The History and Relevance of the Beneficial Ownership Concept in Tax Treaties – Specifically in the context of the Introduction of the Principal Purpose Test

By

Shannen-Leigh Ross

(Student number: rsssha020)

Submitted in the Faculty of Commerce,

University of Cape Town

Supervisor: Jennifer Roeleveld

January 2023

University of Cape Town

Plagiarism Policy

COMPULSORY DECLARATION:

1. This dissertation has been submitted to Turnitin (or equivalent similarity and originality checking software) and I confirm that my supervisor has seen my report and any concerns revealed by such have been resolved with my supervisor.
2. I certify that I have received Ethics approval (if applicable) from the Commerce Ethics Committee.
3. This work has not been previously submitted in whole, or in part, for the award of any degree in this or any other university. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works of other people has been attributed, and has been cited and referenced.

Student number	RSSHA020
Student name	Shannen-Leigh Ross
Signature of Student	Signed by candidate
Date:	16.01.23

Acknowledgments

Firstly, I would like to thank my supervisor, Professor Jennifer Roeleveld for her unwavering support and guidance, and constant encouragement. Without her guidance, I would not have been able to complete my dissertation or year.

I would additionally like to thank the following people:

My colleagues in the faculty for their continuous support and for always being quick to answer my questions and for always being willing to lend a supporting ear.

My mom, Tania, and my dad Francois for always believing in me and sticking by me throughout the period of completing my dissertation.

I am deeply grateful to my sister, Katelyn for her continuous support. I could not have undertaken this journey without her.

My two best friends, Ilke Du Plessis and Lauren Philander. They have always been there to cheer me up with a hug or a smile. I would not have been able to make it through the year without their constant motivational talks.

I especially want to thank my Aunt Carmen Pheiffer, for her unconditional support and for always taking the time to listen to my thought processes and letting me run ideas by her, as well as for all her help and advice in completing my dissertation.

List of abbreviations

Abbreviation	Meaning
CRA	Canada Revenue Authority
DTA	Double Tax Agreement
DTT	Double Taxation Treaties
GAAR	General Anti-Avoidance Rule
HMRC	Her Majesty's Revenue and Customs
IBFD	International Bureau of Fiscal Documentation
IFA	International Fiscal Association
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD MTC	OECD Model Tax Convention on Income and on Capital
PPT	Principal Purpose Test
UN MTC	UN Model Tax Convention on Income and on Capital
US MTC	United States Model Tax Convention
Vienna Convention	Vienna Convention on the Law of Treaties (1969)

Abstract

The term Beneficial Ownership was primarily introduced to prevent treaty shopping and to ensure that only those liable to tax could claim treaty advantages. However, the term is not explicitly defined in the Organisation for European Economic Co-operation Model Tax Convention on Income and on Capital (OECD MTC), leading to its subjective interpretation and asymmetrical application, which may provide opportunities for the exploitation of tax treaties. The Principal Purpose Test (PPT) has been introduced as another anti-treaty-shopping provision for tax treaties. The aim of this research was to explore the term Beneficial Ownership to determine whether it is still relevant given the PPT. The research methodology used an interpretative approach, which entailed a systematic exploration of the literature and legal texts. Information from academic literature, double tax agreements, domestic legislation, OECD MTC (reports, commentaries, and materials) and international case laws were collected. Thereafter, a qualitative analysis was conducted to gain a clearer and more comprehensive understanding of the Beneficial Ownership concept and the PPT. The results of this study demonstrated that although the Beneficial Ownership concept is widely used in tax treaties across states, its subjective interpretation, has led to significant risks for double taxation or double non-taxation. In conclusion, the thesis suggests that the PPT is a viable alternative approach to address treaty shopping, although in its current state, the ambiguity of the terms used within the provision raises a few challenges and concerns. However, with the necessary adjustments made to the provision, the PPT has the potential to provide states with a more potent tool to treaty shopping, especially in structured transactions.

Table of Contents

Chapter 1

1.1 Background and motivation for the study

In recent years, globalisation and the interdependence of the world economy have accelerated significantly due to rapid advancements in telecommunications and information technology, reduced barriers to trade and labour, and increased capital mobility.[1] Although globalisation offers numerous benefits and enables economic trade and investments between countries, these agreements are subject to exploitation and corporate tax evasion and avoidance, which negatively impact economies, particularly those in developing countries. In an attempt to reduce source and residence issues that may lead to double taxation, several models of tax conventions have been developed to provide a uniform basis for international taxation.[2] The Organization for European Economic Co-operation Model Tax Convention on Income and on Capital (OECD MTC) and the United Nations Model Tax Convention (UN MTC) are two of the more significant tax conventions. The choice on which model to use is based on negotiation and compromise between contracting states.

Articles 10, 11 and 12 of the OECD MTC determines the taxing rights in relation to dividends, interest and royalties between countries based on the Beneficial Ownership concept, which relates to who the true owner of the income is, hereby aiming to eliminate tax avoidance, particularly in structured transactions.[3] According to the OECD commentary the term Beneficial Ownership should be interpreted based on the context, object and purpose of the income tax treaty between states.[4] Although the Beneficial Ownership concept has been incorporated in the OECD MTC and plays a pivotal part in establishing whether a person qualifies for tax treaty benefits, the term is not explicitly defined, nor expressively shaped in the OECD MTC, with limited reference to it in the commentaries. This may lead to ambiguity

1 Tejvan Pettinger 'What caused globalisation?' (2021) *Economics Blog*, available at *https://www.economicshelp.org/blog/401/trade/what-caused-globalisation/,* accessed on 2 February 2022.

2 Klaus Vogel 'Double Taxation and the Need for Double Tax Treaties' in *Double Tax Treaties and Their Interpretation*' Vol 4:1 (1986) page 5-13, Donald Whittaker 'An examination of the O.E.C.D and U.N Model Tax Treaties: History, Provisions, and Application to the U.S Foreign Policy' in North Carolina Journal of International Law and Commercial Regulation Vol.8:1 (1982) page 39-41.

3 OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing. available at *https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm*, accessed on 3 February 2022.

4 OECD, Model Tax Convention on Income and on Capital '*Commentary on Article 10*' (2017) para 12.1 -12.3 page 233-234.

and different interpretations by courts and tax administrations, and misunderstandings as to how the concept should be applied. Consequently, the risk of double taxation, non-taxation and unintended treaty results may be increased. Conduit companies present a striking example that illustrates how the subjectivity of the term Beneficial Ownership may be exploited. These companies are defined as legal entities, which have been set up in a treaty state with the intent of acting as a conduit to channel income earned by a person in another country in connection with a tax avoidance scheme.[5] Conduit companies may take advantage of treaty provisions under their own name in the state of source. However, economically, the benefits are given to a person not entitled to use the treaty.[6]

The Beneficial Ownership concept serves as a tool to combat treaty shopping.[7] Treaty shopping refers to the application of tax avoidance, which is defined as the use of lawful practices to reduce taxes.[8] This may lead to residents of non-treaty countries obtaining unintended treaty benefits that are not meant to be available to them.[9] Accordingly, the lack of consensus on the interpretation of the term Beneficial Ownership creates an opportunity for states to exploit the term as a mechanism for treaty shopping.

The traditional objective of tax treaties was to avoid double taxation and to encourage international trade and investment. From a South African perspective, it is acknowledged that the network of tax treaties signed by South Africa has grown since South Africa resumed international participation. However, without effective countermeasures several treaty

5 Luc De Broe, 'Conduit companies' in International Tax Planning and Prevention of Abuse (founding ed) IBFD Doctoral Series vol.14 (2008) para 3-6, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/itpp_p_3_s_Chapter_5*, accessed on 24 April 2022.

6 Ibid.

7 OECD, Public Discussion Draft BEPS ACTION 6: 'Preventing the granting of treaty benefits in inappropriate circumstances' 14 March 2014 – 9 April 2014 (2014) page 3, available at *https://www.oecd.org/tax/treaties/treaty-abuse-discussion-draft-march-2014.pdf*, accessed on 3 February 2022.

8 Annet Wanyana, Oguttu 'Curbing 'Treaty Shopping': The 'beneficial Ownership' Provision Analysed from a South African Perspective' (2007) The Comparative and International Law Journal of Southern Africa Vol 40:2 page 238, available at *http://www.jstor.org/stable/23252664,* accessed on 1 January 2022.

9 Helmet Becker and Felix Wurm 'Treaty shopping: an emerging tax issue and its present status in various countries', (1988), The Netherlands: Kluwer Law and Taxation.

shopping problems may arise which could lead to the erosion of South Africa's tax base, which is already vulnerable.[10]

Increased economic trade and investment between countries have resulted in an elevated flow of royalties, dividends, and interests, which require the consistent and symmetrical application of the term Beneficial Ownership to avoid situations of treaty shopping. Therefore, determining a universal understanding of the Beneficial Ownership concept would be useful to prevent treaty shopping and revenue losses. This is in line with the views of the OECD MTC, which proposes that the inclusion of the Beneficial Ownership concept is one method that could be used to combat treaty shopping. [11]

In recent years, the Principal Purpose Test (PPT) was established with the aim of "shielding" the host country's tax base from abusive transactions. and it has been proposed as an alternative to the Beneficial Ownership concept. The PPT is the general anti-treaty-shopping provision of tax treaties which is outlined in both Article 7(1) (Prevention of Treaty Abuse) of the MLI (Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting) and Article 29(9) of the OECD Model.[12]

1.2 Research question and research objectives

The question that this study aims to address is whether the Beneficial Ownership concept is still relevant (*by considering the history of the concept to date*) in light of the introduction of the Principal Purpose Test (PPT).

Objectives:

1) Explore the term Beneficial Ownership to gain a better understanding of its uses and limitations in tax treaties.
2) To consider whether the Beneficial Ownership requirement is necessary by exploring the flaws in the concept that impede its usefulness in countering treaty abuse and in

10 Ibid.

11 Ibid.

12 Elio Palmitessa 'Interplay between the Principal Purpose Test in the Multilateral BEPS Convention and the Beneficial Ownership Clause as Treaty Anti-Avoidance Tool Targeting Holding Structures' (2018) Intertax vol 46:1 at page 58 – 67, available at *https://doi.org/10.54648/taxi2018006*, accessed on 15 March 2022.

light thereof analyse the relevance of the Principal Purpose Test (PPT) to combat treaty abuse.

1.3 Research methodology

To address the research question and objectives, an interpretive approach will be followed. An interpretive research methodology is often described as doctrinal research, which is characterised as a research methodology that provides a systematic exposition of legal texts.[13] It involves performing studies of the rules governing a particular legal category, analysing the relationship between rules, and explaining areas of difficulty. This is sometimes referred to as the 'black letter' law, as it is based purely on documentary data. A doctrinal research approach further considers comparative law, which compares the legal systems of different countries and possibly also a comparative analysis of the law over time.[14] Based on the descriptions of the doctrinal research provided above, this study will fall within the ambit of this research method as the study will involve performing a qualitative analysis where data will be collected from academic literature, double tax agreements (DTAs), domestic legislation, OECD MTC (Which includes OECD model itself , OECD reports and OECD commentaries) and international case law to gain a clearer and more comprehensive understanding of the Beneficial Ownership concept and the PPT.

The objective criterion on which this research question will be based on is by identifying the issues and flaws that the Beneficial Ownership terminology has proven to be by considering the differing views and outcomes on the concept reached by a) Experts b) Countries and c) International law disputes when determining who the true beneficial owner of income is.

1.4 Limitations of the scope of the study

This study will consider the term Beneficial Ownership in terms of Articles 10, 11 and 12 (dividends, interests, and royalties) of the OECD MTC. The PPT will be considered with reference to the MLI and Article 29(9) of the OECD Model. This type of analysis has an inherent

13 Coralienea Vecoleshaw 'Research Methods: Doctrinal Methodology', available at *https://uweascllmsupport.wordpress.com/author/coralieneavecoleshaw/*, accessed on 1 February 2022.

14 Margaret McKercher *Philosophical Paradigms, Inquiry Strategies, and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation* (Law Research Paper No. 2009-31, University of New South Wales, 2008).

limitation in that the legal research will be based on a sample of countries and expert advice, which may not be representative of all countries.

Additionally, the result of this research is based on selected recent literature, which mainly focuses on the PPT and Beneficial Ownership concept, as a consequence it may not cover all relevant issues in the interpretation of these topics.

1.5 Dissertation Structure

Chapter 1 presents the background and motivation for the study, research question, objectives, research methodology and limitations of the scope of the study. A brief overview of the dissertation structure is also provided.

Chapter 2 will explore the Beneficial Ownership concept by considering its history and intended meaning.

Chapter 3 will assess the relevance of the Beneficial Owner concept considering the development of the PPT and whether the PPT can successfully address treaty shopping issues.

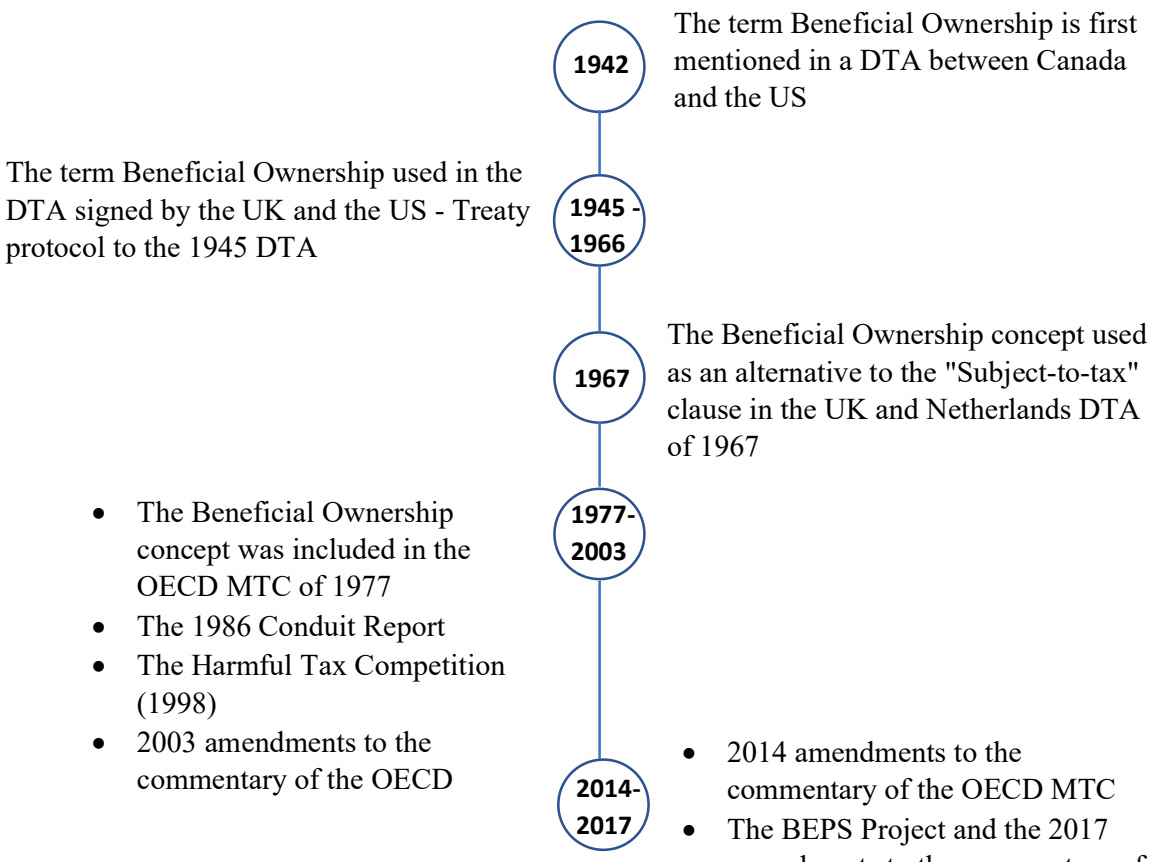
Chapter 4 will conclude with a summary of the topics discussed in this dissertation, providing, and highlighting the author's perspectives, views, and recommendations on the Beneficial Ownership concept and the PPT.

Chapter 2

2.1 The history of the term Beneficial Ownership

2.1.1 Introduction

For more than 50 years, the concept of Beneficial Ownership has been one of the most contentious concerns in the interpretation of tax treaties.[15] The history and evolution of the concept is critical to comprehend its associated challenges. Therefore, this chapter will examine the history of the term Beneficial Ownership and how it came to be used in the OECD MTC. An overview of the history of the term Beneficial Ownership is illustrated in Figure 1 and is further elaborated in sections 2.1.2 and 2.1.3.



15 Błażej Kuźniacki *Beneficial Ownership in International Taxation and Biosemantics – Why a Redundant, Paradoxical and Harmful Concept Can Be a Potent Weapon in the Hands of the Tax Authorities* (2023) Bulletin 77 for international taxation Journal & Articles IBFD Vol 2 page 42 available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/bit_2023_02_o2_1* accessed on 7 February 2022.

Figure 1. The history of the Beneficial Ownership concept as discussed in this dissertation. Noteworthy mention of the concept Beneficial Ownership is highlighted between the period 1942-2017.

2.1.2 The Beneficial Ownership concept before its inclusion in the 1977 OECD MTC

The introduction of the term Beneficial Ownership was primarily intended to prevent treaty shopping and to ensure that only those liable to pay tax can claim treaty advantages.[16] The Beneficial Ownership concept dates back to 1942 when it was first mentioned in a DTA between Canada and the United States (US).[17] At least two objectives were in mind when the DTA used the Beneficial Ownership concept. The first objective was to make sure that the reduced rate of tax on subsidiary parent dividends only applied if the subsidiary was a real subsidiary. The second objective had to do with the meaning of the term "beneficial owner" as it applied to nominees and agents, and it made sure that the recipient of the income received by the nominee or agent was eligible for treaty benefits.[18]Thereafter, the Beneficial Ownership concept, which covers nominees and agent situations as well as trusts, was used in the 1966 treaty protocol to the then existing 1945 DTA signed by the United Kingdom (UK) and the US.[19,20] The term was also used in the UK and Netherlands DTA of 1967 [21] as an alternative to the 'Subject-to-tax' clause, which is an approach where the direct recipient only qualifies for a reduced rate subject to tax in its state of residence.[22] The 'Subject-to-tax' clause proved to be problematic in the case of tax-exempt entities such as charities and pension funds, hence the Beneficial Ownership concept was used as an alternative.[23]

16 According to Robert Danon, 'Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups' (2018) Bulletin for International Taxation Journal Articles & Opinion Pieces IBFD, Vol 72:1 page 31-55 available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/bit_2018_01_int_2*, accessed on 07 February 2022.

17 According to Vann 'Beneficial Ownership: What Does History Tell Us' (2012), The Canada US 1942 treaty was the first to use the term "beneficial owner. See commentary at page 5.

18 Ibid.

19 Richard Vann Beneficial *Ownership: What Does History (and maybe policy) Tell Us*. (Published Legal studies Research Paper, The University of Sydney, 2012).

20 Bruno da Silva 'Evolution of the Beneficial Ownership Concept: More Than Half Of Century Of Uncertainty And What History Can Tell Us*'* (2017) *Frontiers of Law in China* at Vol 12:4 page 502-506 available at *https://go.gale.com/ps/i.do?p=AONE&u=googlescholar&id=GALE|A524866926&v=2.1&it=r&sid=AONE&asid=c3c1642a*, accessed on 07 February 2022.

21 UK- Netherlands double taxation convention of 31 October 1967.

22 OECD (1992), Model Tax Convention on Income and on Capital: Condensed Version September 1992, OECD Publishing, Paris, available at *https://doi.org/10.1787/mtc_cond-1992-en,* accessed on 26 April 2022.

23 Ibid.

2.1.3 The inclusion of the Beneficial Ownership concept in the 1977 OECD MTC

The term Beneficial Ownership was included in the 1977 OECD MTC [24,25], after it had been discussed during a working party meeting on the modifications to be applied to the OECD MTC of 1963. The working party discussed the term in response to concerns that in the absence of the Beneficial Ownership concept, treaty advantages would be accessible to agents or nominees, solely because of their legal entitlement to the income in question. In response to the OECD's efforts to alter the 1963 OECD MTC, the OECD organised a meeting in which delegates were asked about the challenges experienced with the 1963 model. UK delegates, in a document dated May 1967, stated "*If a 'subject to tax' test is not included in these Articles we think that the drafting is defective. The items of income which qualify for relief in the country of source are those which are paid to a resident of the other contracting State. In our view the relief provided for under these Articles ought to apply only if the beneficial owner of the income in question is resident in the other contracting State, for otherwise the Articles are open to abuse by taxpayers who are resident in third countries and who could, for instance, put their income into the hands of bare nominees who are resident in the other contracting State." [26]* The UK delegates proposed two solutions to the challenges encountered with the 1963 OECD MTC, either a 'Subject-to-tax' clause should be included whereby only if the resident country taxes the interest will the source country relinquish its taxing authority, or alternatively the Articles should be modified to apply to interest only, etc., paid to the Beneficial Owner. The Beneficial Ownership concept was eventually approved by the working party. [27]

Subsequently, the Beneficial Ownership concept was included in the 1977 version of the OECD MTC.[28] The commentary to the Article was likewise amended, however, with little guidance on the nature of Beneficial Ownership concept, other than eliminating an intermediary, such as an agent or nominee, as the Beneficial Owner. The commentary read as

24 OECD (1963), Model Tax Convention on Income and on Capital: Condensed Version 1963, OECD Publishing.

25 Robert Collier 'Clarity, Opacity and Beneficial Ownership' (2011) British Tax Review Issue 6 at 686, available at *https://www.uscib.org/docs/BTR_Issue_Beneficial%20Ownership_Collier.pdf*, accessed on 7 February 2022.

26 Richard Vann Beneficial *Ownership: What Does History (and maybe policy) Tell Us*. (Published Legal studies Research Paper, The University of Sydney, 2012).

27 Ibid.

28 OECD Income and Capital Model Convention and Commentary (1977).

follows: "*Under paragraph 2, the limitation of tax in the state of source is not available when an intermediary, such as an agent or nominee, is interposed between the beneficiary and the payer unless the Beneficial Owner is a resident of the other contracting State. States which wish to make this more explicit are free to do so during bilateral negotiations*.[29] The initial intention, as emphasised in the commentary, was merely to state that intermediaries with little ownership rights, such as agents and nominees, should not be treated as beneficiaries for the purpose of imposing reduced withholding tax rates under the relevant tax treaties. This was the substance of the concept until 2003 when it was revised and broadened in response to the 1986 Conduit Report and the Harmful Tax Competition report in 1998.[30]

2.1.4 The 1986 Conduit Report

The 1986 Conduit Report published by the OECD in a report titled '*Double Taxation Conventions and the Use of Conduit Companies*' focused on treaty shopping in situations involving conduit companies.[31] The original intention of the 1986 Conduit Report was to expand the scope of the Beneficial Ownership concept beyond the existing commentary, which merely intended to clarify that intermediaries with minimal ownership rights such as agents and nominees must not be seen as recipients with respect to utilising the reduced withholding tax rates under the tax treaty in question. The report was meant to address concerns about the inappropriate use of tax treaties, and characterised improper use as a person acting via a legal corporation formed in a state with the primary goal of obtaining treaty benefits that would not be accessible to such a person directly.[32] According to the 1986 Conduit report, the concept of Beneficial Ownership should be understood in its context and in light of its object and purpose in accordance with the Vienna Convention on the Law of Treaties (Vienna Convention) Article 31, which outlines the general rules of the interpretation for treaties. According to the Vienna Convention Article 31(1), a treaty should be construed in good faith in accordance with the

29 Commentary to Article 11(2) of the 1977 OECD Model.

30 OECD Harmful Tax Competition: An Emerging Global Issue Report (1998), OECD Double Taxation and the Use for Conduit Companies Report (1986).

31 Ibid.

32 Bruno da Silva 'Evolution of the Beneficial Ownership Concept: More Than Half Of Century Of Uncertainty And What History Can Tell Us*'* (2017) *Frontiers of Law in China* at Vol 12:4 page 504-506 available at *https://go.gale.com/ps/i.do?p=AONE&u=googlescholar&id=GALE|A524866926&v=2.1&it=r&sid=AONE&asid=c3c1642a*, accessed on 07 February 2022.

ordinary meaning to be given to the terms with respect to their context, and in light of the object and purpose.[33]

2.1.5 The Harmful Tax Competition Report (1998)

The OECD's study on Harmful Tax Competition in 1998 heralded revisions to the idea of Beneficial Ownership, implying a relevant extension of its scope. These amendments were recommended by the OECD committee on fiscal affairs in the 2002 reports related to the OECD MTC (2002 Reports) and were later incorporated in the commentaries to Articles 10-12 of the OECD MTC (2003).[34] The OECD Harmful Tax Competition (1998) stated the following on Beneficial Ownership: "*Another example involves denying companies with no real economic function treaty benefits because these companies are not considered as the Beneficial Owner of certain income formally attributed to them. The committee intends to continue to examine these and other approaches to the application of the existing provisions of the Model Tax Convention, with a view to recommending appropriate clarification to the Model Tax Convention"*[35] In his research paper, Vann states that the method attempts to retrofit the new policy change to existing tax treaties through interpretation, which appears to extend outside the legal realm of interpretation.[36]

2.1.6 The 2003 amendments to the commentary of the OECD Model

The Beneficial Ownership concept in the 1977 model has been subjected to various revisions to date. The amendments to the 2003 OECD commentary have widened the scope of Beneficial Ownership to reflect a new emphasis on the intent and purpose of tax treaties, for which one

33 Louan Verdoner, René Offermanns & Steef Huibregtse, 'A Cross-Country Perspective on Beneficial Ownership' (2010) European Taxation Journal Articles & Opinion Pieces IBFD Vol 50:9 page 3, , available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/et_2010_09_int_2* accessed on 7 March 2022, Vienna Convention on the Law of Treaties (1969).

34 Martín Jiménez, 'The 2003 changes to the Commentaries on Articles 10-12 of the OECD Model' in *Beneficial Ownership – Global Tax Treaty Commentaries, Global Topics IBFD* (2022) para 1, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/gttc_beneficial_ownership_chaphead*, accessed on 14 March 2022.

35 OECD, Harmful Tax Competition (1998), para 119.

36 Richard Vann *Beneficial Ownership: What Does History (and maybe policy) Tell Us*. (Published Legal studies Research Paper, The University of Sydney, 2012) at 29.

of those reasons are to prevent tax avoidance and evasion. [37,38] During the 2003 amendments to the commentaries, the OECD made several changes to the concept. The Beneficial Ownership concept in the commentary was substantially extended through the inclusion of the revised paragraphs 12 to 12.2. This amendment added a new dimension to the term by going beyond the formal agency or nominee situation and introducing relatively subjective terms such as the reference to a principal '*who in fact receives the benefit of the income concerned*' and the issue being assessed '*as a practical matter*.'[39] The 2003 commentary has also been seen as favouring an economic or, at the very least, a 'substance-over-form' interpretation of Beneficial Ownership.[40] According to Collier , the word '*benefit*' in particular might be interpreted as having a broader economic meaning. Furthermore, the addition of the words '*as a practical matter*' has been viewed as a significant change, justifying an approach to the interpretation of the term Beneficial Ownership as an economic test as opposed to a test that looks at the legal powers of the recipient of the income. This is a departure from the view that Beneficial Ownership is a legal concept. At the other end of the spectrum, the amendment's reference to '*very narrow powers*' with regard to the income in question, as well as the position of being a simple fiduciary or administrator working on behalf of interested persons, would appear to suggest a legal concept.[41]

37 Para. 12 OECD Model: Commentary on Article 10 (2003).

38 Charles du Toit, 'The Evolution of the Term "Beneficial Ownership" in Relation to International Taxation over the Past 45 Years'(2010) Bulletin for International Taxation 64:10 Journal Articles & Opinion Pieces IBFD at page 5-6, available at *https://researchibfdorg.ezproxy.uct.ac.za/#/doc?url=/document/bit_2010_10_int_2,*accessed on 8 February 2022.

39 Robert Collier 'Clarity, Opacity and Beneficial Ownership (2011) British Tax Review Issue 6 page 689-691, available at *https://www.uscib.org/docs/BTR_Issue_Beneficial%20Ownership_Collier.pdf*, accessed on 07 February 2022.

40 Robert Danon, 'Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11, and 12 OECD Model and Conduit Companies' in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It? in *Current Tax Treaty Issues: 50th Anniversary of the International Tax Group* (ed) IBFD, Books IBFD (2020) at 15:1 page 1-36 available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/ctti_p04_c15*, accessed on 21 March 2022.

41 Ibid.

2.1.7 The 2014 amendments to the commentary of the OECD MTC

The OECD issued two public discussion drafts on the definition of Beneficial Ownership in 2011 and 2012. Of these, one finally resulted in the revision of the commentary to the OECD MTC on 15 July 2014.[42] In the 2014 amendments, several clarifications were provided about Beneficial Ownership in the commentary. The main concepts advanced can be summarised as follows:

2.1.7.1 Paragraph 12 .1

According to the commentary, the phrase Beneficial Owner is intended exclusively to identify the individual entitled to treaty relief when an amount is '*paid directly to a resident*' and should be construed in that context. The current caution against employing a technical definition under the domestic legislation of a certain country is stressed, particularly in common law nations where the term has a specific meaning under trust law. Therefore, for treaty purposes, such technical meaning should be ignored. The amendments to the commentary state that *"Since the term 'Beneficial Owner' was added to address potential difficulties arising from the use of the words "paid to … a resident" in paragraph 1, it was intended to be interpreted in this context and not to refer to any technical meaning that it could have had under the domestic law of a specific country (in fact, when it was added to the paragraph, the term did not have a precise meaning in the law of many countries). The term 'Beneficial Owner' is therefore not used in a narrow technical sense (such as the meaning that it has under the trust law of many common law countries[1]), rather, it should be understood in its context, in particular in relation to the words "paid … to a resident", and in light of the object and purposes of the convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance."*[43]

2.1.7.2 Paragraph 12.4

The succeeding change, highlighted in the first few sentences of paragraph 12.4 of the commentary, confirms that the existing examples (agents, nominees, conduit companies acting as a fiduciaries or administrators) are not Beneficial Owners because they are required by

42 2014 Update to the OECD Model Tax Convention available *at https://www.oecd.org/tax/treaties/2014-update-model-tax-concention.pdf*,accessed on 9 March 2022.

43 2014 Update to the OECD Model Tax Convention available at *https://www.oecd.org/tax/treaties/2014-update-model-tax-concention.pdf*,accessed on 9 March.2022.

contract or law to pass on the payment received to another person.[44] It goes on to say that while assessing this obligation, one might draw it from both legal documents and "*on the basis of facts and circumstances... in substance... does not have the right to use and enjoy the dividend unrestrained*."[45] In other words, the Beneficial Owner relates to the person who receives the payment (dividend, interest, or royalty) and who has the right to use and enjoy it. This person is not contractually or legally required to pass on the income to another person.[46] The concept in paragraph 12.4 is thus centred around two aspects of ownership, notably '*the right to use and enjoy*'.[47] Concentrating on the enjoyment of income implies that the economic gain obtained from dividends, interests, or royalties is a key aspect. However, the freedom to use and enjoy must not be restricted by a contractual or legal responsibility to transfer the income received to another. If such an obligation exists, the receiver does not meet the definition of a Beneficial Owner. Legal papers often establish the existence of the duty; nevertheless, the OECD recommends that a facts and circumstances investigation, i.e., an examination of the content of the matter, may be required.[48]

2.1.7.3 Paragraph 12.5

The commentary on abusive arrangements in paragraph 12.5 of Article 10 is another essential component of the 2014 update. The commentary states that the Beneficial Owner provision is intended to combat a specific type of arrangement, that is, those involving the interposition of a recipient who is obligated to pass on the dividend to someone else and is not intended to be used to combat treaty shopping in general. Therefore, this paragraph encapsulates the idea that Beneficial Ownership is not the best weapon to combat tax avoidance and acknowledges that Beneficial Ownership is not a general anti-avoidance tool, although it may have this impact in some circumstances.[49] The 2003 commentary amendments and reports (1986 Conduit Report

---

44 Ibid.

45 Ibid.

46 Para. 12.4 OECD Model: Commentary on Article 10 (2014).

47 OECD Income and Capital Model Convention and Commentary (2014).

48 C. Hamra, & Jasper Korving, 'Beneficial Ownership Interpreted, To What Extent Are the OECD and the EU on the Same Wavelength'*?* (2021) 49 Interfax, Issue 3, page 254-277, available at *https://kluwerlawonline.com/journalarticle/Intertax/49.3/TAXI2021023*, accessed on 9 March 2022.

49 Felipe Vallada, 'Beneficial Ownership under Articles 10, 11, and 12 of the 2014 OECD Model Convention' in the *OECD-Model-Convention and its Update 2014* (ed) (2015) para g, available *at https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/oecd2014_c02*, accessed on 31 March 2022.

and Harmful Tax Competition Report) referenced above have established that the Beneficial Ownership requirement can be utilised to deny treaty advantages to conduit businesses, at least in some cases. In the same vein both these reports have also been seen as advocating an economic or, at the very least, a 'substance-over-form' interpretation of Beneficial Ownership.[50,51] Furthermore, the 2014 commentary clarified that the Beneficial Owner should not be confused with the ultimate owner of a legal entity or arrangement, and that the limitation applies to the Beneficial Ownership of dividends, interests, and royalties rather than the ownership of the assets producing these items.[52]

2.1.8 The BEPS project and the 2017 amendments to the commentary of the OECD MTC

The OECD recognised the Beneficial Ownership concept as a tool to avoid tax treaty misuse, but only within the limits of Articles 10, 11, and 12 of the OECD MTC. However, history reveals that the lack of a text-based definition, along with the different interpretations by domestic courts, have diminished the concept's power. As a result, several kinds of treaty abuse are possible, resulting in the OECD seeking an alternate method of combating tax treaty misuse, in addition to the adoption of more specific Beneficial Ownership criteria.

The purpose of the Base Erosion and Profit Shifting (BEPS) Action 6 Final Report was to make it clear that tax treaties are not meant to produce double non-taxation and that one of its primary goals is to combat tax evasion or avoidance. The amendments stress that treaty shopping is a kind of treaty avoidance that tax treaties should not permit. The BEPS Action 6 Final Report proposed important adjustments in the approach to treaty shopping, which were eventually included in the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the Multilateral Instrument or MLI) and the OECD MTC (2017). It specifically requested that a new preamble (Article 6 of the MLI) be inserted. In

50 David Ward *Access to Tax Treaty Benefits* (Research Report Prepared for the Advisory Panel on Canada's System of International Taxation, 2008).

51 Robert Danon, 'Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11, and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?' in *Current Tax Treaty Issues: 50th Anniversary of the International Tax Group* (ed) IBFD, Books IBFD(2020) available at page 10-11 *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/ctti_p04_c15*, accessed on 21 March 2022.

52 OECD Income and Capital Model Convention and Commentary (2017).

accordance with the new preamble contracting states "*Intending to eliminate double taxation with respect to the taxes covered by this agreement without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions)*."[53] The 2017 OECD commentary affirms that this new preamble must be considered when interpreting post-BEPS DTAs in light of Article 31 of the Vienna Convention.[54] In addition to the preamble a special provision addressing treaty abuse (Article 7 of the MLI and Article 29 of the OECD Model(2017)) was included. The amendments to the commentaries in the OECD MTC (2017) make no attempt to redefine the term Beneficial Owner, but rather imply that the revised preamble wording and Article 29 of the OECD MTC address tax treaty misuse in paragraph 12.5 of Article 10.[55,56]

53 Robert Danon, 'Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?' in *Current Tax Treaty Issues: 50th Anniversary of the International Tax Group Books IBFD* (2020) at page 31-32, accessed 10 August 2022.

54 Robert Danon, 'Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11 and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?' in *Current Tax Treaty Issues: 50th Anniversary of the International Tax Group Books IBFD* (2020) at page 31-32, accessed 10 August 2022.

55 Ibid.

56 Johann Hattingh, 'The Relevance of BEPS Materials for Tax Treaty Interpretation'(2020) Bulletin for International Taxation Vol 74:4-5 Journal Articles & Opinion Pieces IBFD page 189, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/bit_2020_04_o2_8*, accessed on 16 March 2022.

2.2 The intended meaning of Beneficial Ownership

2.2.1 Beneficial Ownership: An international fiscal meaning versus a domestic meaning

Beneficial Ownership is one of the most controversial concepts in tax treaties, and its international tax meaning is a contentious issue. The concept is used in tax treaties between countries with different legal systems, traditions, and understandings of ownership, which are considered the main factors contributing to differences in opinion about its meaning. The most common conflict in international treaties occur between different legal systems, that is, common law and civil law states.[57]

The meaning of Beneficial Ownership is subject to interpretation under Article 3(2) of the OECD MTC (2017), which states that undefined treaty words are to be assigned the meaning that they have under the applicable domestic law unless the context of the treaty requires otherwise.[58] However, defining Beneficial Ownership in terms of domestic law is problematic since different states may have different definitions. The most obvious reason is that the term Beneficial Ownership has no meaning in many countries, particularly in civil law countries.[59] Therefore, reference to a country's domestic law is pointless because the term is a unique treaty concept that is used almost exclusively in treaties.[60] Civil law countries often do not recognise a division of ownership, at least not to the level that common law jurisdictions do, and therefore do not employ the idea of Beneficial Ownership.[61] As a result, the word must be construed in light of the context of the treaty and in accordance with the general rule of interpretation established in Article 31.

---

57 Adolfo Martín Jiménez, 'Beneficial Ownership – Global Tax Treaty Commentaries', (2022) Global Topics IBFD at page 47 - 53 available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/gttc_beneficial_ownership_chaphead*, accessed on 14 March 2022, Anna Vitko *Towards the International Fiscal meaning of the Concept Beneficial Owner* (Published Master's dissertation, Lund University, 2011), available at chrome-*extension://efaidnbmnnnibpcajpcglclefindmkaj/https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1983706&fileOId=1983710*, accessed on 12 March 2022.

58 OECD Income and Capital Model Convention and Commentary (2017).

59 Waldette Engelbrecht *A Critical Analysis of The Meaning of Beneficial Owner of Dividend Income Received by A Discretionary Trust (*Published M.ACC Taxation, Stellenbosch University), available at *https://scholar.sun.ac.za/handle/10019.1/85648*, accessed on 12 March 2022.

60 Klaus Vogel, *Klaus Vogel on Double Taxation Conventions*, 3 ed (1997).

61 Charl Du Toit *Beneficial Ownership of Royalties in Bilateral Tax Treaties* (Published PhD Thesis, Amsterdam Centre for International Law 1999).

To substantiate the points made above with respect to common law and civil law countries employing varying definitions of the concept Beneficial Ownership, consideration of the concept in common law countries (South Africa, United Kingdom, United States of America, and Canada) and civil law countries (Japan and the Netherlands) is discussed below. Each country's intended meaning of Beneficial Ownership and how dissimilarities in definitions contribute to varied interpretations in countries are outlined. Thereafter, the OECD's views on whether Beneficial Ownership should be defined based on an international fiscal meaning versus a domestic meaning will be discussed briefly.

2.2.1.1 South Africa

In terms of Article 3(2) of the OECD Model (2017), the tax law meaning of the term Beneficial Ownership should take precedence over any other meaning given to the term with respect to any of the country's other laws.[62] The Income Tax Act, No. 58 of 1962 (Income Tax Act) is relevant in the context of South Africa, however, the concept of Beneficial Ownership is unknown under South African common law, and it is also not statutorily defined, despite some references in respect of dividends.[63] In section 64D of the Income Tax Act, a Beneficial Owner refers to "*the person entitled to the benefit of the dividend attached to a share*" [64]. The Beneficial Owner may not necessarily mean that the person is the registered owner of the share.[65] A share is merely a bundle of rights to which a shareholder is entitled to.[66] Therefore, one person may hold the right to registration, another person may hold voting rights, and another person may hold the right to dividends. The person entitled to the dividend rights

62 Ibid.

63 Lynette Olivier 'Domestic anti-avoidance provisions with an international scope'(2010) International Fiscal association at para 2.4.1 available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/data/ifacahier/pdf/ifacahier_2010_volume1_south_africa.pdf,* accessed on 13 March 2022.

64 Section 64D of the Income Tax act 58 of 1962.

65 Ibid.

66 Annet Wanyana, Oguttu 'Curbing 'Treaty Shopping': The 'beneficial Ownership' Provision Analysed from a South African Perspective' (2007) The Comparative and International Law Journal of Southern Africa Vol 40:2 page 237-258, available at *http://www.jstor.org/stable/23252664,* accessed on 1 January 2022.

attached to a share would be the person required to make a declaration to enjoy the exemption afforded by the provisions of section 64F of the Act.[67]

According to Kruger, the definition as postulated in section 64D of the Income Tax Act does not require the Beneficial Owner to have a legal title with respect to the dividend, instead, it brings forth the idea that where a Beneficial Owner exists, that person should have the right of use and enjoyment of the dividend income.[68] Although the definition is brief from a South African perspective, it implies that there is a division of ownership in terms of who the legal and Beneficial Owner is. The definition provided in terms of the Income Tax Act is limited as it only applies to the Beneficial Owner of dividends for withholding tax purposes. The Act contains no general definition of the term Beneficial Owner which applies to the act as a whole and therefore, is unlikely to be expanded into the DTA application.

2.2.1.2 United Kingdom

The United Kingdom (UK) has been a member of the OECD since 1960 [69]. To date, there have been a few cases in the UK that have considered the meaning of Beneficial Ownership in a treaty context. One of these cases involves the UK and the Netherlands - *Case Nos. 18/00318 and 18/00319*. [70] The case was related to whether the taxpayer company - X BV could be regarded as the legal and Beneficial Owner of the dividends. In summary, the taxpayer, X BV, was a limited liability company, situated in the Netherlands. The company was a member of an international banking group that bought packages of AEX shares with a total market value of roughly EUR 7 billion in the period 2006 – 2010, which involved a French company. X BV engaged in a transaction in which it lent these shares to Z Plc (established in the UK), the group's European broker, in exchange for cash collateral and a stock lending fee. The daily activities of company Z Plc included management duties and engagement in the futures market.

---

67 Alwina Brand 'Dividends Withholding Tax – The Importance of Identifying the Beneficial Owner of a Dividend' (2012) South African Institute of Taxation, available at *https://www.thesait.org.za/news/104132/Dividends-Withholding-Tax--The-Importance-of-Identifying-the-Beneficial-Owner-of-a-Dividend.htm,* accessed on 15 March 2022.

68 Des Kruger 'Who is the Beneficial Owner?' (2012) Sabinet African Journals Vol 3:1 at page 13, available at *https://hdl.handle.net/10520/EJC174312*, accessed on 20 March 2022.

69 'The United Kingdom and the OECD' OECD better policies for better lives, available at *The United Kingdom and the OECD* , accessed on 20 March 2022.

70 Netherlands - Case Nos. 18/00318 and 18/00319, 12 May 2020.

No specific documents were held supporting the arrangement between the companies and therefore the stock lending arrangements were based on a general agreement. Z plc would ensure that the loan was repaid prior to dividends being paid and hence the main objective of this arrangement was to ensure that the shares on which the dividends were being paid were (legally) owned by X BV at the time of dividend distribution, and thus guaranteed that X BV could credit the dividend withholding tax withheld on the dividends against its corporate income tax liability. The shares on which dividends were paid were once more lent to Z Plc after the dividends were disbursed.

Consequently, the tax inspector was of the opinion that because it could not be inferred from its administration that X BV was both the Beneficial Owner and the legal owner of the shares on the relevant ex-dividend dates, he disallowed the offset of the dividend withholding tax for the fiscal year 2007/2008. Further, he stated that based on other documentation, he was of the opinion that Z Plc acquired the shares and not X BV. Contrastingly, according to X BV, the shares were purchased by Z Plc, on its behalf. These measures were put in place to ensure that X BV did not unintentionally engage in dividend stripping and that the shares were bought from companies that had the same opportunities for crediting dividend withholding tax as X BV. X BV argued that it should be considered the Beneficial Owner of the shares and the dividends and be entitled to a credit for the dividend withholding tax. The Court of Appeal inferred from the facts that Z Plc and the French company buying the shares gave specific instructions regarding the deposit without X BV performing any management roles. The French company and Z Plc both had a significant impact on the booking of the dividends on the shares. Due to this factor X BV had no economic interest in the shares' temporary transfer into its securities deposit, and it was determined that X BV, was not the shares' Beneficial Owner. As a result, X BV, the taxpayer, was not eligible for a dividend withholding tax credit.[71]

Another significant case which highlights the UK's approach to interpreting the concept of Beneficial Ownership relates to the case by the English court of Appeal in the Indofood International Finance Ltd v. JP Morgan Chase Bank NA[72]. The case shed some light on significant matters with respect to the Beneficial Ownership concept in which the UK Court of Appeal stated, "*the concept 'Beneficial Owner' is to be given an international fiscal meaning*

71 Ibid.

72 Indofood International Finance Ltd v. JP Morgan Chase Bank N.A. London Branch *(2006).*

not derived from the local laws of contracting states".[73] The term Beneficial Ownership has different meanings in common law and equity in UK domestic law. The common law meaning states that ownership is indivisible and only recognises legal ownership. Equity, instead, permits for shared ownership, with one person having a legal title and another person having Beneficial Ownership.[74] Beneficial Ownership was well-defined as ownership on one's own behalf or in other words one's personal benefit instead of ownership as a trustee for another, as discussed in the case of *J Sainsbury plc v O'Conner* (Inspector of Taxes)[75].

According to the International Financial Glossary published by Her Majesty's Revenue and Customs (HMRC), Beneficial Ownership is defined as "*In international tax, a term mainly relevant to double taxation issues, specifically treaty clearance. The Beneficial Owner has rights of ownership over a source of income - to enjoy, dispose of, etc, as they wish - even where legal ownership lies elsewhere. Under most double taxation agreements, a claim to receive interest gross must be made by the Beneficial Owner of the income concerned, not merely an intermediary or conduit.*"[76] Based on the definition described above in the International Financial Glossary, the concept of Beneficial Owner puts forward the notion that it relates to a person who is entitled to ownership over the source of income rather than the underlying asset.

The HMRC has published new paragraphs in its international manual on June 12, 2012. These new paragraphs provide guidelines on Beneficial Ownership in the context of Double Taxation Treaties (DTTs). The guidelines elucidate that persons such as agents and nominees are not Beneficial Owners as they do not have 'full privilege' to directly benefit from the income. [77]

---

73 Indofood International Finance Ltd v. JPMorgan Chase Bank NA, London Branch*, 8 ITLR 653, 674,* para. 42

74 Annet Wanyana, Oguttu 'Curbing 'Treaty Shopping': The 'beneficial Ownership' Provision Analysed from a South African Perspective' (2007) The Comparative and International Law Journal of Southern Africa Vol 40:2 page 237-258, available at *http://www.jstor.org/stable/23252664,* accessed on 1 January 2022.

75 Ibid.

76 HMRC internal manual International Manual 'International Financial Glossary', available at *https://www.gov.uk/hmrc-internal-manuals/international-manual/intm539000#IDA4L4QC*, accessed on 11 September 2022.

77 HMRC internal manual International Manual 'Double taxation treaties: Beneficial ownership: What beneficial ownership means', available at *https://www.gov.uk/hmrc-internal-manuals/international-manual/intm504030*, accessed on 11 September 2022.

In light of the above where a person is obligated to give up or cede income to another person, they consequently do not have the full right to benefit directly from the income. In such a case they cannot be recognised as the true Beneficial Owner of income. This obligation can be found in legal documents or by examining the commercial and practical substance of a transaction. Based on the factors discussed above, it appears that the UK followed the OECD MTC when drafting both of its Beneficial Ownership manuals.

2.2.1.3 United States of America

The American system is a 'common law' system, which depends largely on court practice in formal adjudications[78,79]. The Beneficial Ownership clauses in US tax treaties are based on the OECD MTC, and thus include the typical Beneficial Ownership language in Articles 10 to 12, and 21.[80] The standard Beneficial Ownership language is also used in the US MTC (15 November 2006), which was drafted largely in parallel to the OECD Model Articles. As with the OECD MTC, Beneficial Ownership is not defined in the US Model. However, the technical explanation accompanying the US MTC explains that the term should be defined in the same manner as it is under the internal law of the source country.[81] Apart from the actual treaties, the US legislative history and ensuing case law, the only other possible legal source for the interpretation of the Beneficial Ownership concept in the US is the withholding tax regulations. Regulation 1.1441-1(c)(6) includes a definition of the term that is required to make a suitable withholding tax assessment. It, however, specifies that Beneficial Ownership is limited to payments other than those that are subject to a reduced rate in agreement with the relevant tax treaty provision. Nevertheless, because it is the only definition in US tax law, it may be informative. The regulation defines the Beneficial Owner as "*the person who is the owner of the income for tax purposes and who beneficially owns the income*."[82] This is clearly an ineffective definition. However, based on the definition one would be considered an owner of

78 Yariv Brauner, 'Chapter 9: Beneficial Ownership in and outside US Tax Treaties' *in Beneficial Ownership: Recent Trends* IBFD (2013) page 1-3, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/bort_c09*

79 LexisNexis 'Introduction to the American Legal System' available at *Introduction to the American Legal System | LexisNexis,* accessed on 11 October 2022

80 Yariv Brauner, 'Chapter 9: Beneficial Ownership in and outside US Tax Treaties' *in Beneficial Ownership: Recent Trends* IBFD (2013) page 1-3, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/bort_c09*, accessed on 11 October 2022.

81 United States Model Technical Explanation Accompanying the United States Model Income Tax Convention of November 15, 2006

82 Ibid.

the income if they were required to include it in their gross income under US principles. It also states that Beneficial Ownership can be determined in accordance with the provisions of section 7701(l). The regulations clarify that certain individuals and entities such as nominees, agents, and custodians are not considered Beneficial Owners; that students are the Beneficial Owners of scholarships they receive; and that in the case of non-income payments, Beneficial Ownership is determined as if it were income. Finally, the regulations return to their original purpose of determining Beneficial Ownership in the case of transparent or complex nominal payees. The regulations, particularly in the case of foreign partnerships, provide for a transparent treatment based on an aggregate approach. [83]

US tax law separated itself from Beneficial Ownership as a tool for preventing abuse in general, and treaty shopping in particular. Although it usually pursues specific statutory or regulatory solutions, it has left the interpretation of Beneficial Ownership to the courts, opting for other measures to combat the types of abuse that Beneficial Ownership might have targeted.[84] In the case of *Montana Catholic Missions v. Missoula County*[85], Mr Justice Peckham held the following*: "The expression 'beneficial use' or 'beneficial ownership or interest' in property is quite frequent in the law, and means, in this connection, such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognised by law, and can be enforced by the courts, at the suit of such owner or of someone in his behalf*."[86] Based on the above considerations, the US seems to recommend that in order to define Beneficial Ownership one needs to consider the domestic laws of the source state. This approach is not in line with the views of many experts and countries following the OECD MTC, which suggests that an international meaning should be applied to the Beneficial Ownership concept with no regard to a country's domestic law.

83 Ibid.

84 Ibid.

85 *Montana Catholic Missions v. Missoula County* 200 U.S. 118 (1906), at 127-128

86 Charles du Toit 'The Evolution of the Term "Beneficial Ownership" in Relation to International Taxation over the Past 45 Years' (2010) Bulletin for International Taxation Journal Articles & Opinion Pieces IBFD Vol 64:10 page 1-10 , available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/bit_2010_10_int_2,*accessed on 11 October 2022.

2.2.1.4 Canada

Canada is a country that uses the concept of Beneficial Ownership in its domestic legislation. In accordance with subsection 212(1) of the Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.)[87], various types of income (including dividends, certain types of interest, and royalties) paid or credited, or deemed to be paid or credited to non-residents by a resident of Canada are subject to a 25% withholding tax. The 25% withholding tax rate may be reduced or eliminated if a bilateral tax treaty between Canada and the non-resident's country of residence exists. If the recipient is the Beneficial Owner of the dividend, interest, or royalty, the MTC allows for a lower rate of withholding tax on the payment made by a resident of one country to a resident of another country. However, neither the MTC nor any of Canada's bilateral tax treaties define the term Beneficial Owner. [88]

Recent Canadian law on the term Beneficial Owner provides insight into how the concept has been interpreted by Canadian courts. The Tax Court of Canada referred to the definition of Beneficial Owner of income, which was adopted by the courts in the *Prevost Car case* as the person who receives income for his or her own use and enjoyment and assumes the risk and control over the income received. The court used *Prevost Car* to distil four factors to consider when determining Beneficial Ownership: (a) possession; (b) use; (c) risk; and (d) control.[89] The Canada Revenue Authority (CRA) was asked to clarify its position on when a non-resident is considered the Beneficial Owner of income (such as dividends, interest, or royalties) for tax treaty purposes, at the 2012 International Fiscal Association (IFA) conference. If the income is received for the recipient's own use and enjoyment, and the recipient assumes risk and control over the income, the CRA considers the recipient to be the Beneficial Owner. This test would generally be met, according to the CRA, if the recipient has a sufficient degree of discretion over the use or application of the income received.[90]

87 Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.)

88 Christopher Steeves 'The meaning of beneficial ownership in Canada and the OECD revised discussion draft'(2012) Fasken, available at *https://www.fasken.com/en/knowledge/2012/12/taxbulletin-20121203*, accessed on 9 August 2022.

89 Prévost Car Inc. v. Her Majesty the Queen

90 Ian Gamble 'CRA Releases comments on Beneficial Ownership' (2013), Thorsteinssons Canada's Premium Tax Law Firm, available at *https://www.thor.ca/blog/2013/01/cra-releases-comments-on-beneficial-ownership/*, accessed on 25 July 2022.

2.2.1.5 Japan

In Japan, the concept of Beneficial Ownership is a treaty term as neither Japanese internal tax law nor non-tax law uses the term, except for the concept of beneficiary in the context of a trust. However, it is worth noting that a case involving the definition of Beneficial Ownership had occurred. The case happened in 1998 and was resolved in 1999. One of the issues in the case involved whether an interposed East European company was a Beneficial Owner of the royalties paid by the Japanese sub-licensee. Based on the facts of the case, the Japanese tax authorities stated that for a Beneficial Owner to exist the following requirements had to be met: Firstly, the intermediary company must be a legitimate party. As a result, the corporation cannot act as an agent, nominee, or broker. Secondly, there must be substance in the interposed company regarding the fact that it is a resident of the treaty partner country:

(i) it must be a lawfully established and registered company in the treaty partner country. This fact can be confirmed by obtaining a certified copy of the company registration;

(ii) a residence certificate of the company must be obtained from that country's tax authorities;

(iii) the company should have an actual office; and

(iv) the company should have at least one full-time employee.

The third requirement that the tax authorities brought forward related to the income itself. According to the authorities, for the company to qualify as the Beneficial Owner, the company should record 100% of the royalty income in its books. It is worth noting that the Japanese tax authorities did not stipulate that royalty income be subject to income taxation in the country where the interposed company is located.[91] As stipulated above, the doctrine of '*substance over form*' is closely associated with the Beneficial Owner's determination in this case. Beneficial Ownership is a complicated issue, but this case illustrates how Japan has dealt with it in practice.

2.2.1.6 Netherlands

The bill for the introduction of the Income Tax Act 2001 uses the term Beneficial Owner 'uiteindelijk gerechtigde' in several places, thus introducing the term into Dutch domestic law.

91 David Oliver , Jerry Libin, Stef van Weeghel, Charl du Toit 'Beneficial Ownership'(2000) International Bureau of Fiscal Documentation page 310-325, available *at https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/collections/bit/pdf/bifd070001.pdf* accessed on 28 July 2022.

The term Beneficial Owner has been clarified to some extent in the Netherlands. The concept was mentioned several times in the documents accompanying the parliamentary debate on the Netherlands–Korea income tax treaty of 1978. The purpose of introducing the concept is to establish that only the Beneficial Owner resident in the other contracting state is entitled to the agreed-upon reduction in terms of the tax levied at the source by the state in which the debtor is resident.[92] The Netherlands believes that an interested party cannot be considered the Beneficial Owner if they have contractually committed themselves to pay a significant portion of the income received to third parties. When it comes to the term Beneficial Owner, the Netherlands takes an economic approach rather than a factual or legal one. According to this viewpoint, if income (or a significant portion of it) accrues to a third party, neither a person nor an intermediary can be the Beneficial Owner of that income.[93]

The term Beneficial Owner is not defined in this provision or any of the supporting provisions in the Individual Income Tax Act or the Corporate Income Tax Act. However, the Official Explanation (Memorie van Toelichting) to the Corporate Income Tax Act includes the following definition: "*Beneficial Owner means a person who, from an economic standpoint, could be considered to be the one who benefited from the income because the dividend distribution increased her/his wealth; the economic reality takes precedence over any other legal reality*".[94]

2.2.1.7 Conclusion on the subjective approaches taken by contracting states

Based on the discussion above, it can be concluded that the term Beneficial Ownership has a wide and varied application across contracting states, which may lead to confusion when the concept is not defined using a fiscal international meaning. The use of the concept under a country's domestic law will pose problems that would result in loss of the uniformity in the OECD MTC and its commentary that has long existed in the interpretation of tax treaties and

92 Hans Pijl 'The Definition of "Beneficial Owner" under Dutch' (2000) International Bureau of Fiscal Documentation page 256-260, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/collections/bit/pdf/bifd060002*.pdf accessed on 10 June 2022.

93 Ibid.

94 Hans Pijl 'The Definition of "Beneficial Owner" under Dutch' (2000) International Bureau of Fiscal Documentation page 256-260, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/collections/bit/pdf/bifd060002*.pdf accessed on 10 June 2022.

tax treaty terms. Using the domestic meaning of the term would also result in uncertainty and loss of predictability for taxpayers.[95] When a country's domestic law is utilised to determine the concept of Beneficial Ownership, there is significant danger that the domestic law meaning exceeds the usual meaning of the word used in the treaty. Booker stated that "*Opening the door to a local categorisation of Beneficial Ownership exacerbates the possibility of different interpretations and double taxation that the OECD seeks to avoid*".[96] Furthermore, if each country is left to construe the term under its domestic law, one abandons the principle of reciprocity, which is a fundamental cornerstone of tax treaties.[97] According to Edwardes-Ker, '*international tax language*' in tax treaties should be interpreted by adopting an autonomous approach, which recognises that terms must be interpreted in their tax treaty context. He goes on to say that for tax treaties to be successful and reciprocal, treaty states must interpret them equally; only by doing so can double taxation (and perhaps double non-taxation) be avoided.[98]A consistent approach to tax treaty interpretation must take into consideration public international tax law concepts, as presently established in the Vienna Convention.[99] In accordance with the views and opinions expressed by several experts as stated above when determining the concept of Beneficial Ownership in a tax treaty framework, adopting an international fiscal definition rather than a local meaning should be maintained.

95 Annet Wanyana, Oguttu 'Curbing 'Treaty Shopping': The 'beneficial Ownership' Provision Analysed from a South African Perspective (2007) The Comparative and International Law Journal of Southern Africa Vol 40:2 page 237-258.

96 Thomas Booker 'Recent Developments Regarding Beneficial Ownership in Denmark'(2012) European Taxation Journal Articles & Opinion Pieces IBFD at Vol 52: 2-3 page 67-76, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/et_2012_02_dk_1*, accessed on 10 May 2022.

97 Directorate for Financial, Fiscal and Enterprise Affairs, OECD Income and Capital Model Convention and Commentary, Glossary of Industrial Organisation Economics and Competition Law, available at *https://stats.oecd.org/glossary/about.asp,* accessed on 11 May 2022.

98 Michael Edwardes-Ker *Tax Treaty Interpretation* (Published PhD Thesis, Queen Mary University of London 1994).

99 Charl Du Toit *Beneficial Ownership of Royalties in Bilateral Tax Treaties* (Published PhD Thesis, Amsterdam Centre for International Law 1999).

2.3 Defining the international fiscal meaning of the concept of Beneficial Ownership

The main issue affecting the international fiscal meaning of Beneficial Ownership is whether it is a legal concept as opposed to a factual or economic substance concept. There are two schools of thought on this, for which no consensus has been reached to date. The next part of this chapter will explore the opposing views of scholars and literature to date on whether the concept of Beneficial Ownership should be interpreted as an economic or a legal concept.

2.3.1 Economic – 'substance over form' doctrine

One approach to the economic definition of Beneficial Ownership is the doctrine of '*substance over form*'. The OECD glossary of tax terms defines '*substance over form*' as follows: "*Doctrine which allows the tax authorities to ignore the legal form of an arrangement and to look to its actual substance in order to prevent artificial structures from being used for tax avoidance purposes*".[100] The idea frequently goes beyond the form to focus on the economic realities of the transaction in a particular context. Using a '*substance over form*' approach requires applying criteria such as whether the receiver of income has '*economic substance*'.[101] Legal motives, such as contractual and statutory entitlement to income, is only one component of this approach and can never be decisive on their own. Establishing who economically and ultimately benefits from a payment requires an approach that plays down or ignores legal formalism, with an emphasis on the substance of a commercial arrangement. This interpretation clearly attaches an anti-tax avoidance purpose to the Beneficial Owner concept, which implies that the presence or absence of tax avoidance motives are more likely to be examined during the interpretation exercise.[102]

---

100 OECD Income and Capital Model Convention and Commentary, Glossary of Tax Terms available at *https://www.oecd.org/ctp/glossaryoftaxterms.htm* accessed on 26 April 2022.

101 C. Hamra & Jasper Korving, 'Beneficial Ownership Interpreted, To What Extent Are the OECD and the EU on the Same Wavelength?' (2021) Interfax, Vol 49 :3 page 254-277, available at *https://kluwerlawonline.com/journalarticle/Intertax/49.3/TAXI2021023*, accessed on 9 March.2022.

102 Johann Hattingh, 'The Relevance of BEPS Materials for Tax Treaty Interpretation'(2020) Bulletin for International Taxation Vol 74:4-5 Journal Articles & Opinion Pieces IBFD at page 179-196, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/bit_2020_04_o2_8*, accessed on 16 March 2022.

The amendments to the OECD's 2003 commentary support the economic approach to Beneficial Ownership.[103] It offers two clarifications on the meaning of Beneficial Ownership. Firstly, the commentary's reference to the term Beneficial Ownership in paragraph 12 states that it should not be construed in a narrow technical sense (in a strict legal sense), but rather in light of the convention's intent and purposes such as avoiding double taxation and preventing fiscal evasion and avoidance. Secondly, the commentary indicates that one of the purposes of the Beneficial Ownership concept is to prevent tax avoidance, which should be considered for interpretation purposes. These clarifications suggest that the OECD favours a broad economic interpretation and does not interpret the phrase in line with common law standards, which necessitate a legal inquiry. Additionally, the phrase '*practical matter*' used in relation to conduit companies implies that a factual evaluation is necessary, or at the very least authorised, when establishing who the Beneficial Owner of income is. This indicates that the OECD does not favour a strict legal analysis.[104]

The OECD's approach to interpreting Beneficial Ownership as an economic test rather than a test that looks at the legal rights of the recipient of income is viewed as a significant development by legal experts.[105] Considering the origins and growth of the concept of Beneficial Ownership in literature to date, it appears that the economic approach to Beneficial Ownership was adopted earlier than the revisions made in the 2003 OECD commentary. According to the 1986 Conduit Report, a person cannot be considered the Beneficial Owner of income if that person is not economically entitled to the income. Similarly, it was stated in the 1998 Harmful Tax Competition Report that the Beneficial Ownership concept denies treaty advantages to firms that provide no meaningful economic role.[106] Additionally, the changes made to the 2014 OECD commentaries attempted to expand on the definition of Beneficial Ownership. According to these changes, the recipient of income is the Beneficial Owner of that

---

103 Adrian Wardzynski 'The 2014 Update to the OECD Commentary: A Targeted Hybrid Approach to Beneficial Ownership' (2015) Intertax at Vol 43:2 page 179-191, available at *https://kluwerlawonline.com/journalarticle/Intertax/43.2/TAXI2015015 ,* assessed on 15 March 2022.

104 OECD Income and Capital Model Convention and Commentary (2003).

105 Charles du Toit 'The Evolution of the Term "Beneficial Ownership" in Relation to International Taxation over the Past 45 Years' (2010) Bulletin for International Taxation Journal Articles & Opinion Pieces IBFD Vol 64:10 page 1-10, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/bit_2010_10_int_2,*accessed 8 on February 2022.

106 OECD, Harmful Tax Competition (1998), para 119.

income if she or he has the right to use and enjoy the income without being bound by a contractual or legal responsibility to pass on the income received to another person.[107] The definition is centred around two ownership attributes, namely, '*the right to use and enjoy'*. Focusing on the enjoyment of the income, the OECD advocates that an important factor is the economic benefit derived from the dividends, interests, or royalties.[108]

2.3.2 Legal Approach

According to the legal viewpoint, Beneficial Ownership is determined by legal responsibilities emanating from contracts and other legal instruments. It does not include a factual examination into whether the conduit companies benefit from the money, therefore facts or larger economic realities are given little or no weight.[109] Scholars present a variety of arguments in support of the legal approach to understanding the concept of Beneficial Ownership. Firstly, it is advocated that the concept of Beneficial Ownership is legal rather than economic since the use of an economic approach to determine who the Beneficial Owner is, will be so wide-ranging that it will not distinguish between broader anti-avoidance actions.[110] Secondly, adopting a legal test provides the confidence that specific legally binding requirements are met (instead of basing an analysis on facts and circumstances). Therefore, adopting a legal approach would bring forth greater assurance to whether the requirements for the Beneficial Ownership conditions are met.[111]

---

107 OECD Income and Capital Model Convention and Commentary (2014).

108 Robert Danon, 'Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11, and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?' in Current Tax Treaty Issues: 50th Anniversary of the International Tax Group IBFD, Books IBFD (2020) page 12 , available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/ctti_p04_c15*, accessed on 1 April 2022.

109 Ibid.

110 Adolfo Martín Jiménez, 'Beneficial Ownership – Global Tax Treaty Commentaries' (2022) Global Topics IBFD page 1-58, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/gttc_beneficial_ownership_chaphead*, accessed on 14 March 2022.

111 C. Hamra & Jasper Korving, 'Beneficial Ownership Interpreted, To What Extent Are the OECD and the EU on the Same Wavelength?' (2021) Interfax, Vol 49 :3 page 254-277
, available at *https://kluwerlawonline.com/journalarticle/Intertax/49.3/TAXI2021023*, accessed on 9 March.2022.

The Canadian Prévost and Velcro case laws [112] are good examples of the formal interpretation of Beneficial Ownership. In the *Prévost Car Inc. v. The Queen case*, the concern related to whether a Dutch holding company was the Beneficial Owner of dividends paid to it by its wholly owned Canadian Subsidiary Prévost Car. According to Article 10 of the treaty between the contracting states, should the Dutch company be classified as the Beneficial Owner of the dividends, Prévost would be required to withhold 5 % of the dividends. The crown contended that the Dutch company held no real economic ownership because the company was required to actively distribute dividends to its shareholders, corporations that were resident in Sweden and the UK. Therefore, the Dutch company could not be classified as the Beneficial Owner of the dividends and the lowered withholding tax rate should not be applicable. However, the Canadian Tax Court ruled in favour of Prévost stating that Beneficial Ownership is defined as: '*the person who enjoys and assumes all the attributes of ownership*'.[113] This definition required an assessment of whether the Dutch company enjoyed possession, use, risk, and control over the income received from the Canadian corporation, in addition to considering whether the company acted in the capacity of an agent, conduit or nominee in relation to the income received.[114] The court contended that although an obligation existed in which profits had to be distributed to its shareholders, and the company had no physical office or employees in the Netherlands or elsewhere, the Dutch company owned the Canadian subsidiary's shares. Thus, making the dividends from these shares part of the Dutch company's property. According to the court, the agreement did not subject the Dutch entity to any legal obligations, and as such the court maintained that the Dutch company was the Beneficial Owner of the dividends received.[115]

As with Prévost, in the case *Velcro Canada v. The Queen*[116], Beneficial Ownership was maintained by a Dutch company despite them having an obligation to distribute roughly 90%

112 *Canada - Prévost Car Inc. v. Her Majesty the Queen.*

113 *Canada - Prévost Car Inc. v. Her Majesty the Queen*, para. 99.

114 Mark Weterings, *Beneficial Ownership: An Evaluation of the concept of Beneficial Ownership in light of Dutch conduit companies* (Published Master's Thesis, Tilburg University, 2012).

115 Robert Danon, 'Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups' (2018) Bulletin for International Taxation Journal Articles & Opinion Pieces IBFD, Vol 72:1 page 31-55, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/bit_2018_01_int_2*,accessed 11 August 2022.

116 Velcro Canada Inc v. the Queen.

of the royalties it obtained in Canada to an affiliate in the Netherlands Antilles. The court found that even though the Dutch company was required to distribute its royalties, it still had some discretion on its use. Based on the discussions above, with respect to the Prévost and Velcro case laws, it is apparent that the Canadian Tax Court places special emphasis on the elements of legal control of the said income. Many scholars agree that rulings as the one made in the Canadian Prévost and Velcro cases establish an extremely low threshold to identify what constitutes Beneficial Ownership.[117] It simply eliminates agents, nominees, and conduit companies with no discretion on the amounts obtained or obliged, on the basis of a legal obligation to transferring the income received to a non-resident.[118]

2.4 Experts' views on defining the Beneficial Ownership concept

The chapter will proceed by analysing the diverging viewpoints of experts in the international tax arena and literature in defining the concept of Beneficial Ownership.

2.4.1 Klaus Vogel

Klaus Vogel, who was born in Hamburg, Germany is widely known as an academic expert on the aspects of international taxation, particularly in tax treaties. He defines the Beneficial Owner as the person who determines the use of the asset or capital, and how yields are to be used. Vogel goes on to say that treaty benefits should be awarded with the real title in mind and not the formal right to dividends, interest, or royalties.[119] Vogel has consistently maintained that "*The old dispute of 'form versus substance' should be decided in favour of substance*". According to Vogel, economic control is the most important factor in determining Beneficial Ownership. Therefore, the Beneficial Owner is the person "*who is free to decide (1) whether or not the capital or other assets should be used or made available for use by others, (2) how the yields from those assets should be used, or (3) both*".[120] The issue of control seems

117 Brian Arnold, *The Concept of Beneficial Ownership under Canadian Tax Treaties*, in Beneficial Ownership – Recent Trends, IBFD (2013) page 48.

118 Adolfo Martín Jiménez, 'Beneficial Ownership – Global Tax Treaty Commentaries' (2022) Global Topics IBFD page 1-58.

119 Charles du Toit, *Beneficial Ownership of Royalties in Bilateral Tax Treaties (Published* Ph.D. Thesis, Amsterdam Centre for International Law,1999), Klaus Vogel Double *Taxation Convention* (1997) 3 ed page 561-562.

120 Klaus Vogel Double *Taxation Convention* (1997) 3 ed page 561-562.

to be the most important factor in Vogel's definition. Vogel argues that Beneficial Ownership should be interpreted by referring to international tax law and a treaty-based framework rather than by reference to domestic law, which lacks a precise definition of the term.[121,122] By applying an approach as described by Vogel, will promote a consistent treaty application, both between contracting states in specific cases and across the entire network of tax treaties.

2.4.2 Robert Danon

According to the international tax expert Robert Danon, who is a tenured Professor of Law at the University of Lausanne (Switzerland) with expertise in international tax law, tax treaty, comparative law, and international tax controversies. He defines the term Beneficial Owner in the context of a tax treaty as the person who has the legal, economic, or factual power to control the attribution of income. The core element of this definition is the recipient's actual control over the income they receive, as well as their effective ability to freely choose whether or not to transfer the income to a third party.[123] Danon supports the view that to define Beneficial Ownership, one needs to consider its international fiscal meaning. He asserts that applying a domestic meaning may open the way for a domestic characterisation that potentially exacerbates the risk of diverging interpretations.[124]

---

121 Klaus Vogel *Double Taxation Convention* (1997) 3 ed page 561-562, Robert Danon, 'Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups' (2018) Bulletin for International Taxation Journal Articles & Opinion Pieces IBFD, Vol 72:1 page 31-55 available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/bit_2018_01_int_2*,accessed on 11 August 2022.

122 Olli Ryynänen 'The Concept of a Beneficial Owner in the Application of Finnish Tax Treaties' Stockholm Institute for Scandinavian Law page 349, available at *https://www.scandinavianlaw.se/pdf/44-21.pdf,* accessed on 11 August 2022, Ibid.

123 Robert Danon, 'Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11, and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?' in Current Tax Treaty Issues: 50th Anniversary of the International Tax Group IBFD, Books IBFD (2020) page 1-36, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/ctti_p04_c15*, accessed on 21 March 2022.

124 Mark Weterings, *Beneficial Ownership: An Evaluation of the concept of Beneficial Ownership in light of Dutch conduit companies* (Published Master's Thesis, Tilburg University, 2012), Robert Danon "2011 OECD Discussion draft on the meaning of beneficial owner" *available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.oecd.org/tax/treaties/48415237.pdf,* accessed 15 June 2022.

2.4.3 Charles Du toit

Charles Du Toit, who is an academic and legal practitioner is a partner in the Tax Advisory Division at Stonehage Fleming in Cape Town, South Africa, a company that specialises in Corporate International Tax. Du Toit supports the legal approach and argues that Beneficial Ownership should be interpreted based on a common-law meaning, thus defining the concept as a split of ownership rights between different persons. This approach to interpreting the concept would necessitate an investigation into the nature and extent of the ownership attributes held. Du Toit summarises the concept of Beneficial Ownership as the following:

"(1) *Beneficial Ownership can either be with legal ownership or divided therefrom, but mere legal title to property without the right to deal with it to some extent as your own, does not constitute Beneficial Ownership;*
(2) *determining whether someone is a beneficial owner requires an analysis of the facts to determine the weight of the ownership attributes, but the right of Beneficial Ownership must be recognised by law and be enforceable before the court;*
(3) *acquiring something subject to an obligation to transfer that specific item to another, is not regarded as Beneficial Ownership*."[125]

2.4.4 Luc De Broe

When defining Beneficial Ownership, Luc De Broe who is a leading expert in Belgian and international tax, advocates that the focus should be on income ownership and thus on attributes of ownership, excluding only agents, nominees, and conduit companies, who have such limited powers over income. They are effectively mere fiduciaries or administrators managing property on behalf of their creditor or shareholder. Therefore, a person will qualify as the Beneficial Owner if they have the right to claim the income for their own account and benefit, and they are able to freely use the income they receive (i.e., they are not contractually obligated to pay the specific item of income they receive to their creditor/shareholder).[126] De Broe further states

125 Charles du Toit, *Beneficial Ownership of Royalties in Bilateral Tax Treaties (Published* Ph.D. Thesis, Amsterdam Centre for International Law,1999).

126 Luc De Broe *International Tax Planning and Prevention of Abuse under Domestic Tax Law , Tax Law Treaties & EC – Law* IBFD Doctoral Series Vol 14 (2008), page 518-519, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/itpp_chaphead*, accessed on 1 January 2022.

"*The source State should only give relief from tax on the condition that the recipient of the income is the person to whom the income is attributed for income tax purposes in his State of residence*."[127] The logic of such a proposal is clear as treaty relief purports to eliminate juridical international double taxation. There can only be such double taxation if the recipient of the income arising in the source state is a taxpayer in his state of residence and a person to whom the income is attributed for tax purposes under the laws of that state.[128] If treaty relief is given by the source state to a person to whom the income is not attributed for tax purposes in his residence state, one openly invites tax avoidance and treaty abuse.[129] In terms of this approach, tax authorities need to assess whether the recipient is subject to pay tax on the payment received as the Beneficial Owner.

Luc De Broe criticises Du Toit's understanding of the term Beneficial Ownership, which is based on a common-law meaning. His criticism can be summarised as follows:

a) First, De Broe challenges the plausibility of civil law governments adding a common law idea in their double tax treaties, particularly given that common law is not well understood in civil law jurisdictions. The term Beneficial Ownership frequently refers to the ownership of assets rather than the claim to income.
b) Second, he argues that the OECD MTC makes no mention of defining the idea of Beneficial Ownership in terms of common law. This is verified by the revisions made to the commentaries that explain that the concept should not be interpreted based on a common law basis;[130]
c) Third, he mentions that the official French translation of the phrase Beneficial Ownership does not allude to ownership, which might imply that the common law interpretation of the term was not intended.

As a result, he believes that Du Toit's views are problematic in terms of applying common law meaning.[131] Although De Broe has levelled some criticisms for the interpretation of Beneficial Ownership under a common law approach, he contends that, with regard to the reference made in paragraph 12 of the commentaries on Article 10 (i.e. a conduit company cannot be regarded

127 Ibid.

128 Ibid.

129 Ibid.

130 OECD Income and Capital Model Convention and Commentary (2017).

131 Luc De Broe *International Tax Planning and Prevention of Abuse under Domestic Tax Law , Tax Law Treaties & EC – Law* IBFD Doctoral Series Vol 14 (2008), page 500-511.

as the Beneficial Owner, though the formal owner, it has as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties) can nevertheless be read as gaining a legal definition of the phrase. In particular, the reference to fiduciary or administrator acting on behalf of interested parties, which are legal terms not defined in the OECD MTC or commentary, may compel courts to investigate the meaning of those terms under the controlling private law. This may assist in determining whether the conduit company in the given case meets the legal characteristics of a fiduciary or administrator under such law. In addition, reference to '*limited powers*' is consistent with the definition of Beneficial Ownership, which entails an examination into the nature and extent of the rights possessed by various parties.[132]

2.4.5 Richard Vann

Richard Vann who is a Challis Professor of Law at the University of Sydney summarises his position on who the Beneficial Owner of income is by addressing two principles. First, he argues that if the country of residence of the person to whom the income is paid does not attribute it to that person, that person will not be deemed the Beneficial Owner of the income. Second, if the country of residence attributes the income to a person, that person will not be treated as the Beneficial Owner of the income in only a very limited number of situations, such as where the person is acting as an agent or nominee.[133] Vann continues to state that if it is deemed necessary, in light of subsequent OECD developments, to incorporate particular conduit situations, the critical point should be that a person is not the Beneficial Owner of income if the person has no control over its application due to an immediate and legally enforceable obligation to pass the income on to another. Furthermore, he stresses that if a person is entitled to keep the income for use as the person decides, that person is the Beneficial Owner even though at some future time that income may be distributed to a third party.[134]

132 Ibid.

133 Richard Vann *Beneficial Ownership: What Does History (and maybe policy) Tell Us*. (Published Legal studies Research Paper, The University of Sydney, 2012).

134 Ibid

2.4.6 Philip Baker

Philip Baker, another international tax expert who specialises in international aspects of taxation, which covers both corporate and private client matters, describes Beneficial Ownership as an international fiscal concept. Baker states that Beneficial Ownership is described in the OECD's commentaries. Accordingly, persons who receive income as nominees, agents, mere fiduciaries, or other administrators are not Beneficial Owners of the income. The OECD commentaries focus on the receipt of income being subject to a binding obligation to pay income to another person. In those cases, the recipient is not the true owner. However, in cases where there is no such binding obligation to transfer the income received, the recipient is the Beneficial Owner.[135] Baker continues to state that "*The Beneficial Owner limitation is a relatively narrow provision concerned with potential abuse of treaty claims, but more broadly to ensure that the treaty benefits accrue to a real owner and not to someone who is bound to pay on the specific dividends received to another person*." [136] As a result, it should be emphasised that the Beneficial Owner's level of substance is of limited importance.

2.4.7 Conclusion on subjective interpretations by experts

Based on the discussions held above Richard Vann, Robert Danon, Luc De Broe and Philip Baker agree that when determining who the true Beneficial Owner is, one will consider if they have the right to claim the income for their own account and benefit (excluding agents, nominees, and conduit companies) and therefore they are able to freely use the income they receive.

In contrast to these views Klaus Vogel believes that Beneficial Ownership should be decided in favour of substance. Therefore, economic control is the most important factor in determining Beneficial Ownership. Whilst Charles Du Toit, defines Beneficial Ownership as a split of ownership rights between different persons. This approach to interpreting the

---

135 Philip Baker *The Meaning of "Beneficial Ownership as applied to Dividends under the OECD Model Tax Convention*, page 87-102, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fieldtax.com/wp-content/uploads/2015/09/The-Meaning-of-Beneficial-Ownership-as-Applied-to-Dividends-Under-the-OECD-Model-Tax-Convention.pdf, accessed on the 1 January 2022.

136 Ibid.

concept would necessitate an investigation into the nature and extent of the ownership attributes held.

In terms of the OECD commentaries, literature to date, and expert opinions, it is evident that Beneficial Ownership is defined subjectively and therefore there is limited consensus.

Chapter 3

3.1 Introduction of the Principal Purpose Test

This chapter will consider the future relevance of the Beneficial Ownership concept by analysing the Principal Purpose Test (PPT). The PPT was created in response to the proposed adjustments of the BEPS Action 6 Final Report to address treaty shopping and is found in Article 29(9) of the 2017 OECD MTC and in Article 7(1) of the MLI. The introduction of Article 29 of the OECD Model (2017) adopted a similar objective (*which was included to address treaty abuse relating to treaty shopping*) as the concept of Beneficial Ownership, with the primary role to curb treaty shopping. In contrast to the Beneficial Ownership concept, which is restricted to Articles 10–12 (OECD Model), the PPT applies to a wider range of cases and articles.

This leads one to question the relevance of the Beneficial Ownership concept, which is currently being used as one of the main tools to combat treaty shopping. Beneficial Ownership is no longer solely responsible for acting as the primary anti-treaty shopping mechanism due to the PPT.

3.2 Purpose of the Principal Purpose Test in the OECD MTC

The PPT is the general anti-treaty-shopping provision of tax treaties which aims to shield the host country's tax base from abusive transactions. The test is outlined in both Article 7(1) (Prevention of Treaty Abuse) of the MLI and Article 29(9) of the OECD Model.[137] With the exception of the MLI's use of 'the Covered Tax Agreement' rather than 'this Convention', the two provisions are nearly identical. The OECD Model provision reads as follows: "*Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention*."[138]

137 Elio Palmitessa 'Interplay between the Principal Purpose Test in the Multilateral BEPS Convention and the Beneficial Ownership Clause as Treaty Anti-Avoidance Tool Targeting Holding Structures' (2018) Intertax Vol 46 page 58-67, available at *https://doi.org/10.54648/taxi2018006*, accessed on 15 March 2022.

138 OECD Income and Capital Model Convention and Commentary (2017).

In principle when applying the PPT, the steps one would follow can be illustrated as follows:

- Consideration as to whether a benefit has been obtained;
- An assessment of all relevant facts and circumstances of the case needs to be considered;
- Ascertaining whether obtaining that benefit was one of the principal purposes of the arrangement or transaction;
- Granting the benefit because the benefit is in accordance with the object and purpose of the arrangement of the convention; and
- Denying the benefit if one of the principal purposes of the arrangement and transaction was to obtain the benefit. [139]

After analysing the provision of the PPT included in the OECD Model as stated above, the rule may raise several concerns in relation to the vagueness that is embedded within the text, as this may give rise to ambiguity by taxpayers when interpreting the provision. The provision includes ambiguous terms such as '*a benefit under this convention*', '*one of the principal purposes,* '*reasonable to conclude, having regard to all relevant facts and circumstances'*, and '*would be in accordance with the object and purpose of the relevant provisions of this Convention'.* These ambiguous terms will be discussed below.

3.2.1 A benefit under this convention

The notion of 'benefit' is crucial for the establishment of abuse and for the determination of the consequence of the PPT application. Obtaining a 'benefit' should be one of the principal purposes of an arrangement or transaction and not necessarily the main objective.

According to the Oxford dictionary, the term's common meaning is an 'advantage, profit, or good'[140] When analysing the OECD commentary to the PPT, it indicates that the term 'benefit' "*includes all limitations (e.g., a tax reduction, exemption, deferral or refund) on taxation imposed on the State of source under Articles 6 through 22 of the Convention, the relief from*

139 Svitlana Buriak, 'Chapter 2: The Application of the Principal Purpose Test under Tax Treaties' in Tax Treaty Entitlement in Books IBFD (2015) page 3-4, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/tte_c02*, accessed on 18 October 2022.

140 See Benefit, in Oxford English Dictionary (3rd ed., 2003).

double taxation provided by Article 23, and the protection afforded to residents and nationals of a Contracting State under Article 24 or any other similar limitations. This includes, for example, limitations on the taxing rights of a Contracting State in respect of dividends, interest, or royalties arising in that State, and paid to a resident of the other State (who is the beneficial owner) under Articles 10, 11, or 12. It also includes limitations on the taxing rights of a Contracting State over a capital gain derived from the alienation of movable property located in that State by a resident of the other State under Article 13. When a tax convention includes other limitations (such as a tax sparing provision), the provisions of this Article also apply to that benefit."[141] The word 'benefit' unambiguously refers to a taxpayer receiving a favourable tax treatment as a result of applying one or more tax treaty provisions. To comprehend a taxpayer's arbitrary intent, it is crucial to examine a 'benefit'. Therefore, one of the key concerns relates to how this term should be interpreted. According to Buriak, when compared to similar treatment, the tax position of the taxpayer should be better. He continues to state that there are two views to interpreting the term 'benefit'. This being that the tax position of a taxpayer must be compared with the position that would be applicable under the domestic tax law or other tax treaty provisions. The term benefit is commonly understood to improve the tax position of a taxpayer in contrast to that which would be applicable under the domestic law. This option is well-matched with treaty-shopping circumstances. Without a questionable transaction, the taxpayer will not fall within the personal scope of the respective treaty and therefore the provisions of the domestic tax law will be the provisions that are appropriate. [142] If one contends that a benefit provided by the convention under the PPT has the general meaning of improving one's tax situation in comparison to that provided by domestic law, then the denial of this benefit must result in the application of a pertinent domestic provision. However, such an interpretation of the term is not that clear as far as rule-shopping arrangements are concerned. [143] Alternatively, a 'benefit' under a treaty obtained as a result of the arrangement or transaction in question may be compared to a tax treatment under a different

141 See the Commentary to the PPT, at para. 175.

142 Svitlana Buriak, 'Chapter 2: The Application of the Principal Purpose Test under Tax Treaties' in Tax Treaty Entitlement in Books IBFD (2015) page 3-14, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/tte_c02*, accessed on 18 October 2022.

143 Svitlana Buriak, 'Chapter 2: The Application of the Principal Purpose Test under Tax Treaties' in Tax Treaty Entitlement in Books IBFD (2015) page 3-14.
available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/tte_c02*, accessed on 18 October 2022.

treaty provision. In defining the term 'benefit', the PPT provision and the Model commentary (2017) do not appear to adequately address these circumstances. This may be because establishing the tax treatment that would otherwise be applicable necessitates inventing a legal fiction that a transaction has taken place even though it has not in fact happened. The second strategy might be more suitable to show whether the main goal of a taxpayer's arrangement was to circumvent treaty provisions. However, the first approach is more suitable to establish clearer legal consequences for the application of the PPT. [144]

Based on the above considerations, when defining the term 'benefit' it should be interpreted broadly and purposefully, which could result in various interpretations between states and in turn result in the incorrect application of the PPT.

3.2.2 One of the Principal purposes

Next, focusing on the phrase 'One of the Principal Purposes'. This phrase creates great concern in establishing what the standard is for determining what qualifies as 'One of the Principal Purposes'. In the view of the OECD, obtaining a benefit under a tax convention "*need not be the sole or dominant purpose of a particular arrangement or transaction. It is sufficient that at least one of the principal purposes was to obtain the benefit*".[145] When considering how the phrase 'One of the Principal Purposes' could create an area of great concern, the first thing to consider relates to the possibility of there being more than one principal purposes. The OECD lacks in providing sufficient guidance to ascertain how one should approach a) differentiating between principal purposes and ancillary purposes, and b) between various principal purposes.[146] Furthermore, the OECD does not offer any guidance on what facts and circumstances might be relevant or how relevant they are, unlike some domestic GAARs (general anti-avoidance rules). Nor does it provide any specific objective requirements for abuse. Due to these ambiguities, domestic courts may interpret the law differently. In addition to the concerns posed above, an additional challenge would stem from the nature of the tax

144 Ibid.

145 Action 6 Final Report, Part B, at para. 12 at page 58.

146 Luc De Broe Joris Luts 'BEPS Action 6 : Tax Treaty Abuse' (2015) Intertax Vol 43:2 page 122-146, available at *https://www.deepdyve.com/lp/kluwer-law-international/beps-action-6-tax-treaty-abuse-QvRtGfSTez,* accessed on 13 September 2022.

treaty itself, which aims to increase international trade by removing or reducing tax barriers.[147] If the definition of treaty abuse in the anti-treaty abuse rule is too broad, as it is in the PPT, it may destroy treaties rather than achieve a balance between preventing abusive treaty shopping and eliminating double taxation. Therefore, it is recommended that treaty benefits be given in the occurrence where there is a true economic goal if the arrangement is not motivated by a single or predominating desire to obtain treaty benefits. De Broe (2008) stated that if a taxpayer can also demonstrate significant economic reasons unrelated to tax treaty advantages, it is theoretically improper to refuse treaty benefits to that taxpayer just because obtaining those benefits is one of their principal motivations[148]. According to Kok (2016), "*the OECD should have selected for one of the alternative tests because it is challenging to argue that the taxpayer is abusing a treaty if he has equally important motives to carry out a transaction*."[149] Finally, according to Rosenbloom, any transaction with a 'substantial non-tax nexus' ought to be accepted as legal and entitled to treaty benefits.[150]

These opinions are highly relevant because there are no clear definitions to what constitutes a principal purpose of an arrangement or transaction, how they should be related to one another, or when a tax purpose may be referred to as a principal purpose.

3.2.3 Reasonable to conclude, having regard to all relevant facts and circumstances

The phrase 'reasonable to conclude' indicates that this is an objective test, and it should be used by considering all pertinent circumstances and determining whether, given those circumstances, a reasonable conclusion would be that obtaining a tax advantage was the main

147 Ibid.

148 Luc De Broe, 'International Tax Planning and Prevention of Abuse: A Study under Domestic Tax Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies' in IBFD Doctoral Series Online Books IBFD (2008) Vol 14.

149 Reinout Kok, '*The Principal Purpose Test* in *Tax Treaties under BEPS 6*'(2016) Kluwer Law International BV Intertax Vol 44(5) page 406-412, available at *https://core.ac.uk/reader/158600120,* accessed on 13 September 2022.

150 David Rosenbloom, 'Derivative Benefits: Emerging US Treaty Policy' (1994) Kluwer Law International BV Intertax Vol 22(2) page 83-86, available at *https://doi.org/10.54648/taxi1994011*, accessed on 10 June 2018.

purpose, or one of the main purposes, of the arrangements.[151] However, it would be extremely rare to come across a circumstance where, despite the participants' subjective denials, obtaining a tax advantage appeared to be one of the arrangement's primary goals. Challenges appear to arise because there is great uncertainty as to how the PPT should be applied due to different interpretations of the same facts and circumstances.

The OECD fails to clearly outline the specific criteria that satisfy the 'reasonableness' requirement. Who decides what are 'relevant facts' and 'relevant circumstances' is one of the issues with the PPT's substantive test? What qualifies as 'reasonableness' and who defines 'reasonableness'? The Oxford English Dictionary defines 'reasonable' as "*within the limits of what it would be rational or sensible to expect; not extravagant or excessive; moderate"* when referring to the phrase *'reasonable to conclude*'.[152] The term 'conclude' means "*to arrive by reasoning at a judgment or opinion; to come to a conclusion, draw an inference, infer, deduce*"[153] Only after taking into account 'all relevant facts and circumstances should a court or tax authority reach such a conclusion. The question of whether a specific person such as the taxpayer or, if any, a promoter of the arrangements actually had that intention is neither necessary nor appropriate according to the 2017 OECD commentary on Article 29, which only offers sparse guidance.[154] The OECD commentary further states that when determining what constitutes 'reasonableness' consideration should be given to the various perspectives on the transaction or arrangement under investigation. [155] Although a taxpayer's arbitrary intention or motivation may point to one or more purposes of the transaction, this is not the focus of the test, and there is a good reason for it. The likelihood of consistency in decision-making across jurisdictions increases with an objective assessment. It would be improper if, out of two identical transactions, only one was deemed to be subject to the PPT because one taxpayer had the necessary tax-avoidance intention or motive while the other did not. Two similar

151 Vita Apriliasari ' Interpretation issue of the Principal Purpose Test (2019) Journal Pajak Indonesia Vol 3(2) page 11- 19, available at *INTERPRETATION ISSUE OF THE PRINCIPAL PURPOSE TEST (researchgate.net),* accessed on 10 June 2018.

152 Reasonable, in Oxford English Dictionary (3rd ed., 2003).

153 Ibid.

154 Vita Apriliasari ' Interpretation issue of the Principal Purpose Test (2019) Journal Pajak Indonesia Vol 3(2) page 11- 19, available at *INTERPRETATION ISSUE OF THE PRINCIPAL PURPOSE TEST (researchgate.net),* accessed on 10 June 2018.

155 Ibid.

arrangements in different jurisdictions should be treated equally if the assessment is truly objective. As illustrated in the landmark New Zealand Supreme Court decision of Ben Nevis, although the test is objective, it will be very difficult for courts to ignore such evidence when presented with conclusive proof of a taxpayer's intention or motive to evade taxes. In the case, the court desired to objectively decide the purpose of the arrangement and transaction. The court repeated in this decision the problematic draft business plan's text, which contained the following red flags for tax avoidance: "*The real benefits of the deal are tax concessions that can be obtained now by the investors and the foundation [...] The actual outcome of the deal in 50 years' time is not considered material*."[156] The way courts view this kind of evidence tends to indicate that, even in cases where a court makes an effort to only consider objective evidence, they will occasionally be influenced by subjective matters.

3.2.4 Object and purpose of the convention

The PPT's concluding and most crucial objective section "*object and purpose of the relevant provisions, "* states that, even if the test is satisfied, the benefit should be withheld unless "*granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Convention*."[157] The PPT would permit the granting of treaty benefits provided that doing so would be consistent with the objectives and goals of the applicable tax treaty provisions.[158] The issue is whether the taxpayer must demonstrate that '*providing that advantage is in conformity*' with the 'relevant provisions' object and purpose on an individual basis or the object and purpose of the 'relevant provisions' read in the context of the tax treaty's overall object and purpose.[159] The OECD offers no guidelines in this regard and has thus left the interpretation open to different approaches, which reduces legal certainty

156 NZ: Supreme Court, 19 Dec 2008, Ben Nevis Forestry Ventures Ltd v. Commissioner of Inland Revenue [2008] NZSC 115.

157 OECD Model Tax Convention on Income and Capital (2017).

158 Craig Elliffe 'The Meaning of the Principal Purpose Test: One Ring to Bind Them All?'(2019) World Tax Journal Articles & Opinion Pieces IBFD Vol 11(1) page 48-75, available at *https://research-ibfd-org.ezproxy.uct.ac.za/#/doc?url=/document/wtj_2019_01_int_2*, accessed on 1 October 2022.

159 Chand Vikram 'The Principal Purpose Test in the Multilateral Convention: An in-depth Analysis'(2018)) Kluwer Law International BV Intertax at Vol 46(1) page 18-44, available at *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TAXI\TAXI2018004.pdf&casa_token=DOxeeXuXH_MAAAAA:-18qfJnYjRi8kiSfPZonoWY4D-KFFYa1KSLUUlltMaXH1CNdDWeHhEehFzPwKUJbE9YGx5ZDXg*, accessed on 1 October 2022.

and feasibility. This may result in one of the significant reasons for the confusion created amongst scholars in determining the purpose of the relevant treaty provisions under the PPT. According to De Broe, distributive rules do not have a different objective in comparison to those of the ultimate principle of the tax treaty as the allocation of taxing rights represent the means for allowing the elimination of double taxation. Although he argues in a different place that the objective of distributive rules is to allocate the taxing rights over the various items of income among the contracting states. [160] On the other hand, Andrés Moreno is of the opinion that distributive rules are not appropriate for a purposive interpretation due to their design and the fact that defining their purpose in light of the ultimate purpose of tax treaties is serving and circular. These contradicting views show how difficult the question of establishing the purpose of treaty provisions is.[161] The determination of the object and purpose requires an analysis based on interpretation rather than arbitrary facts. However, since it can sometimes be very difficult to ascertain the purpose of treaty provisions and/or a tax treaty, the objective nature of this second part of the PPT is not always certain. Hence, there is a lot of confusion in the literature regarding how to determine the purpose of a relevant treaty provision under the PPT. The lack of appropriate guidelines justifies the difficulty in determining the purpose of the relevant treaty provisions to some extent, allowing for a variety of approaches. The MLI itself, including its preamble, is the most crucial tool in interpreting the PPT's object and purpose, followed by the BEPS Report because it reflects the opinions of the OECD and G20 (Group of Twenty is an intergovernmental forum comprising 19 countries and the European Union) on the PPT. The principles of the Vienna Convention continue to be applicable in determining the object and purpose of treaty provisions under the PPT.[162]

160 Luc De Broe, International Tax Planning and Prevention of Abuse: A Study under Domestic Tax Law, Tax Treaties and EC Law in Relation to Conduit and Base Companies, Amsterdam 2008.

161 Andres Moreno, 'GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test. What Have We Gained from BEPS Action 6?' (2017) Kluwer Law International BV Intertax Vol 45, page 6-7, available at *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://kluwerlawonline-com.ezproxy.uct.ac.za/api/Product/CitationPDFURL?file=Journals\TAXI\TAXI2017036.pdf*, accessed on 28 November 2022.

162 OECD Model Tax Convention on Income and Capital.

3.2.5 Conclusion on the Principal Purpose Test

The introduction of the PPT as stated above adopted a similar objective as the concept of Beneficial Ownership, with the primary role to curb treaty shopping. However, the subjective nature of the PPT makes applying it difficult. The rule may raise several issues related to the ambiguity that is embedded in the text, as discussed above. This may cause taxpayers to have difficulty interpreting the provision because it contains vague terms like "a benefit under this convention," "*one of the principal purposes*," "*reasonable to conclude*, *having regard to all relevant facts and circumstances*," and "*would be in accordance with the object and purpose of the relevant provisions of this convention*." Even though the commentary on the PPT offers some guidance on how to interpret these expressions, it also emphasises the need to apply such expressions broadly, implying the PPT's deterrent nature.[163,164]

As a result, even though the inclusion of the PPT in the context of the DTA indicates that contracting states have access to a more potent tool to address treaty abuse, more guidance should be offered to clarify the PPT's exceedingly vague subjective component.

163 Vita Apriliasari 'Interpretation issue of the Principal Purpose Test (2019) Journal Pajak Indonesia Vol 3(2) page 11- 19.
164 OECD Model Tax Convention on Income and Capital (2017).

Chapter 4

4.1 Summary, recommendations and concluding remarks

Avoiding treaty shopping and tax abuse is of immense importance, particularly in developing countries where establishing and maintaining a sustainable source of revenue to pay domestic expenditures is vital. Notably, the tax base of developing countries such as South Africa has been negatively impacted by several global issues including the Covid-19 epidemic. The South African Revenue Service (SARS) estimated that the tax base decreased from 7.6 million taxpayers in 2019 to 6.9 million in 2021[165], highlighting the need for the correct application of the Beneficial Ownership concept to protect the country's tax base. The ongoing argument about the subjective interpretation of the Beneficial Ownership concept served as motivation for this research.

Chapter 2 summarised the history of the term Beneficial Ownership, and how it has been revised over the years to minimise its subjective interpretation. The chapter further demonstrated that an international meaning, rather than a domestic meaning is preferred, which prevents subjective interpretation under a country's domestic laws. However, it is still debatable whether the international meaning of the concept should be defined using a legal or an economic approach. Thereafter, the conflicting viewpoints of tax experts were discussed, demonstrating that even experts and tax authorities have differing opinions on how Beneficial Ownership should be interpreted.

Chapter 3 described the PPT, which was introduced in response to the proposed adjustments of the BEPS Action 6 Final Report to address treaty shopping and is found in Article 29(9) of the 2017 OECD MTC and in Article 7(1) of the MLI. The main objective with the introduction of Article 29 of the OECD Model (2017) was to curb treaty shopping. The chapter established that, although ambiguous terms are used within the provision, the PPT may still provide a more potent tool to address treaty shopping, provided additional guidance is provided to clarify the PPT's exceedingly vague subjective components.

[165] Businesstech " South Africa's tax base has taken a big knock" available at *South Africa's tax base has taken a big knock – BusinessTech*, accessed on 28 November 2022.

Taken together, this research demonstrates that the subjective interpretation of Beneficial Ownership by states could lead to significant risks of double taxation or double non-taxation. Experts summarise that the application of the Beneficial Ownership concept continues to raise significant difficulty in treaty practice as it is unable to address treaty abuse consistently and comprehensively and is only appropriate for cases involving the channelling of dividends, interest, and royalties. Consequently, the Beneficial Ownership concept is not suitable for other distributive rules such as, capital gains.

In light of the considerations made above, the PPT was introduced as an alternative approach to combat treaty shopping. The inclusion of the PPT in the DTA's text indicates that contracting states have access to a more potent tool to address tax treaty abuse and combatting treaty shopping situations. The PPT goes beyond the traditional anti-avoidance tax treaty tools, supporting host nations in their fight to dismantle aggressive structures and abusive agreements. The PPT stipulates that multinational corporations must pay their fair share of tax in host countries, protecting fundamental principles of tax systems like horizontal equity and fairness. However, if it were to be widely applied without restrictions, and beyond reasonable and acceptable bounds, it may instead harm international trade.[166] After analysing the PPT, the following areas have been identified as cause for concern, a) The reasonableness element, b) The object and purpose of the relevant treaty provision, and c) The interpretation of the phrases 'One of the principal purposes and 'Treaty Benefit'. Despite the PPT being widely covered by international tax treaties, it is unclear to what extent discretion on the interpretation of the PPT is being transferred from an international consensus to domestic views. The concern is that individual countries may adopt inconsistent and irreconcilable views on the interpretation of the PPT. This is supported by Baker's views in which he states that the application of the PPT and the inconsistent interpretation of tax treaties have the potential to "*undermine the entire system of tax treaty benefits."*[167] It is very likely that countries will opt for their own domestic viewpoints rather than for a worldwide autonomous meaning, which may have detrimental effects. Different jurisdictions' inconsistent approaches to tax avoidance raise concerns about potential tax competition on the one hand, and tax aggression to increase revenue on the other.

166 Costa Michail 'The boundaries and Impact of the Principal Purpose Test' (2018) Bloomberg Tax, available at *https://news.bloombergtax.com/daily-tax-report-international/the-boundaries-and-impact-of-the-principal-purpose-test*, accessed on the 12 September 2022.

167 Baker, supra n. 3, at p. 283.

Despite the challenges raised above, the widespread implementation of the PPT represents a profound change in the network of international tax treaties and is likely to be an effective deterrent to treaty abuse. As a result of the way the PPT was drafted, the provision creates several challenges as discussed throughout the study, both conceptually and practically. Should courts not adhere to a uniform approach to interpreting the PPT, it will result in subjective approaches by various jurisdictions. Therefore, a uniform interpretation when applying the PPT is imperative. The revised preamble, which is contained in Article 6 of MLI, provides an aid for the interpretation of the PPT. It ensures that the purpose of tax treaties is to eliminate double taxation and opportunities for tax evasion and avoidance.[168] For the PPT to replace the Beneficial Ownership concept, it would need to be drafted and defined appropriately and objectively. An option to address the challenges discussed above, would be to revisit and clarify the application of the PPT, by providing a PPT application guide. This guide could start with the Final Report on Action 6, which gives ten examples on how to use the PPT in various factual settings, while also discussing important facets of the interpretation of various terms and phrases used in the test.

In conclusion, this thesis has demonstrated that although the Beneficial Ownership Concept is widely used in tax treaties across states, the subjective approach to defining who the true Beneficial Owner is, has led to significant risks which could result in double taxation or double nontaxation. The thesis goes on to motivate that the PPT is a viable alternative approach to address treaty shopping, although in its current state, the ambiguity of the terms used within the provision raises a few challenges and concerns. However, with additional guidance provided to the provision, the PPT has the potential to provide states with a more potent tool to addressing the issues regarding treaty shopping, especially in structured transactions.

168 See 2016 OECD, Multilateral Convention, Art. 6(1). Also see 2015 OECD, Final Report on Treaty Abuse, paras 72-74.

Bibliography

Case Law

UK- Netherlands double taxation convention of 31 October 1967.

Netherlands - Case Nos. 18/00318 and 18/00319, 12 May 2020.

Indofood International Finance Ltd v. JP Morgan Chase Bank N.A. London Branch (2006).

Montana Catholic Missions v. Missoula County 200 U.S. 118 (1906), at 127-128.

Prévost Car Inc. v. Her Majesty the Queen.

NZ: Supreme Court, 19 Dec 2008, Ben Nevis Forestry Ventures Ltd v. Commissioner of Inland Revenue [2008] NZSC 115.

Primary sources

Directorate for Financial, Fiscal and Enterprise Affairs.

Glossary of Industrial Organisation Economics and Competition Law.

HMRC internal manual International Manual 'International Financial Glossary.

HMRC internal manual International Manual 'Double taxation treaties: Beneficial ownership: What beneficial ownership means.

Income Tax act 58 of 1962.

Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.)

OECD (1963), Model Tax Convention on Income and on Capital: Condensed Version 1963, OECD Publishing.

OECD Income and Capital Model Convention and Commentary (1977).

OECD Double Taxation and the Use for Conduit Companies Report (1986).

OECD (1992), Model Tax Convention on Income and on Capital: Condensed Version September 1992.

OECD Harmful Tax Competition: An Emerging Global Issue Report (1998).

OECD Income and Capital Model Convention and Commentary (2003).

OECD Income and Capital Model Convention and Commentary (2014).

OECD 2014 Update to the OECD Model Tax Convention on Income and on Capital (2014).

OECD, 'Public Discussion Draft BEPS ACTION 6: Preventing the granting of treaty benefits in inappropriate circumstances, 14 March 2014 – 9 April 2014.

OECD Income and Capital Model Convention and Commentary (2017).

OECD Draft 2017 Update to the OECD Model Tax Convention on Income and on Capital (2017).

United States Model Technical Explanation Accompanying the United States Model Income Tax Convention of November 15, 2006**.**

Secondary sources

Electronic Books

Donald Whittaker '*An examination of the O.E.C.D and U.N Model Tax Treaties: History, Provisions, and Application to the U.S Foreign Policy*' Volume 8 Number 1 (1982).

Felipe Vallada, 'Beneficial Ownership under Articles 10, 11, and 12 of the 2014 OECD Model Convention' in the *OECD-Model-Convention and its Update 2014 IBFD, Books IBFD* (2015) para g.

Klaus Vogel, *Klaus Vogel on Double Taxation Conventions*, 3 ed (1997).

Klaus Vogel '*Double Tax Treaties and Their Interpretation*' Vol 4:1 (1986).

Luc De Broe *International Tax Planning and Prevention of Abuse under Domestic Tax Law , Tax Law Treaties & EC – Law* IBFD Doctoral Series Vol 14 (2008), page 518-519.

Philip Baker *The Meaning of "Beneficial Ownership as applied to Dividends under the OECD Model Tax Convention*, page 87-102.

Robert Danon, 'Chapter 15: The Beneficial Ownership Limitation in Articles 10, 11, and 12 OECD Model and Conduit Companies in Pre- and Post-BEPS Tax Treaty Policy: Do We (Still) Need It?' in Current Tax Treaty Issues: 50th Anniversary of the International Tax Group IBFD, Books IBFD (2020) page 1-36.

Svitlana Buriak, 'Chapter 2: The Application of the Principal Purpose Test under Tax Treaties' in Tax Treaty Entitlement in Books IBFD (2015) page 3-14.

Yariv Brauner, 'Chapter 9: Beneficial Ownership in and outside US Tax Treaties' *in Beneficial Ownership: Recent Trends* IBFD (2013) page 1-3.

Articles

Adolfo Martín Jiménez, 'Beneficial Ownership – Global Tax Treaty Commentaries' (2022) Global Topics IBFD page 1-58.

Adrian Wardzynski 'The 2014 Update to the OECD Commentary: A Targeted Hybrid Approach to Beneficial Ownership' (2015) Intertax at Vol 43:2 page 179-191.

Alwina Brand 'Dividends Withholding Tax – The Importance of Identifying the Beneficial Owner of a Dividend' (2012) South African Institute of Taxation.

Andres Moreno, 'GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test. What Have We Gained from BEPS Action 6?' (2017) Kluwer Law International BV Intertax Vol 45, page 6-7.

Annet Wanyana, Oguttu 'Curbing 'Treaty Shopping': The 'beneficial Ownership' Provision Analysed from a South African Perspective' (2007) The Comparative and International Law Journal of Southern Africa Vol 40:2 page 237-258.

Bruno Da Silva, 'Evolution of the Beneficial Ownership Concept: More than Half of a Century of Uncertainty and What History Can Tell Us', (2017), 12 *Frontiers of Law in China* 501.

Chand Vikram 'The Principal Purpose Test in the Multilateral Convention: An in-depth Analysis' (2018) Kluwer Law International BV Intertax at Vol 46(1) page 18-44.

Charles du Toit 'The Evolution of the Term "Beneficial Ownership" in Relation to International Taxation over the Past 45 Years' (2010) Bulletin for International Taxation Journal Articles & Opinion Pieces IBFD Vol 64:10 page 1-10.

Christopher Steeves 'The meaning of beneficial ownership in Canada and the OECD revised discussion draft' (2012) Fasken.

C. Hamra & Jasper Korving, 'Beneficial Ownership Interpreted, To What Extent Are the OECD and the EU on the Same Wavelength*?* (2021) Intertax, Vol 49 :3 page 254-277.

Craig Elliffe 'The Meaning of the Principal Purpose Test: One Ring to Bind Them All?' (2019) World Tax Journal Articles & Opinion Pieces IBFD Vol 11(1) page 48-75.

David Oliver, Jerry Libin, Stef van Weeghel, Charl du Toit 'Beneficial Ownership'(2000) International Bureau of Fiscal Documentation page 310-325.

David Rosenbloom, '*Derivative Benefits:* Emerging US Treaty Policy'(1994) Kluwer Law International BV Intertax Vol 22(2) page 83-86.

David Ward *Access to Tax Treaty Benefits* (Research Report Prepared for the Advisory Panel on Canada's System of International Taxation, 2008) Canadian Tax Foundation.

Des Kruger 'Who is the Beneficial Owner?' (2012) Sabinet African Journals Vol 3:1 page 8-17.

Elio Palmitessa 'Interplay between the Principal Purpose Test in the Multilateral BEPS Convention and the Beneficial Ownership Clause as Treaty Anti-Avoidance Tool Targeting Holding Structures' (2018) Intertax Vol 46 page 58-67.

Hans Pijl 'The Definition of "Beneficial Owner" under Dutch'(2000) International Bureau of Fiscal Documentation page 256-260.

Helmet Becker and Felix Wurm 'Treaty shopping: an emerging tax issue and its present status in various countries', (1988), The Netherlands: Kluwer Law and Taxation.

Ian Gamble 'CRA Releases comments on Beneficial Ownership*'* (2013), Thorsteinssons Canada's Premium Tax Law Firm.

Johann Hattingh, 'The Relevance of BEPS Materials for Tax Treaty Interpretation'(2020) Bulletin for International Taxation journal Articles & Opinion Pieces IBFD at Vol 74: 4/5 page 189.

Louan Verdoner, René Offermanns & Steef Huibregtse, 'A Cross-Country Perspective on Beneficial Ownership' (2010) European Taxation Journal Articles & Opinion Pieces IBFD Vol 50:9 page 3.

Luc De Broe Joris Luts 'BEPS Action 6: Tax Treaty Abuse' (2015) Intertax Vol 43:2 page 122-146.

Luc De Broe, 'Conduit companies' in International Tax Planning and Prevention of Abuse (founding ed) IBFD Doctoral Series vol.14 (2008) para 3-6.

Luc De Broe *International Tax Planning and Prevention of Abuse under Domestic Tax Law , Tax Law Treaties & EC – Law* IBFD Doctoral Series Vol 14 (2008), page 518-519.

Lynette Olivier 'Domestic anti-avoidance provisions with an international scope'(2010) International Fiscal association at para 2.4.1.

Martín Jiménez, 'The 2003 changes to the Commentaries on Articles 10-12 of the OECD Model' in *Beneficial Ownership – Global Tax Treaty Commentaries, Global Topics IBFD* (2022) page 1-58.

Reinout Kok, '*The Principal Purpose Test* in *Tax Treaties under BEPS 6*'(2016) Kluwer Law International BV Intertax Vol 44(5) page 406-412.

Robert Collier 'Clarity, Opacity and Beneficial Ownership (2011) British Tax Review Issue 6 page 689-691.

Robert Danon, 'Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups' (2018) Bulletin for International Taxation Journal Articles & Opinion Pieces IBFD, Vol 72:1 page 31-55.

Tejvan Pettinger 'What caused globalisation?' (2021) Economics Blog.

Thomas Booker 'Recent Developments Regarding Beneficial Ownership in Denmark' (2012) **European** Taxation Journal Articles & Opinion Pieces IBFD at Vol 52: 2-3 page 67-76.

Vita Apriliasari 'Interpretation issue of the Principal Purpose Test (2019) Journal Pajak Indonesia Vol 3(2) page 11- 19.

Dissertations

Anna Vitko *Towards the International Fiscal meaning of the Concept Beneficial Owner* (Published Master's dissertation, Lund University, 2011).

Charl Du Toit *Beneficial Ownership of Royalties in Bilateral Tax Treaties* (Published PhD Thesis, Amsterdam Centre for International Law 1999).

Margaret McKercher *Philosophical Paradigms, Inquiry Strategies, and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation* (Law Research Paper No. 2009-31, University of New South Wales, 2008).

Mark Weterings, *Beneficial Ownership: An Evaluation of the concept of Beneficial Ownership in light of Dutch conduit companies* (Published Master's Thesis, Tilburg University, 2012).

Michael Edwardes-Ker *Tax Treaty Interpretation* (Published PhD Thesis, Queen Mary University of London 1994).

Richard Vann *Beneficial Ownership: What Does History (and maybe policy) Tell Us*. (Published Legal studies Research Paper, The University of Sydney, 2012).

Waldette Engelbrecht *A Critical Analysis of The Meaning of Beneficial Owner of Dividend Income Received by A Discretionary Trust (*Published M.ACC Taxation, Stellenbosch University).