.
101 UN Model Commentary on Article 1, paragraph 17.
102 Philip Baker, *Paper on Selected Topics in Administration of Tax Treaties for Developing Countries* (2013) p. 7.
103 Philip Baker, *Paper on Selected Topics in Administration of Tax Treaties for Developing Countries* (2013) p. 7.

3. General anti-abuse rules found in domestic law

The first statutory GAAR appears to have been Section 29 of the New Zealand Property Assessment Act 1879.[104] Many countries enacted GAARs during the twentieth century, but several major economies did so only in relatively recent years: China 2007, the United States 2010, the United Kingdom 2013, and India 2013, to come into force in 2016.[105]

GAARs have some elements in common all over the world.[106] However, the scope of transactions falling within a GAAR varies from country to country.[107]

Some tax systems contain a GAAR in the domestic tax legislation that is intended to prevent abusive arrangements that are not adequately dealt with through specific rules.[108] The cornerstone element of a GAAR is the focus on tax abuse.

GAARs have been described as "the only way to plug the gaps discovered by ingenious tax consultants", as they should be broad enough to catch tax avoidance schemes not yet contemplated by the drafter of the GAAR.[109] In this sense, GAARs are a sort of catch-all provision for tax avoidance schemes.[110]

There is a possible danger of conflict between such a general anti-abuse rule and the provisions of a tax treaty.[111] To the extent that the application of such general rules is restricted to cases of abuse, however, conflicts should not arise and it is therefore not necessary to include a provision in tax treaties that allows the application of domestic GAARs.[112] This is the general conclusion of the OECD.[113]

Hence, it may be argued that a GAAR has the theoretical advantage of drawing a line in the sand to guide taxpayers between what is acceptable or impermissible tax behaviour. However, in practice major drawbacks of a GAAR are that it creates increased uncertainty for taxpayers and there is a greater risk that genuine business transactions would fall within its ambit.[114]

104 John Prebble, 'Kelsen, the principle of exlusion of contradictions, and General Anti-Avoidance Rules in tax treaties', *WU International Tax Research Papers* (2015-23) p. 2.
105 John Prebble, *WU International Tax Research Papers* (2015-23) p. 2.
106 Lydia G. Ogazon Juarez/Ridha Hamzaoui, 'Common strategies against Tax Avoidance: A Global Overview', (Amsterdam: IBFD Tax Research Series, 2015) p. 19.
107 Lydia G. Ogazon Juarez/Ridha Hamzaoui, 'Common strategies against Tax Avoidance: A Global Overview', (Amsterdam: IBFD Tax Research Series, 2015) p. 19.
108 UN Model Commentary on Article 1, paragraph 20.
109 Lydia G. Ogazon Juarez/Ridha Hamzaoui, 'Common strategies against Tax Avoidance: A Global Overview', (Amsterdam: IBFD Tax Research Series, 2015) p. 18.
110 Lydia G. Ogazon Juarez/Ridha Hamzaoui, 'Common strategies against Tax Avoidance: A Global Overview', (Amsterdam: IBFD Tax Research Series, 2015) p. 18.
111 See the contribution of Katja Rajala in this volume ; Philip Baker, *Paper on Selected Topics in Administration of Tax Treaties for Developing Countries* (2013) p. 8.
112 Philip Baker, *Paper on Selected Topics in Administration of Tax Treaties for Developing Countries* (2013) p. 8.
113 OECD Model Commentary on Article 1, paragraphs 22 and 22 (1).
114 Lydia G. Ogazon Juarez/Ridha Hamzaoui, 'Common strategies against Tax Avoidance: A Global Overview', (Amsterdam: IBFD Tax Research Series, 2015) p. 18.

C. Treaty anti-abuse measures

1. Overview

It is no surprise that double taxation conventions are used for tax planning purposes, too.[115] More precisely, it is the legal opportunities deriving from tax treaties which are so used.[116]

Numerous transactions are aimed at obtaining the benefits of a treaty which would not otherwise be applicable to the taxpayer because he is not a resident of a contracting state; these are the arrangements which have become known as "treaty shopping" and that were described above in subsection II.E.[117]

Bilateral anti-avoidance measures are consequentely increasingly included in treaties, many of them are aimed at combating treaty shopping.

2. Specific anti-abuse rules found in tax treaties

Paragraph 9 (6) of the OECD Commentary on Article 1 recognizes that the potential application of general anti-abuse provisions, either in domestic law or in the tax treaty, does not mean that there is no need for the inclusion of specific anti-abuse provisions in tax treaties in cases where "specific avoidance techniques have been identified or where the use of such techniques is especially problematic".[118]

However, the OECD Commitee also affirms that such special anti-abuse provisions need to be accompanied by specific provisions to ensure that treaty benefits will be granted in *bona fide cases*.[119] As a consequence, one should not underestimate the risks of relying extensively on specific treaty anti-abuse rules to deal with tax treaty avoidance strategies.[120]

First, SAARs are often drafted once a particular avoidance strategy has been identified.[121] Second, the inclusion of a specific anti-avoidance provision in a treaty can weaken the case as regards the application of general anti-abuse rules or doctrines to other forms of treaty abuses.[122] In fact, adding specific anti-abuse rules to a tax treaty could be wrongly interpreted as suggesting that an unacceptable avoidance strategy that is similar to, but slightly different from, one dealt with by a specific anti-abuse rule included in the treaty is allowed and cannot be challenged under general anti-abuse rules.[123] Third, in order to specifically address

115 Klaus Vogel in: Klaus Vogel (ed.) *Double Taxation Conventions* p. 119.
116 Klaus Vogel in: Klaus Vogel (ed.) *Double Taxation Conventions* p. 119.
117 Klaus Vogel in: Klaus Vogel (ed.) *Double Taxation Conventions* p. 119.
118 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 47.
119 Michael Lang, *Introduction to the Law of Double Taxation Conventions* p. 69.
120 UN Model Commentary on Article 1, paragraph 33.
121 UN Model Commentary on Article 1, paragraph 33.
122 UN Model Commentary on Article 1, paragraph 33.
123 UN Model Commentary on Article 1, paragraph 33.

complex avoidance strategies, complex rules may be required. This is especially the case where these rules seek to address the issue through the application of criteria that leave little room for interpretation rather that through more flexible criteria such as the purposes of a transaction or arrangement.[124]

For these reasons, whilst the inclusion of SAARs in tax treaties is the most appropriate approach to deal with certain situations, it cannot, by itself, provide a comprehensive solution to treaty abuse.[125]

A number of prevailing specific anti-abuse provisions found in the OECD Model or suggested in the OECD Commentary will be addressed below.

Some of the main provisions of the OECD Model Convention, which purport to directly tackle tax treaty abuse, are contained in Articles 10 (2), 11 (2) and 12 (1), i.e. all containing the requirement that recipient of such items of income be the "beneficial owner" thereof.[126]

The beneficial owner requirement was introduced in the 1977 version of the OECD Model.[127] The 1995 version of the Commentary clarified that use of the beneficial owner concept means that the source state is not obliged to give up taxing rights over dividend, interest or royalty income merely because that income was immediately received by a resident of a state with which the source state had concluded a treaty.[128] The Commentary was further amended in 2003 to not only exclude agents and nominees but also conduits or persons receiving the income who have very narrow powers over the income, such that they act as a mere fiduciary or administrator acting on behalf of the interested parties.[129]

Therefore, the treaty concept of beneficial ownership can be used by tax authorities to deny treaty relief where the arrangement is inconsistent with the object and purpose of the tax treaty; for example, where the recipient of the income simply acts as a conduit for another person who in fact receives the benefit of the income concerned.[130]

It is clear from the 2003 OECD Model changes that treaty shopping is widely perceived as a problem.[131] The OECD, in the 2003 Model changes, has suggested in its Commentary a number of different treaty provisions that address treaty shopping. For instance, the inclusion of a comprehensive limitation-on-benefits (LOB) clause in its income tax treaties.

124 UN Model Commentary on Article 1, paragraph 33.
125 UN Model Commentary on Article 1, paragraph 33.
126 Bart Kosters, *Bulletin for International Taxation (Asia-Pacific)* (2009) p. 13.
127 Daljit Kaur, Kamesh Susarla, *Bulletin for International Taxation* (2011) p. 258.
128 Daljit Kaur, Kamesh Susarla, *Bulletin for International Taxation* (2011) p. 258.
129 Daljit Kaur, Kamesh Susarla, *Bulletin for International Taxation* (2011) p. 259.
130 Daljit Kaur, Kamesh Susarla, *Bulletin for International Taxation* (2011) p. 259.
131 Bart Kosters, *Bulletin for International Taxation (Asia-Pacific)* (2009) p. 12.

The LOB clause generally denies to a resident of a contracting state the benefit of the tax treaty unless certain criteria are met with respect to both the ownership of the company and the tax base. Typically, the shares in a company must be owned to a sufficient extent by qualifying residents of the other treaty country and the gross income of the company must not be eroded with deductible payments to persons that are not qualifying residents of the treaty countries, beyond a certain threshold.[132]

Triangular cases[133] are dealt with in paragraph 71 of the Commentary on Article 24 (3) as well as in paragraph 8 (2) on Article 4 of the OECD Model. The OECD Commentary indicates that these practices may be regarded as abusive.[134]

Last but not least, it is worth mentioning the provision relating to "star companies" of Article 17 (2) of the OECD Model Convention that is intended to counter a particular form of avoidance which might be used by artistes or sportspersons who assign their income to other persons, typically a company under their control.

Apart from these specific anti-abuse provisions, it is standard tax treaty policy of a large number of countries not to enter into a tax treaty with tax havens and to carve out privileged tax regimes from the application of tax treaties.[135]

Even if domestic anti-abuse rules do not conflict with a tax treaty, because they can generally be reconciled with tax treaty obligations, or specifically by virtue of a treaty provision to that effect, there is a question whether a domestic anti-abuse rule should give way where the treaty contains a specific rule addressing the abuse.[136] In that respect, very few countries are specific on this issue; however in the United States, for example, specific treaty rules complement domestic rules and domestic rules are not preempted by the treaty provisions.[137]

3. General anti-abuse rules found in tax treaties

Aside from specific anti-abuse rules, some countries have the practice of including a GAAR in their bilateral tax treaties.[138] The countries that report occasional inclusion of these treaty provisions are, for example, Austria, Brasil, China, Denmark, Israel, Luxembourg, the Netherlands, Russia, Singapore and Ukraine.[139]

For instance, we can find such a provision in paragraph 2 of Article 25 of the treaty between Israel and Brazil, signed in 2002:

132 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 49.
133 See the contribution of Tanvi Jagtap in this volume.
134 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 52.
135 Bart Kosters, *Bulletin for International Taxation Asia-Pacific* (2009) pp. 13–14.
136 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 53.
137 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 53.
138 Philip Baker, *Paper on Selected Topics in Administration of Tax Treaties for Developing Countries* (2013) p. 9.
139 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 43.

"A competent authority of a contracting state may deny the benefits of this convention to any person, or with respect to any transaction, if in its opinion the granting of those benefits would constitute an abuse of the convention according to its purpose. Notice of the application of this provision will be given by the competent authority of the contracting state concerned to the competent authority of the other contracting state".

As is also observed in the report of the UN Subcommittee on Improper Use of Treaties, the inclusion of a GAAR in a tax treaty can have the disadvantage that inclusion could be construed as a recognition of the fact that without such inclusion treaty abuse cannot be addressed and that this would then be problematic in the interpretation of tax treaties without the inclusion of the general anti-abuse provision.[140]

Perhaps against this background and probably because of the fact that in many countries the application of domestic general anti-abuse rules is generally regarded as consistent with tax treaty obligations, the inclusion of general anti-abuse provisions in tax treaties is the exception rather than the rule.[141]

4. The interpretation of tax treaty provisions

Another approach that has been used to counter improper uses of treaties has been to consider that there can be abuse of the treaty itself and to disregard abusive transactions under a proper interpretation of the relevant treaty provisions that takes account of their context, the treaty's object and purpose as well as the obligation to interpret these provisions in good faith.[142]

As noted in paragraph 9 (3) of the Commentary on Article 1 of the OECD Model: "Other states prefer to view some abuses as being abuses of the convention itself, as opposed to abuses of domestic law".

These states, however, then consider that a proper construction of tax conventions allows them to disregard abusive transactions, such as those entered into with the view to obtaining unintended benefits under the provisions of these conventions. This interpretation results from the object and purpose of tax conventions as well as the obligation to interpret them in good faith (see Article 31 of the Vienna Convention).[143]

This approach is applied, although not consistently, for example, in Finland, India, New Zealand and Norway.[144] Then there are countries in which no clear line is drawn and where abuse of the treaty itself can be addressed either through do-

140 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 46.
141 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 46.
142 UN Model Commentary on Article 1, paragraph 38.
143 UN Model Commentary on Article 1, paragraph 38.
144 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 35.

mestic law principles or by interpretation of the treaty (e.g. Austria, Canada, Germany, Israel, Japan, the United States).[145]

There seems to be some support for an approach that a good faith interpretation, consistent with a tax treaty's object and purpose, would lead to a conclusion inconsistent with the abuse of tax treaty provision.[146]

For example, although in Switzerland abuse of a tax treaties is usually dealt with by applying domestic anti-abuse principles, in a landmark case, *A Holding ApS,* handed down in 2005, the Swiss court viewed abuse as being abuse of the convention itself.[147]

In this case, a company resident in Guernsey had interposed a Danish holding company, A Holding, in order to own the shares in a company resident in Switzerland. A Holding was a mere holding company, without any economic activity in Denmark, which clearly had been interposed only with a view to obtaining the benefits of the Denmark-Switzerland income tax treaty.[148] A Holding received a dividend from its Swiss subsidiary and invoked the benefits of Article 10 of the tax treaty. The Swiss tax authorities denied the benefit of the treaty, arguing that A Holding had only been organized with a view to obtaining treaty benefits and that granting these benefits would be tantamount to an abuse of the treaty.[149] The Denmark-Switzerland DTA does not contain a general or specific anti-abuse provision that would result in denial of the treaty benefits.[150] The court, however, referred to the principle of good faith that should be observed in the interpretation of treaties as well as to the OECD Commentary and held that the principle of good faith entailed the prohibition of abuse.[151] The court also referred to the recognition of the principle of abuse of rights in Denmark, that Denmark had not made a reservation against the Swiss anti-abuse decree of 1962 and, furthermore, although the treaty at issue was concluded in 1973, it referred to the 2003 OECD Model changes and denied A Holding the benefits of the treaty.[152]

D. Judicial doctrines

Finally, if no general or special provisions are included in domestic law or in a treaty, one can inquire about general rules: may the domestic principles on 'abuse' or 'substance over form' be applied in cases involving double taxation treaties?

145 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 35.
146 Philip Baker, *Paper on Selected Topics in Administration of Tax Treaties for Developing Countries* (2013) p. 9.
147 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 38.
148 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 38.
149 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 38.
150 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 38.
151 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 38.
152 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 38.

In fact, in the process of determining how domestic tax law applies to tax avoidance transactions, the courts of many countries have developed different judicial doctrines that have the effect of preventing domestic and sometimes treaty law abuses.[153] The nature and scope of these principles differ considerably from country to country.[154]

In actively counteracting tax avoidance, the US judiciary, for example, has created a number of anti-abuse doctrines, which are referred to under the headings of "business purpose", "economic substance" or "sham transaction", "step transaction" and "substance-over-form".[155]

These doctrines are essentially views expressed by courts as to how tax legislation should be interpreted and as such, typically become part of the domestic tax law.[156] These doctrines can also be applied in the international context, particularly for the interpretation of tax treaty provisions.[157]

The simplest of these doctrines and probably the only universal one is sham, under which the true nature of legal transactions is determined.[158]

The step transaction doctrine is generally used by the lower courts to disregard interconnected steps that have no significance for tax purposes by consolidating these into a single transaction.[159]

Substance-over-form regimes are prevalent in many countries and they purport to let the taxation of transactions follow their economic substance.[160] For example, the substance-over-form doctrine is used by the US judiciary to disregard the legal form of a transaction in favour of its underlying economic substance.[161]

On the other hand, in a number of civil law countries, such as Spain, Swizerland, Brazil and Indonesia, tax avoidance is sometimes prevented by the application of doctrines that were judicially developed under the civil law.

These doctrines have been primarily based on the notion of abuse, namely "simulation", "abuse of form", "abuse of rights" and "*fraus legis*".[162] Again, these doctrines are essentially views expressed by courts as to how tax legislation should be interpreted and as such, typically become part of the domestic tax law.[163]

153 UN Model Commentary on Article 1, paragraph 28.
154 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 22.
155 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 349.
156 UN Model Commentary on Article 1, paragraph 29.
157 Amanda P. Varma/Philip R. West, 'Domestic anti-avoidance provisions with an international scope' in: *Tax treaties and tax avoidance: application of anti-avoidance provisions* (Rome: IFA Cahiers, 2010) p. 827.
158 Klaus Vogel in: Klaus Vogel (ed.) *Double Taxation Conventions,* m.no 116.
159 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 350.
160 Stef van Weeghel, 'General Report', (Rome: IFA Cahiers, 2010) p. 22.
161 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 351.
162 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 354.
163 UN Model Commentary on Article 1, paragraph 29.

Simulation, which is essentially equivalent to the common law concept of "sham", occurs when the intention of the parties is different from the arrangement that the parties purport to make, for example, the parties sign an agreement that engages in a sale transaction, but both parties know and intend it to be a gift.[164] In this situation, the tax authorities apply tax in accordance with the actual legal reality, not the taxpayer's pretended reality.[165]

The conditions for establishing the existence of cases of 'abuse' vary from country to country as does the frequency with which a transaction is considered 'abusive'.[166]

Abuse of form involves the use of an atypical, abnormal or unnecessary legal form by the taxpayer to perform a juridical act, which, if carried out through a "normal" form, would have a more burdensome tax treatment.[167] The doctrine of abuse of form could be compared to the "step transaction" doctrine, as it is usually used by tax authorities to disregard unnecessary transactions adopted by the taxpayer with the only purpose of avoiding taxation.[168]

Abuse of rights, in contrast, is the improper exercise of a right. Historically, the doctrine of abuse of rights has the following two aspects: (1) an objective aspect, which states that the correct exercise of any right should not damage the right of others and (2) a subjective aspect, which means that any exercise of the right should be consistent with the good faith of the user, who should try to comply with the legislator's intention.[169]

Finally, *fraus legis* (also known as abuse of law) corresponds to an indirect violation of the law, in which the taxpayer observes the literal content of the law, but to achieve a result contrary to its spirit.[170] In the doctrine of *fraus legis* two norms are usually used. The first must be imperative and determine a given conduct, i.e. the payment of taxes.[171] The second norm (a bypassing norm) must be the rule used by the taxpayer to avoid the imperative law.[172]

The doctrine of *fraus legis* is sometimes confused with the doctrine of abuse of rights, as in both cases the taxpayer acts against the legislator's intention.[173] Hence, in the case of statutory or court-developed abuse of rights rules and *fraus legis*, application of the doctrine may entail substitution of the valid legal con-

164 UN Model Commentary on Article 1, paragraph 29.
165 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 354.
166 Klaus Vogel in: Klaus Vogel (ed.) *Double Taxation Conventions,* m.no 118.
167 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 354.
168 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 354.
169 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 354.
170 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 354.
171 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 354.
172 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 355.
173 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 355.

struct by different facts that give rise to the tax liability that would otherwise be avoided by the legal structure.[174]

The greater or lesser aptitude of courts to switch from considering the legal form to considering the economic substance of a transaction is, it appears, not so much a question of the underlying doctrine –'abuse' or 'substance versus form'– but rather far more a question of the disposition of the judge, or the legal tradition of a particular country.[175]

Does it matters whether a jurisdiction has a statutory GAAR or a judicial GAAR?

It could be argued that no one model is clearly superior to the other.[176] In fact, while many jurisdictions now have a statutory GAAR, the policy behind much of these statutory GAARs has been influenced by judicial precedent.[177] It appears that both are equally capable of resulting in taxpayer uncertainity.[178] For judicial GAARs, this uncertainity often arises because the formation of the GAAR is so dependent on the views of individual judges and it is subject to relatively easy reformulation by higher courts.[179] In contrast, statutory GAARs may appear to be theoretically much clearer because of their written and prescriptive nature; however, they often provide no more clarity than a judicial GAAR due to the inherent 'catch all' objective with which the provision is drafted.[180]

IV. Conclusion

On very similar facts courts in different jurisdictions have arrived at diametrically opposite results by using different measures to counter abusive practices.[181]

Various reasons appear to explain this situation, including: (1) different appreciation of the facts; (2) the different judicial methodologies adopted by courts in the various jurisdictions; (3) the different policies of states towards tax avoidance and treaty shopping; (4) different approaches to fundamental questions as to whether tax treaties include an implied anti-abuse rule and whether domestic GAARs and SAARs can be applied to treaty situations where the tax treaty does not explicitly so allow, etc.; and (5) the willingness of courts to rely on the OECD and UN Commentaries and to apply posterior the Commentary to earlier tax treaties and/or facts.[182]

174 Christine Alves Alvarrenga, *Bulletin for International Taxation* (2013) p. 355.
175 Klaus Vogel in: Klaus Vogel (ed.) *Double Taxation Conventions,* m.no 116.
176 John Prebble, *WU International Tax Research Papers* (2015-23) p. 21.
177 John Prebble, *WU International Tax Research Papers* (2015-23) p. 21.
178 John Prebble, *WU International Tax Research Papers* (2015-23) p. 21.
179 John Prebble, *WU International Tax Research Papers* (2015-23) p. 21.
180 John Prebble, *WU International Tax Research Papers* (2015-23) p. 21.
181 Luc de Broe, Nathalie Goyette, Philippe Martin, Roy Rohatgi, Stef van Weeghel, Phil West, *Bulletin for International Taxation* (2011) p. 389.
182 Luc de Broe, Nathalie Goyette, Philippe Martin, Roy Rohatgi, Stef van Weeghel, Phil West, *Bulletin for International Taxation* (2011) p. 389.

As a consequence, the danger of the improper use or abuse of tax treaties certainly exists, and countries need to be aware of this, as well as aware of the ways in which they can prevent or counter this abuse.[183]

In this context, the recent debates in national and international political fora indicate that the beacons of what civil society tolerates as acceptable tax planning are shifting.[184]

In the OECD BEPS Report the effectiveness of the current anti-avoidance measures has been identified as a "key pressure area" contributing to the phenomenon of base erosion and profit shifting (BEPS).[185] In the recent BEPS Action Plan, treaty abuse was indicated as one of the most important sources of BEPS concerns.[186]

Accordingly, and despite the current provisions of the Commentary on Article 1 of the OECD Model, the OECD has indicated its plans to change the Model by inserting positive treaty anti-abuse clauses.[187]

Something needs to be changed, it seems.[188] Whether international consensus will emerge on newly defined boundaries of acceptable tax avoidance, and whether this consensus can be translated into an international regulatory framework and collective tax treaty amendments remains, however, to be seen.[189]

183 Philip Baker, *Paper on Selected Topics in Administration of Tax Treaties for Developing Countries* (2013) p. 17.
184 Bob Michel, 'Anti-Avoidance and Treaty Override: Pacta Sunt Servanda', *Bulletin for International Taxation* (2013) p. 414.
185 Bob Michel, *Bulletin for International Taxation* (2013) p. 414.
186 Bob Michel, *Bulletin for International Taxation* (2013) p. 414.
187 Bob Michel, *Bulletin for International Taxation* (2013) p. 414.
188 Bob Michel, *Bulletin for International Taxation* (2013) p. 414.
189 Bob Michel, *Bulletin for International Taxation* (2013) p. 414.

Historical Development of the OECD's Work on Treaty Abuse

Romi Irawan

I. Introduction

The purpose of this paper is to provide a historical overview of the OECD's work on abuse of tax treaties and in particular the changes to the Commentary of OECD Model Tax Convention. This includes several reports which expressed the OECD's views on this topic and the OECD recommendation on Action 6 of the BEPS project. Section II. discusses the initial work performed by the OECD in the period leading up to the adoption of the 1977 OECD Model Tax Convention. Section III. provides a summary of several reports resulting from an "in-depth study" of The Committee Fiscal Affairs regarding treaty abuse which led to the extension of the improper use of the convention section in the OECD Model Tax Convention. Section IV. elaborates on the changes to the Commentary on Article 1 of OECD Model Tax Convention, which clarifies the relationship between domestic anti-avoidance rules and tax treaties. Section V. addresses several updates and the historical development on the beneficial ownership concept. Section VI. examines recommendations on Action 6 of the OECD BEPS Project on preventing treaty abuse. Based on above analysis, section VII. will provides general conclusions.

II. 1977 version of the OECD Model Tax Convention

A. History of treaty

The earliest treaties on taxation were concluded by Belgium. In 1843, Belgium concluded a treaty with France, and in 1845, it concluded treaties with Luxembourg and the Netherlands. The purpose of these treaties at that time was not the avoidance of double taxation, but rather the exchange information and mutual assistance.[1]

Today's tax treaties, to large extent influenced by the work of the Financial Committee and Fiscal Committee of the League of Nations (LON), which later was continued by the Fiscal Committee of the OEEC and the Fiscal Committee of the OECD. The first structural study of the economic consequences of double taxation and the principles of international competence in taxation was contained in the Report on Double Taxation which was presented to the Financial Committee of the LON in 1923.[2]

Subsequent to the finalization of the Report on Double Taxation, a group of technical experts to the Financial Committee of the LON was given the task of proposing measures for a more equitable international assignment of taxation, to prevent the

1 John G. Herndon, Jr., *Relief from International Income Taxation* (Chicago: Callaghan and Company, 1932) pp. 14–15.

2 See *Report on Double Taxation submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp*, League of Nations Doc. E.F.S.73.F.19. (Geneva 1923).

evil of double taxation and to check tax evasion.[3] The technical experts concluded their work and according to their recommendation that a conference of technical experts be convened on a wider basis, led to the creation of such a committee. It was also called Committee of Technical Experts on Double Taxation and Tax Evasion. This Committee presented the first draft bilateral convention for the prevention of double of taxation in the sphere of direct impersonal and personal taxes and a draft bilateral convention on administrative assistance in matters of taxation, designed to address tax evasion and abuse of the treaty for the prevention of double taxation.

Based on a recommendation of the Committee of Technical Experts on Double Taxation and Tax Evasion, the Fiscal Committee was formed and until 1939 the Fiscal Committee and its subcommittees drafted and discussed several draft conventions for the avoidance of double taxation, including multilateral conventions. It also studied the issue of tax evasion. The work of these subcommittees on the task to revise the earlier draft treaty led to two draft model conventions, generally known as the Mexico draft and London draft model conventions of 1943 and 1946, respectively. As a result of the different composition of the participants at the meetings in Mexico and London, the Mexico draft generally follows the principle that income may be taxed in the source country, whereas the London draft modifies that principle as regards interest, dividends, royalties, annuities and private pensions. Both draft conventions cover taxpayers of the contracting states, but in fact restrict their application to persons having their fiscal domicile in one of the contracting states.[4]

After 1955, the work of the Fiscal Committee of the LON was continued by the Fiscal Committee of the OEEC. The work of the Fiscal Committee of the OEEC resulted in draft articles for the assignment of the right to tax royalties, dividends and interest. Later in 1961, the OECD was formed and its council adopted certain resolutions previously adopted by the OEEC, including draft Articles and Commentary prepared by the Fiscal Committee of the OEEC. Further, in 1963, the Fiscal Committee of the OECD presented its first completed draft on conventions, the OECD Model Convention of 1963, which has since been widely used by OECD member states in negotiating tax treaties.

B. Initial work on treaty abuse: Working Group No. 21

It is worth mentioning efforts taken by Working Group No. 21 as their work could be considered to be the initial work of the OECD concerning treaty abuse in the period leading up to the adoption of the 1977 OECD Model.

3 *Double Taxation and Tax Evasion, Report and Resolutions Submitted by the Technical Experts to the Financial Committee of the League of Nations*, League of Nations Doc. F. 212 (Geneva 1925), Part I, Introduction.

4 London and Mexico Model Tax Conventions, Commentary and Text, League of Nations Doc. C.88.M.88.1946. IIA. (Geneva 1946), Article I of the Protocol.

Working Group No. 21 of the Committee of Fiscal Affairs was the successor to Working Party No. 21 of the Fiscal Committee of the OECD.[5] Working Party no. 21 was established in 1962, after the OEEC became the OECD and the United States and Canada became members of the OECD in 1961. At that time, certain abuse considerations had been raised earlier, in particular in the context of the development of articles and commentaries on interest, dividends, and royalties, as well as treaty residence (in relation to partnerships) and exchange of information.[6]

Soon after joining the OECD, the United States pushed for establishment of Working Party No. 21, with a mandate to study international tax planning involving "abuse of tax conventions" with particular reference to various specific contexts.[7] Earlier, the United States had circulated a formal statement "Note by The United States delegation on tax avoidance through the improper use of tax conventions" to delineate its main concerns.[8]

Working Party No. 21 consisted of the delegates from the United States and the delegates from Denmark and been instructed to submit its first report for the session of the Fiscal Committee in May 1962, presumably with a view to getting something agreed on for inclusion in the 1963 Model and commentaries.[9] During 1963 until 1976, Working Party No. 21 published several reports on tax avoidance through the improper use or abuse of tax conventions.[10]

What followed the establishment of Working Party No.21 and its efforts was a flurry of correspondence, but no consensus on either the problems or the poten-

5 See John F. Avery Jones, 'Understanding the OECD Model Tax Convention: The Lesson of History', *Florida Tax Review* (2009) pp. 1–49.

6 Angelo Nikolakakis, 'Historical Perspectives on Abuse of Tax Treaties' in: Guglielmo Maisto/Angelo Nikolakakis/John M. Ulmer (eds.) *Essay on Tax Treaties: A Tribute to David A. Ward*, (Amsterdam: IBFD, 2012) p. 345.

7 Organisation for Economic Co-operation and Development, 'Draft Terms of Reference: Working Party on Tax Avoidance', document TFD/FC/141, January 17, 1962, in www.taxtreatieshistory.org.

8 See document TFD/FC/135, November 14, 1961, pp. 1–2 in www.taxtreatieshistory.org.

9 Angelo Nikolakakis in: Guglielmo Maisto/Angelo Nikolakakis/John M. Ulmer (eds.) *Essay on Tax Treaties: A Tribute to David A. Ward*, p. 346.

10 See Organisation for Economic Co-operation and Development, Working Party No. 21 of the Fiscal Committee (United States-Denmark), 'Preliminary Report on Tax Avoidance Through the Improper Use or Abuse of Tax Conventions', document FC/WP21(63)1, January 9, 1963 in www.taxtreatieshistory.org; Organisation for Economic Co-operation and Development, Working Party No. 21 of the Fiscal Committee (United States-Denmark), 'Second Report on Tax Avoidance Through the Improper Use or Abuse of Tax Conventions', document FC/WP21(65)1, February 10, 1965 (unpublished); Organisation for Economic Co-operation and Development, Working Party No. 21 of the Fiscal Committee, 'Third Report on Tax Avoidance Through the Improper Use or Abuse of Tax Conventions', document FC/WP21(67)1, December 21, 1967 in www.taxtreatieshistory.org; Organisation for Economic Co-operation and Development, Working Party No. 21 of Working Party No.1 (United States, Denmark, and Germany), 'Draft Report on Tax Avoidance Through the Improper Use or Abuse of Tax Conventions', document CFA/WP1(75)3, May 21, 1975 in www.taxtreatieshistory.org; Organisation for Economic Co-operation and Development, Working Party No.1 on Double Taxation of the Committee of Fiscal Affair, Working Group No.1, 'Second Draft Report on Tax Avoidance Through Improper Use and Abuse of Tax Conventions', document CFA/WP1(76)5, April 28, 1976 (unpublished).

tial solutions. The formal work commenced with a preliminary report and responses circulated among the 20 members of the Fiscal Committee, which led to a number of reports from the working party and the subsequent working group, but did not reach any broad consensus among member states.[11]

The result was that the 1977 OECD Model and commentaries contained very little on the subject of abuse and hence did not reflect the efforts of Working Group No. 21 or its predecessor, Working Party No. 21. It proved to be impossible at that time to build a strong consensus on a statement of the "problem", let alone any "common solution", notwithstanding approximately 15 years of effort. Nevertheless, at least the objectives of this project have been achieved in the sense that most of the states have now adopted CFC regimes, given that this was the one of proposed solutions in the preliminary report and in the sense that the OECD Commentaries have now been revised to incorporate much of was that being proposed in this project.[12]

III. 1992 version of the OECD Model Tax Convention

After the 1977 OECD Model, several OECD reports in the 1980s expressed the view of the OECD Fiscal Affairs Committee on the improper use of tax treaties. Some of these reports are less formalistic than the 1977 OECD Model and are more inclined to the application of domestic anti-abuse norms in the context of tax treaties. The OECD's views, as expressed in these reports, are summarized below.

A. 1987 Report on Double Tax Convention and the Use of Conduit Companies

In its Commentary on Article 1 of the 1977 OECD Model Convention, the Committee on Fiscal Affairs expressed its concern about the improper use of tax convention by a person, either resident or not, acting through a legal entity created in a state with the main or sole purpose of obtaining treaty benefits which would not be available directly to such person.[13] Further, the common situation referred to in the Commentary is a situation in which a person resident in a given state who is not entitled to the benefit of a tax treaty sets up an entity in another state in order to obtain those treaty benefits that are not directly available to him. Such an entity is called "*conduit company*".[14] This situation is also often referred to as "*treaty shopping*", which connotes a premeditated effort to take advantage of the

11 See paragraph 7–10 of the 1977 commentaries.

12 Angelo Nikolakakis in: Guglielmo Maisto/Angelo Nikolakakis/John M. Ulmer (eds.) *Essay on Tax Treaties: A Tribute to David A. Ward*, pp. 345–385.

13 OECD, *Double Taxation Conventions and the Use of Conduit Companies* (Paris: OECD, 1987) para. 9.

14 Luc de Broe, *International Tax Planning and Prevention of Abuse* (Amsterdam: IBFD, 2008) p. 5.

international tax treaty network and careful selection of the most favourable tax treaty for specific purpose.[15]

The existence of "conduit companies" has long been perceived to be a problem in tax treaty negotiations and it may also become a problem in the applications of the existing tax treaties. At that time, the Committee on Fiscal Affairs had a different opinion on whether the absence of an overall solution to the conduit problem was a serious flaw in the OECD Model Convention 1977.[16] The Committee also noted that this problem had become more acute and that improvement was advisable in some respects.[17] It recommended that the OECD should come up with policies regarding conduit companies in more detail in order to prevent the improper use of tax treaties, and incorporate into the Commentary on the OECD Model Conventions as to general policy approaches and specific treaty provisions relating to conduit companies.[18]

This report suggests some general policy approaches, including the "radical solution" of not concluding treaties with the countries which are especially prone to becoming a base for conduit companies and suggestions of treaty provisions "which treaty negotiators might consider when searching for solution to a specific case".[19] Further, the Committee has steered away from strict recommendations and this report is not very specific as to reasons for the absence of such recommendations. Perhaps the significant variety of situations and tax regimes in different countries is one of the reasons. It is also conceivable that the different interest and tax treaty policies of OECD member states prevented the Committee in arriving at a common opinion.[20]

However, the report recommends several solutions such as provisions that the states may consider introducing in their treaties. These approaches have been incorporated, with certain amendments, in the Commentary on Article 1 of the OECD Model Convention 1992:[21]

1. The look-through approach: disallows treaty benefits for foreign-owned companies, i.e. not owned or controlled by resident individuals. This approach may effectively exclude foreign controlled base or conduit companies;

15 H. David Rosenbloom, 'Tax Treaty Abuse: Problems and Issue' *15 Law and Policy in International Business*, 1983, p. 766.
16 Committee on Fiscal Affairs of the OECD, International Tax Avoidance and Evasion, Four Related Studies, Issues in Interational Taxation Series, No. 1 (OECD, Paris 1987) p. 94.
17 OECD, *Double Taxation Conventions and the Use of Conduit Companies* (Paris: OECD, 1987) para. 16.
18 Committee on Fiscal Affairs of the OECD, International Tax Avoidance and Evasion, Four Related Studies, Issues in Interational Taxation Series, No. 1 (OECD, Paris 1987) p. 94.
19 Committee on Fiscal Affairs of the OECD, International Tax Avoidance and Evasion, Four Related Studies, Issues in Interational Taxation Series, No. 1 (OECD, Paris 1987) p. 95.
20 Stef van Weeghel, *The Improper Use of Tax Treaties* (Deventer: Kluwer, 1998) p. 213.
21 Ned Shelton, *Interpretation and Application of Tax* Treaties (UK: Tottel, 2004) p. 6.20.

2. The exclusion approach: excludes certain entities enjoying tax privileges from treaty application;
3. The subject-to-tax approach: requires minimum taxation or "ordinary" taxation in the other contracting state. The approach was considered to be useful in combating typical conduit situations, but not if income is offset with expense deductions;
4. The channel approach: this is a provision against stepping stone structures or base erosion which reduces the taxable base by making tax-deductible payments to persons resident in third countries. The provision is broad and could interfere with genuine business activities, whilst the application is burdensome and requires efficient administration; and
5. Bona-fide provisions: require sound business reasons behind the activity or stock exchange quotation. The report mentions that is necessary as an exception to ensure treaty benefits are granted in bona fide cases since the other provisions are very general nature.

B. 1987 Report on Double Tax Convention and the Use of Base Companies

According to the Report, a base company is described as follows:

> The 'conduit company' concept is focused on tax advantages to be secured in the country of source of the sheltered income, whereas the 'base company' is concerned with minimization of tax in the country of residence of its controllers. Often the same corporate structure is designed to achieve both of these results and in those case problems can be regarded as different sides of the same coin.

Further, the Report mentions three kinds of base company and various examples of each are given in the Report:[22]

1. Asset administration (e.g. a patent is registered in the name of a low-taxed base company and licensed out);
2. Financial pivots (e g a holding company or financing entity); and
3. Operational base companies (e.g. an intermediary sales company, an artistes 'rent-a-star' company).

The report states that anti-abuse rules or rules on 'substance over form' can be used to conclude that a base company is not the beneficiary of an item of income.[23] It appears, therefore, that the report favours applying domestic anti-abuse rules in the context of tax treaties. In this regard, the OECD makes it clear that the majority of OECD countries believe that this type of domestic norm is

22 OECD, *Double Taxation Conventions and the Use of Base Companies* (Paris: OECD, 1987) paras. 14–17.

23 OECD, *Double Taxation Conventions and the Use of Base Companies* (Paris: OECD, 1987) para. 38.

connected with the internal rules on taxable events, and the rules are neither covered by tax treaties nor affected by them.[24] These conclusions refer implicitly to the problem of CFC legislation, but it seems as if the OECD wanted to draw more general conclusions, as shown by the reference to 'substance over form' principles. These conclusions, however, are limited to base companies and do not pertain to other matters, such as rule shopping or conduit companies.[25]

C. Concluding remarks

As a result of these reports, the Fiscal Affairs Committee, in connection with the 1992 OECD Model, studied the problem of applying domestic anti-abuse norms more thoroughly than in connection with the 1977 OECD Model. The 1992 OECD Model retained Para. 7 of the Commentary on Article 1, but added conclusions of several of the reports. Paras. 12 through 21 of the Commentary on Article 1 added the conclusions of the Conduit Companies Report that conduit companies cannot be excluded from the scope of tax treaties unless specific clauses to this effect are added to the treaty.[26] The conclusions of the Base Companies Report defend a position that differs from that concerning conduit companies: according to the majority of OECD countries, CFC rules and 'substance over form' principles or doctrines are compatible with tax treaties, are incorporated in Paras. 22 through 26, but they are drafted in terms of the problem of base companies.[27]

IV. The 2003 revisions to the Commentary of OECD Model Tax Convention

A. Background: OECD Harmful Tax Competition Report 1998

The OECD issued a report in April 1998 entitled Harmful Tax Competition: An Emerging Global Issue[28] and the 2003 changes to the Commentary dealing with the improper use of tax treaties, and in particular the Changes to the Commentary on Article 1, are the direct product of recommendations in the report.

The report made several recommendations concerning changes to tax treaties to counter harmful tax practices including two direct recommendations related to tax avoidance and tax treaties:[29]

24 OECD, *Double Taxation Conventions and the Use of Base Companies* (Paris: OECD, 1987) paras. 40 and 42.
25 Adolfo J. Martin Jimenez, 'Domestic Anti-Abuse Rules and Double Taxation Treaties: a Spanish Perspective – Part 1', *Bulletin for International Taxation* (2002) p. 548.
26 See Paras. 12–21 of the Commentary on Article 1.
27 See Paras. 22–26 of the Commentary on Article 1.
28 OECD, *Harmful Tax Competition: An Emerging Global Issue* (Paris: OECD, 1998).
29 OECD, *Harmful Tax Competition: An Emerging Global Issue* (Paris: OECD, 1998) pp. 47–49.

(1) The Report recommended that tax treaties be revised to deny or restrict the entitlement of treaty benefits for income and entities that are subject to harmful tax practices.[30] In response to these recommendations, the OECD released a report in November 2002 entitled Restricting the Entitlement to Treaty Benefits.[31] This Report proposed the inclusion of several new paragraphs and deletion of several others, including the changes to the Commentary dealing with the place of effective management, beneficial ownership, specific anti-avoidance provisions in tax treaties, and provisions restricting their application in tax treaties, and provisions restricting the application of preferential regimes after a treaty has been entered into.
(2) The Report recommended that the Commentary be clarified to remove any uncertainty or ambiguity regarding the compatibility of domestic anti-abuse measures with the OECD Model Tax Convention.[32] This issue will be discussed in detail in a later part of this thesis.

B. Overview: Pre-2003 Commentary on Article 1

The concept of anti-avoidance made its first appearance in the OECD Commentary 1977, even though at that time the provisions on tax treaties said little about tax avoidance.[33] The 1977 Commentary on Article 1 OECD Model Tax Convention stated essentially that tax treaties should not help tax avoidance or evasion; that states concerned with tax avoidance should adopt anti-avoidance provisions in their domestic laws and that such a state, if it wished to preserve the application of such domestic law provisions in situations governed by tax treaties, should specifically safeguard those provisions in their treaties.[34] Thus, the 1977 Commentary clearly implied that domestic anti-avoidance measures could not be applied to tax treaties, even if states perceive certain behaviour of taxpayers as abusive of their tax treaties, unless they specifically adopt these domestic rules in their treaties.[35] The 1977 Commentary also pointed out that some of the provisions of the Model Tax Convention already dealt with tax treaty abuse, for example the notion of "beneficial ownership" in Articles 10–12 and the special "artiste" companies provision in Article 17 paragraph 2. States were encouraged to include such specific anti-abuse provisions in their bilateral treaties.[36]

The 1963 and 1977 versions of the OECD Model Tax Convention referred to the purpose of the Model Tax Convention to eliminate double taxation and prevent

30 OECD, *Harmful Tax Competition: An Emerging Global Issue* (Paris: OECD, 1998) pp. 47–48.
31 OECD, *Issues in International Taxation, Part 1: Restricting the Entitlement to Treaty Benefits* (Paris: OECD, 2003) pp. 7–30.
32 OECD, *Harmful Tax Competition: An Emerging Global Issue* (Paris: OECD, 1998) pp. 48–49.
33 Brian J. Arnold, 'Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model', *Bulletin – Tax Treaty Monitor* (2004) p. 244.
34 See Para. 7 of the Commentary on Article 1.
35 See Para. 23 of the Commentary on Article 1.
36 OECD Model Commentary (1977) on Article 1, paragraphs 7–10.

fiscal evasion.[37] The reference to fiscal evasion was arguably limited to fraud or criminal tax evasion and did not include tax avoidance, which was universally considered to be different from tax evasion.[38] Until 2003, the provisions of the Commentary of the OECD Model were equivocal about treatment of tax avoidance under tax treaties.[39]

In January 2003, extensive revisions to the Commentary were issued which clarify the relationship between tax treaties and domestic anti-avoidance rules and the problems concerning the improper use of tax treaties.[40] The 2003 changes to the Commentary on Article 1 take a fundamentally different approach to tax avoidance and tax treaties. The OECD has added in its commentary in para. 7 on Article 1 that treaties also have, together with that "principal purpose" another purpose – "to prevent tax avoidance and evasion". Tax treaties should not be interpreted to prevent application of the domestic anti-avoidance rules. Further, tax treaties should be interpreted so as to prevent their abuse. In the pre-2003 Commentary the onus was placed on those countries concerned about tax avoidance to put provisions into their tax treaties to deal with it.[41] In the absence of such explicit provisions, the benefit of tax treaties arguably had to be given in accordance with the literal meaning of their provisions, even in the face of abusive transactions entered into solely for the purpose of obtaining those benefits.[42] Therefore, by the 2003 changes, the onus has shifted to those countries that have entered observations on the Commentary on Article 1 and to non-OECD countries that take a different view from that expressed in the Commentary to put provisions into their treaties to restrict the application of the domestic anti-avoidance rules of the other contracting state or to prevent the treaties from being interpreted in a way that counters abusive transactions.

Until early 2003, the Commentary (para. 7) on Article 1 of the OECD Model Tax Convention emphasized that the purpose of bilateral tax treaties was to facilitate international trade and investment by eliminating double taxation. Para. 7 also added that tax treaties "should not, however, help tax avoidance or evasion". The Commentary placed the onus firmly on countries to adopt domestic anti-avoidance rules to prevent such exploitation and then to preserve the application of these rules in their treaties. Para. 7 provided: "Such States will then wish, in their bilateral double taxation conventions, to preserve the application of provisions

37 See OECD Model Tax Convention, Introduction, Para. 16.
38 Stef van Weeghel, *The Improper Use of Tax Treaties,* pp. 34–35.
39 See Paras. 22–26 of the Commentary on Article 1, as they read before 2003.
40 For further details, see OECD Model Commentary of 2003.
41 See, for example, van Weeghel, *Improper Use* 259.
42 For an argument that, prior to 2003, a country was not obliged to give treaty benefits with respect to abusive transaction, see Martin Jimenez, The 2003 Revision of the OECD Commentaries on the Improper Use of Tax Treaties: A Case for the Declining Effect of the OECD Commentaries?, *IBFD* 2004, 17.

of this kind [anti-avoidance rules] contained in their domestic laws."[43] The implication was that, if treaty did not explicitly allow the application of domestic anti-avoidance rules, such rules could not apply to deny the availability of treaty benefits. Admittedly, the Commentary did contain any other statements suggesting that tax treaties did not preclude the application of domestic anti-avoidance rules.[44]

The pre-2003 Commentary also identified conduit situations in which a taxpayer could obtain treaty benefits by establishing a legal entity in a country, although the taxpayer was not resident in the country and did not have substantial economic connections with it. The balance of the Commentary on the improper use of tax treaties was based on two 1987 OECD Reports on Base and Conduit Companies.[45] Several alternative techniques for dealing with the problem – look through provisions, exclusion provisions, subject-to-tax clauses and the channel approach – were set out, but no recommendations were made for their use.[46]

Paragraph 23 of the Article 1 Commentary indicated that domestic anti-avoidance provisions, including substance-over-form and CFC rules "are part of the basic domestic rules set by national tax law for determining which facts give rise to a tax liability. These rules are not addressed in tax treaties and therefore are not affected by them."[47] This position is stated to be view of "the large majority of OECD Member Countries" and the Commentary also recognized a dissenting view.

The pre-2003 Commentary summarized the opposing majority and minority viewpoints. According to one view, if domestic anti-avoidance rules were given precedence over treaties, economic double taxation might well result. According to the other view, tax treaties should not be abused and, therefore, treaties should not prevent the application of domestic anti-avoidance rules. Despite the facts that "[i]t is not easy to reconcile these divergent opinions", according to the pre-2003 Commentary paragraph 24 on Article 1, "it is the view of the wide majority that such rules [domestic anti-avoidance rules], and the underlying principles, do not have to be confirmed in the text of the convention to be applicable".[48]

Overall, the pre-2003 Commentary on Article 1 dealing with the improper use or abuse of tax treaty was confusing. It was attempted to make it clear that most OECD Member countries consider domestic anti-avoidance rules against treaty

43 See Para. 7 of the Commentary on Article 1.
44 See Para. 23 of the Commentary on Article 1.
45 OECD, *Double Taxation Conventions and the Use of Base Companies* (Paris: OECD, 1987) and OECD, *Double Taxation Conventions and the Use of Conduit* Companies (Paris: OECD, 1987). Also see section III.A. of this contribution.
46 Brian J. Arnold, *Bulletin – Tax Treaty Monitor* (2004) p. 246.
47 This statement has been retained in the 2003 Commentary on Article 1 (see Para. 22.1).
48 See Para. 24 of the Commentary on Article 1.

shopping and other forms of treaty abuse to be consistent with the provisions of tax treaties.[49] Further, that Commentary also seemed to go out of its way to recognize the views of the minority of OECD Member countries and to emphasize the limits imposed by tax treaties on the application of domestic anti-avoidance rules in order to them to be consistent with treaties. Although the Commentary recognized that tax treaties should not be abused and should not preclude the application of domestic anti-avoidance rules, the Commentary paragraph 10 on Article 1 suggested that "[i]t may be appropriate for Contracting States to agree in bilateral negotiations that any relief from tax [provided by a treaty] should not apply in certain cases, or to agree that the applications of domestic laws against tax avoidance should not be affected by the Conventions".

C. The 2003 revisions to the Commentary on Article 1

According to the 2003 Commentary paragraph 9.1 on Article 1, there are two fundamental issues involving tax treaties and tax avoidance: (1) whether tax treaties can be interpreted and applied to deny treaty benefits with respect to abusive transactions; (2) whether domestic anti-avoidance rules conflict with, and their application is precluded by, tax treaties.

The Commentary on Article 1 provides a detailed analysis of these two issues. The Commentary notes that for many countries there is only one issue, namely, the second issue. For these countries, any abuse of tax treaty is an abuse of domestic law because tax is imposed under domestic law (Paragraph 9.2 of the Commentary on Article 1). If tax is reduced because of the improper use or abuse of the provisions of tax treaty, there is an abuse of domestic law subject to any domestic anti-avoidance rules. Therefore, the only issue is whether the provisions of tax treaties preclude or restrict the application of domestic anti-avoidance rules. For other countries, however, abuses of a treaty are not necessarily abuse of domestic law. For them, the issue is whether tax treaties can be interpreted, independent of domestic law, to deny treaty benefits with respect to abusive transactions (Paragraph 9.3 of the Commentary on Article 1).

According to the Commentary paragraph 9.4, whatever approach the country takes, the answer is the same: treaty benefits should not be granted with respect to transactions that constitute an abuse of the treaty. Although the Commentary does not provide a definition of abusive transaction, it offers "a guiding principle" that a transaction should be considered abusive where a main purpose of the transaction is to obtain treaty benefits and, in the circumstances, providing treaty benefits would be contrary to the object and purpose of the relevant provisions of the treaty.[50]

49 Brian J. Arnold, *Bulletin – Tax Treaty Monitor* (2004) p. 246.
50 See Para. 9.5 of the 2003 revisions to the Commentary on Article 1.

D. The purpose of tax treaties to prevent tax avoidance

In the 1963 and 1977 versions of the OECD Model Tax Convention, the title referred to the purposes of tax treaties as being the elimination of double taxation and the prevention of fiscal evasion. These references were removed in 1992 in recognition of the fact that tax treaties have a variety of other purposes (for example, non-discrimination and administrative cooperation)[51]. Nevertheless, the OECD states that that countries may wish to include the reference in the title to the elimination of double taxation and the prevention of fiscal evasion.[52]

The reference to the prevention of fiscal evasion in the title of the OECD Model Tax Convention has never been satisfactory: For most countries, there is a clear distinction between tax avoidance and tax evasion, the latter being illegal and subject to serious fines and imprisonment. Before the addition of Article 27 in 2003, the OECD Model Tax Convention said virtually nothing about tax evasion. The exchange of information between the tax authorities could be useful in preventing tax evasion, but it could be equally useful in combating tax avoidance. Therefore, the reference to fiscal evasion as one of the main purposes of the OECD Model Tax Convention seems curious as the Model Tax Convention did not contain any provisions dealing expressly with tax evasion. As a result, it has been suggested that the term "tax evasion" should be interpreted to mean or to include tax avoidance. This argument has some basis as a result of the use of the term "*evasion fiscale*", which is generally translated as "tax avoidance", in the French-language version of the OECD Model Tax Convention. The term "*evasion fiscale*", however, was changed in 1992 to "*fraude fiscale*", which in France is considered equivalent to tax evasion.[53] Under most countries' domestic tax laws, fiscal or tax evasion and tax avoidance are clearly different concepts.[54] Moreover, although the OECD Model Tax Convention contains several provisions dealing with tax avoidance, some of them (the special relationship provisions in Articles 11[6] and 12[4]) are very narrow, some of them (the beneficial owner requirement in Articles 10, 11 and 12) are arguably fundamental rules of taxation rather than anti-avoidance rules, and some of them (the exchange of information article) have much broader purposes. Therefore, the argument that the reference to fiscal evasion in the title of the OECD Model Tax Convention (or in the footnote to the title after 1992) should be considered to include tax avoidance is not clearly supported by the provisions of the OECD Model Tax Convention.

The pre-2003 Commentary did not clarify the interpretation and application of the OECD Model Tax Convention to prevent tax evasion or tax avoidance. Before

51 Para. 16 of the Introduction to the OECD Model.
52 See footnote 1 to the title of the OECD Model.
53 See Frans Vanistendael, 'Legal Framework for Taxation', in Victor Thuronyi (Ed.), Tax Law Design and Draftting (Deventer, the Netherlands: Kluwer, 2000) pp. 44–46. See also Victor Thuronyi, *Comparative Tax Law* (The Hague, the Netherlands: Kluwer, 2003) pp. 154–155.
54 Brian J. Arnold, *Bulletin – Tax Treaty Monitor* (2004) p. 248.

2003, the Commentary on Article 1 suggested that tax treaties should not promote tax avoidance. This suggestion is not equivalent to a positive statement that one of the purposes of tax treaties is to prevent tax avoidance. In fact, several commentators read the pre-2003 Commentary to mean that tax treaties can tolerate tax avoidance unless the treaty contains explicit anti-avoidance provisions.[55] As noted earlier, the pre-2003 Commentary stated explicitly that it was the responsibility of those countries concerned about tax avoidance to adopt domestic anti-avoidance rules and to preserve their application in treaties.[56]

The 2003 changes to the Commentary on Article 1 clarify that one of the purposes of tax treaties is to prevent tax avoidance.[57] Paragraph 7 of the Commentary on Article 1 provides: "It is also a purpose of tax conventions to prevent tax avoidance and evasion." Although the Commentary acknowledges that the principal purpose of tax treaties is to facilitate international trade and investment by eliminating double taxation, this does not detract from additional ancillary purposes. The effect of clarifying that one of the purposes of tax treaties is to prevent tax avoidance relates to the interpretation and application of treaties. Article 31(1) of the Vienna Convention on the law of treaties provides that a treaty should be interpreted in light of its purpose. Accordingly, the provisions of a bilateral tax treaty should be interpreted to prevent tax avoidance.

Although this clarification of the Commentary effectively eliminates any argument that the prevention of tax avoidance is not one of the purposes of tax treaties, such a vague statement about the purpose of tax treaties provides little guidance to tax authorities or courts as to how to interpret and apply treaties to counter tax avoidance. Fortunately, the 2003 changes to the Commentary on Article 1 provide some useful elaboration on the significance of the clarification that tax treaties are intended to counter tax avoidance (Paragraph 9.1). First, it follows that tax treaties should not be interpreted to prevent the operation of domestic anti-avoidance rules and judicial anti-avoidance doctrines. Second, the benefits of a tax treaty should not be available for transactions that involve the improper use or abuse of the treaty.

E. Relationship between domestic anti-avoidance rules and treaties

1. General overview

According to the Commentary on Article 1, domestic anti-avoidance rules, such as substance-over-form, economic substance or general anti-avoidance rules, are used to determine the facts on which liability to tax is based; as such, "these rules

55 Stef van Weeghel, *The Improper Use of Tax Treaties*, p. 35.
56 See section VI.A. of this contribution.
57 Brian J. Arnold, *Bulletin – Tax Treaty Monitor* (2004) p. 248.

are not addressed in tax treaties and are therefore not affected by them".[58] As a result, there is no conflict between domestic anti-avoidance rules and tax treaties. Domestic anti-avoidance rules may be applied to determine the character of amounts or transactions for domestic tax purposes.

The fact that domestic (general) anti-abuse rules might apply to deny treaty benefits does not imply that specific treaty-based anti-abuse rules aimed at particular forms of tax avoidance are unnecessary. In that respect, the Commentary suggests a number of provisions tax treaty negotiators might consider (ranging from "look through", "subject-to-tax clauses" to comprehensive "limitation-on-benefits provisions").[59]

Although the Commentary is very clear that there is no conflict between tax treaties and domestic anti-avoidance rules, it states that countries should eliminate double taxation in accordance with the provisions of their treaties unless there is clear evidence of abuse (Paragraph 22.2 of the Commentary on Article 1). As a result, if one country applies its domestic anti-avoidance rules and the treaty is then applied to the transaction as characterized under those rules, the other country should accept the first country's treatment of the transaction for purposes of providing relief from double taxation.[60]

2. Controlled foreign corporation (CFC) rules

The revision to the Commentary explicitly concludes that controlled foreign corporation (CFC) rules are not in conflict with tax treaty provisions.[61] The issue is dealt with as an example of domestic anti-avoidance rules directed at situations involving the abuse of treaties and, in particular, the use of foreign base companies by a resident of a country to avoid tax in that country.[62] Under CFC rules, all or part of the income of a foreign company is attributed to the resident taxpayers who control or who have a substantial interest in the foreign company. Further, the 2003 revisions to the Commentary (Paragraph 23) on Article 1 asserts that CFC rules "are now internationally recognized as a legitimate instrument to protect the domestic tax base".

Before the 2003 changes, the Commentary to the OECD Model Tax Convention was unclear and unsatisfactory in its treatment of the relationship between CFC rules and tax treaties.[63] The Commentary on Article 1 dealt with CFC rules and

58 Para. 22.1 of the Commentary on Article 1. This position is unchanged from the pre-2003 Commentary.
59 Luc de Broe/Joris Luts, 'BEPS Action 6: Tax Treaty Abuse', *Intertax* (2015) p. 124.
60 Brian J. Arnold, *Bulletin – Tax Treaty Monitor* (2004) p. 250.
61 OECD Model Commentary on Article 1, paragraph 23; Article 7, paragraph 13; Article 10, paragraphs 37–39.
62 OECD Model Commentary on Article 1, paragraphs 24–25.
63 For an overview of the pre-2003 Commentary, see 20.

substance-over-form rules together. Consequently, the specific issues involving the interaction of CFC rules and treaties were not dealt with explicitly. The pre-2003 Commentary (Paragraph 23) on Article 1 stated that CFC rules and substance-over-form rules "are not addressed in tax treaties and are therefore not affected by them". It recognized a difference of views among the OECD countries, with some countries taking the position that a treaty should take precedence over domestic anti-avoidance rules except to the extent that such rules are expressly mentioned in the treaty. The view of the wide majority of countries, however, was that anti-avoidance rules, including CFC rules, "do not have to be confirmed in the text of the convention to be applicable" (Paragraph 24 of the Commentary on Article 1). Although the Commentary (Paragraph 25) on Article 1 acknowledged that CFC rules "are not inconsistent with the spirit of tax treaties", it went on to indicate that "it seems desirable that counteracting measures comply with the spirit of tax treaties with a view to avoiding double taxation".

F. Concluding remarks

Although the revised Commentary at that time was well received by certain scholars,[64] it was widely criticized on various aspects by others.[65] In addition, various OECD Member States have made observations to the Commentary on Article 1 after the 2003 revisions.[66] Further, the 2003 revisions still do not offer a uniform solution for tackling improper use despite the fact that it sets out the solution that might be considered when searching solutions to specific cases, namely beneficial ownership approach, the look-through approach, the channel approach, the limitation of residence approach, the exclusion approach and the subject-to-tax approach.[67] The fact that Action 6 is part of BEPS implies that the 2003 revisions were unsatisfactory or that many states did not execute the OECD recommendations proposed therein.

64 J. Sasseville, 'A Tax Treaty Perspective: Special Issues' in: G. Maisto (Ed.) *Tax Treaties and Domestic Law* (Amsterdam: IBFD, 2006) p. 55.

65 See, for example, L. de Broe, *International Tax Planning and Prevention of Abuse*, Amsterdam, IBFD, 2008, 386–404; A.J.M Jimenez, 'The 2003 Revision of the OECD Commentaries on the Improper Use of Tax Treaties: A Case for the Declining Effect of the OECD Commentaries?', *Bulletin for International Taxation* (2004) pp. 17–18; B.J Arnold, 'Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model', *Bulletin for International Taxation* (2004) p. 244; J.J. Zornoza Perez and A. Baez, 'The 2003 Revision to the Commentary to the OECD Model on Tax Treaties and GAARs: A Mistaken Starting Point' in M. Lang et al. (Eds.), Tax Treaties: *Building Bridges between Law and Economics*, Amsterdam, IBFD, 2010, p. 130.

66 Five countries (i.e., Belgium, Ireland, Luxembourg, the Netherlands and Switzerland) made observations on the Commentary position that there is no conflict between CFC rules and tax treaties. With the exception of Belgium, these countries have also recorded observations with respect to the relationship between tax treaties and domestic anti-abuse rules in general (see OECD Commentary Art. 1, s. 27.4–27.9).

67 Reuven S. Avi-Yonah/Christiana HJI Panayi, 'Rethinking Treaty Shopping: Lessons for the European Union' in: Michael Lang/Pasquale Pistone/Josef Schuch/Claus Staringer/Alfred Storck/Martin Zagler (eds.) *Tax Treaties: Building Bridges between Law and Economics* (Amsterdam: IBFD, 2010) pp. 31–32.

V. 2014 update to the OECD Model Tax Convention regarding beneficial ownership

A. Historical overview of beneficial ownership

The introduction of beneficial ownership into the OECD Model Tax Convention occurred in 1977. As with the 1963 Draft Model, the work was done by various groups whose conclusions sometimes overlapped and required coordination. Although there were at least four groups whose work had some relation directly or indirectly to beneficial ownership, the focus here will be on Working Party No. 27 (WP27) on interest and royalties and Working Party No. 21 (WP21) on abuse on treaties which as the numbering suggest was created some time before WP27. The papers deal with them in the reverse order because WP21's work was completed after WP27, which was directly responsible for the introduction of the beneficial ownership concept.[68]

The OECD Model Tax Convention 1977 introduced in Articles 10, 11 and 12, the requirement that the recipient of the item of income be the beneficial owner thereof in order for tax to be reduced in the source state.[69] According to Vogel, this requirement was introduced in order to help prevent tax avoidance.[70] This is an anti-avoidance provision which states that corresponding treaty provisions are to be applied only when the recipient of this type of income is also the economic owner.[71]

With the widespread use of the term "beneficial owner" in tax treaties, one would expect the term to have a clearly defined meaning and there seems little change of being an accepted universal meaning.[72] Vogel argues that the term must be interpreted with reference to the context of the treaty, and particularly with a view to the purpose of the restriction. Further, the first and foremost reason why the term cannot be interpreted by reference to the domestic law of the state applying the treaty is (because) none of the national tax systems in question offer a precise definition thereof.[73]

B. The changes to the Commentary in 2003

Generally speaking, beneficial owner means a recipient who receives the income to which it has title and not a recipient who receives it for the benefit of a third

68 Richard Vann, 'Beneficial Ownership: What Does History (and Maybe Policy) Tell Us' in: Michael Lang/Pasquale Pistone/Josef Schuch/Claus Staringer/Alfred Storck/Martin Zagler (eds.) *Beneficial Ownership: Recent Trends* (Amsterdam: IBFD, 2013) p. 281.

69 Stef van Weeghel, *The Improper Use of Tax Treaties*, p. 64.

70 Vogel, *DTCs*, chapter 1, footnote 6, preface to Article 10–12.

71 Mahesh Shah, 'Trends in the Application of Anti-Avoidance Concepts in Tax Treaties' in: Markus Stefaner/Mario Züger (eds.) Tax Treaty Policy and Development (Vienna: Linde, 2005) p. 161.

72 John F. Avery Jones and Depret, 'The Treatment of Trust under the OECD Model Convention' in: *European Taxation*, No.12, 1983, p. 379.

73 Vogel, *DTCs*, chapter 1, footnote 6, preface to Article 10–12.

party. In other words, the benefit of these provisions would be extended only when the taxpayer is the ultimate, i.e. the real, beneficiary of the income and it is not warranted based on the apparent circumstances.[74]

The 2003 revisions to the Commentaries on Articles 10, 11 and 12 attempt to make the concept of beneficial owner more effective by clarifying that the term "'beneficial owner' is not used in a narrow technical sense; rather, it should be understood in its context and in light of the object and purposes of the Convention".[75] It is worth emphasizing in this regard, as mentioned earlier, that one of the purposes of tax treaties is to prevent tax avoidance. The Commentary has avoided any attempt to define beneficial owner. Although the lack of a definition permits the term to be interpreted in a flexible manner depending on the particular facts of each situation, it also permits the term to be given a narrow interpretation. The Commentary has attempted to reduce this risk by expressly indicating that the term is not intended to have a narrow meaning.

The 2003 revisions to the Commentaries on Articles 10, 11 and 12 also clarify that treaty benefits should not be given by the source state with respect to income received by an agent or nominee resident in the other contracting state unless the beneficial owner is also a resident of that state.[76] In this situation, it would seem obvious that the agent or nominee is not the beneficial owner of the income and that no treaty relief is appropriate because the agent or nominee will not be taxable on the income.[77]

One controversial issue derived from the 1987 Reports on Conduit Companies is that the 2003 revisions to the Commentary suggest that treaty benefits need not be given to persons (other than agents or nominees) acting as a conduit for someone else. Further, "a conduit company cannot normally be regarded as the beneficial owner if … it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator". Although it may suggest that a holding company that simply owns investment assets on behalf of its shareholders may not be the beneficial owner of the income received by it, the Report indicates that it is unlikely that sufficient information would be available in most cases to deny treaty benefits to a holding company. For this reason, the Commentary suggests that countries may wish to include specific provisions in their treaties to deal with such holding companies.[78]

74 Mahesh Shah in: Markus Stefaner/Mario Züger (eds.) Tax Treaty Policy and Development, p. 162.
75 OECD Model Commentary Articles 10, 11 and 12, paragraphs 12, 8 and 4.
76 OECD Model Commentary Articles 10, 11 and 12, paragraphs 12.1 and 12.2, 8.1 and 8.2, and 4.1 and 4.2.
77 Brian J. Arnold, *Bulletin – Tax Treaty Monitor* (2004) p. 258.
78 OECD Model Commentaries Article 10, 11 and 12, paragraphs 22, 12 and 7.

C. The 2011 Discussion Draft and meaning of beneficial ownership in the 2014 update to the OECD Model Tax Convention

Consultation has been being carried out by the OECD regarding the beneficial ownership concept, namely Clarification of The Meaning of "Beneficial Owner" in the OECD Model Tax Convention, particularly in the light of the confusing case law that has developed in recent years on the concept of beneficial ownership. However, the proposals made in the Discussion Draft may serve to increase the confusion and the problems rather than resolving them.

Perhaps the greatest problem of the proposed amendments is that they continue the trend of stating a much broader policy than the specific test apparently being recommended. The Draft fails to address the essential factors that distinguish a person who does not have beneficial ownership from a person who has limited rights over income but who does pass the beneficial ownership threshold.[79] It thus may well continue to encourage tax administrators to go down the path that has caused the recent litigation which will not produce the clarification that the Draft is intended to provide.

In 2014, the OECD Council approved the contents of the 2014 Update to the OECD Model Tax Convention which includes a number of changes to provide guidance and clarification with respect to the meaning of "beneficial owner" in Articles 10, 11 and 12.

VI. BEPS Action 6: Preventing Treaty Abuse

A. Introduction

On 5 October 2015, the OECD presented the results of OECD/G20 Base Erosion and Profit Shifting (BEPS) project. In total 15 reports have been finalized and one of them is the final report on Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances. Action 6 of the BEPS project identified treaty abuse, and in particular treaty shopping, as one of the most immportant sources of BEPS concerns.[80] In this regard, the focus of Action 6 was to develop model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances.

The final report on Action 6 contains the following three areas in which action should be taken to achieve the objective described above:[81]

79 Richard Vann, in: Michael Lang/Pasquale Pistone/Josef Schuch/Claus Staringer/Alfred Storck/Martin Zagler (eds.) *Beneficial Ownership: Recent Trends*, pp. 304–305.

80 OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumtances, Action 6 – Final Report*, para. 2 (OECD 2015).

81 OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumtances, Action 6 – Final Report*, para. 3 (OECD 2015).

1) Developing model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances;
2) Clarifying that tax treaties are not intended to be used to generate double non-taxation; and
3) Identifying the tax policy considerations that, in general, countries should consider before deciding to enter into a tax treaty with another country.

These changes should reflect the agreement that the OECD Model be amended to include the minimum level of protection against treaty abuse, including treaty shopping, which is necessary to effectively address BEPS. Ultimately, the OECD wants to ensure a minimum standard for all contracting states to prevent treaty shopping, but states are not mandatorily required to follow the proposals contained in the report.[82]

B. How this Final Report deals with treaty abuse

The Final Report sets out the result of work carried out to achieve three areas mentioned in the previous section and dedicated the most attention to the first objective. Introducing a general anti-abuse rule (GAAR) into tax treaties is an important recommendation in this area.[83] The OECD distinguished between the following two types of treaty abuse that should be addressed:[84]

1) Where a person tries to circumvent the limitation set out in the tax treaties itself; and
2) Where a person tries to circumvent the provisions of domestic tax law using treaty benefits.

The first type of treaty abuse consists in the first place in situations generally referred to as treaty shopping. Treaty shopping is the form of abuse to which the Report gives the greatest attention, although the Report also considers other situations in which a person tries to circumvent treaty limitation. According to the Report, although the GAAR will be useful in addressing such situations, targeted anti-abuse rules (TAARs) or specific anti-abuse rules (SAARs) generally provide greater certainty for both taxpayers and tax authorities.

The second form of treaty abuse can arise when (i) an abuse of a domestic law provision is dealt with by (ii) an abuse of domestic GAAR, SAAR or judicial doctrine, subsequent to which (iii) treaty protection is invoked by the taxpayer to

82 Erik Pinetz, 'Final Report on Action 6 of the OECD/G20 Base Erosion and Profit Shifting Initiative: Prevention of Treaty Abuse', *Bulletin for International Taxation* (2016) p. 113.
83 Carlos Palao Taboada, 'OECD Base Erosion and Profit Shifting Action 6: The General Anti-Abuse Rule', *Bulletin for International Taxation* (2015) p. 602.
84 OECD, *Preventing the Granting of Treaty Benefits in Inapropriate Circumtances, Action 6 – Final Report*, para. 15 (OECD 2015).

make the rule or doctrine inapplicable.[85] This form of treaty abuse only involves the avoidance of domestic law; consequently, these cases only be countered by domestic anti-abuse rules.

In order to counter such undesirable actions on the part of taxpayers, after referring to the previous work of the OECD on the issue,[86] the following three-pronged approach to address treaty shopping situation is recommended:[87]

1) A clear statement that contracting states, when entering into a tax treaty, wish to prevent tax avoidance and, in particular, intend to avoid creating opportunities for treaty shopping that are to be included in tax treaties, including in the title and the preamble of a tax treaties;
2) A limitation of benefits (LOB) rule should be included in the OECD Model. Such a specific rule would address a large number of treaty shopping situations based on legal nature, ownership in and the general activities of the residents of a contracting state; and
3) In order to address other forms of treaty abuse, including treaty shopping situations that would not be covered by the LOB rule, a more general anti-avoidance rule (GAAR) based on the principal purposes of transactions or arrangements should be included in future tax treaties. According to the OECD, such a rule was already reflected in the Commentary on Article 1 of the OECD Model, according to which the benefits of tax treaty should not be available where one of the principal purposes of arrangements or transactions is to secure a benefit under tax treaty and where obtaining that benefit in such circumstances would be contrary to the object and purpose of the tax treaty.

The Report acknowledges that, although some flexibility is possible, at a minimum states should agree to include in their tax treaties the express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. Further, states should implement that common intention by way of either the combined approach of both LOB and the principal purposes test rules supplemented by a mechanism designed to counter conduit arrangements, such as suggested in paragraph 15 of the Commentary on the PPT rule.

C. Concluding remarks

Although the 2003 Commentary on Article 1 provided countries with a well-equipped tool box to prevent treaty abuse, apparently this toolbox was not effi-

85 Luc de Broe/Joris Luts, *Intertax* (2015) p. 135.
86 OECD, *Preventing the Granting of Treaty Benefits in Inapropriate Circumtances, Action 6 – Final Report*, para. 18 (OECD 2015).
87 OECD, *Preventing the Granting of Treaty Benefits in Inapropriate Circumtances, Action 6 – Final Report*, para. 19 (OECD 2015).