Role of the Preamble for the Interpretation of Old and New Tax Treaties and on the Policy of the Prevention of Treaty Abuse

This article examines the effect of the preamble of tax treaties before and after the amendments made to the OECD Model (2017) on the interpretation of tax treaties with the aim of preventing their abuse.

1. What Legal Power Is Conferred to the Preamble for Purposes of the Interpretation of Treaties? – General Discussion

The preamble to a treaty consists of a set of recitals which commonly include the motivations, aims and considerations of the Contracting States and the affirmation of the shared values which have played a part in the conclusion of the treaty. The general rule of treaty interpretation set out in article 31(1) of the UN Vienna Convention on the Law of Treaties (the “Vienna Convention”) (1969) is based on the textual approach. The text of a treaty must be presumed to represent the authentic expression of the intention of the parties. Consequently, the starting point of every interpretation is the elucidation of the text of the treaty, rather than an investigation ab initio into the intentions of the parties. Article 31(1) of the Vienna Convention (1969) contains three separate principles which have been combined in one single rule of interpretation. The first principle is that the treaty must be interpreted in good faith which flows directly from “pacta sunt servanda” – the principle of article 26 of the Vienna Convention (1969) – that imposes a fundamental requirement of reasonableness on the interpreter. The second principle, which, according to the Commentary on the 1966 Draft Vienna Convention, is “the very essence of the textual approach”, requires the terms of the treaty to be given their ordinary meaning, as article 31 of the Vienna Convention (1969) rests on the presumption that the intention of the parties is reflected in the ordinary meaning of the terms which they have used. The third principle which, according to the Commentary on the 1966 Draft Vienna Convention is “one of both common sense and good faith”, requires that the ordinary meaning of a term is determined in the context of the treaty and in light of its object and purpose. The general rule of interpretation of article 31 of the Vienna Convention (1969) does not set some chronological or hierarchical order in which those principles are to be applied but instead formulates, as Judge Torres Bernardéz observed, “a closely integrated single rule” that contains these principles. Accordingly, the finding of the ordinary meaning of a treaty term is a holistic process, which requires an examination in good faith of the terms of the treaty read in their context and in light of the treaty’s object and purpose.

The process of treaty interpretation is not a purely grammatical exercise or a search for the dictionary meaning of treaty terms as the meaning of those terms is to be determined in their context. Article 31(2) of the Vienna Convention (1969) clarifies that, for the purpose of interpretation of a treaty, the context comprises the whole text of the treaty as well as its preamble and annexes. As a result, the Vienna Convention on the Law of Treaties: A Commentary p. 587 (O. Dorr & K. Schalenbach eds., Springer 2012). See also HU/SK: ICJ, 25 Sept. 1997, Galiczqwa-Nagymaros Project Case [1997], ICJ Reports, 142. “The principle of good faith obliges the parties to apply it [the Treaty, author’s addition] in a reasonable way and in such a manner that its purpose can be realized”. 4. YBILC 1966-II, supra n. 3, p. 221, at para. 12. 6. Article 31(4) of the Vienna Convention (1969) is the exception to that rule: if it can be established that the parties intended to give a special meaning to a term of the treaty, such special meaning should prevail. 7. YBILC 1966-II, supra n. 3, p. 221, at para. 12. 8. S. Torres Bernardéz, Interpretation of Treaties by International Courts of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties, in Liber Amicorum Professor I. Seidl-Hohenvedeler pp. 744 and 747-748 (A. Rest et al. eds., Kluwer L. Intl. 1998); Dorr & Schalenbach eds., supra n. 4; and E.A. Engelen, Interpretation of Tax Treaties under International Law, Doctoral Series No. 4, p. 121 (IBFD 2004), Books IBFD

9. The context of the treaty includes more than just the text of the treaty, the preamble and the annexes to the treaty. Article 31(2) of the Vienna Convention (1969) makes it clear that the context also includes contemporaneous agreements between the parties. And article 31(3) of the Vienna Convention (1969) adds that there shall be taken into account “together with the context” subsequent agreements between the parties.

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the preamble is part of the context of the treaty and thus falls within the primary interpretive resources of article 31 of the Vienna Convention (1969). It is, therefore, a mandatory factor in the interpretation process. Consequently, treaty interpretation always requires an examination of the preamble as part of the textual and/or contextual examination of its terms. There are many examples in case law in matters of public international law where the preamble of a treaty has been used to elucidate the ordinary meaning of the terms used. In addition to this and following from the fact that the preamble usually states the aims and objectives of the treaty, the preamble is instrumental to identifying the treaty’s object and purpose, which according to article 31 of the Vienna Convention (1969) must also be considered when determining the meaning of a treaty term. Accordingly, it is well established practice of courts and tribunals to refer to the preamble of a treaty for indication of the treaty’s object and purpose. Where there is doubt about the interpretation of a treaty term, the stated object and purpose of the preamble may help to clarify the ordinary meaning of that term and eventually justify a wider or more narrow meaning than that arrived at before considering the treaty’s object and purpose.

The language of the preamble has no normative meaning and the recitals of the preamble are not the appropriate place to state rights and obligations of the parties. Such must be included in the substantive provisions of the treaty. The preamble merely serves to interpret those substantive provisions.

The textual and/or contextual function and the object and purpose function of the preamble are not mutually exclusive. Rather, the two functions operate in parallel. The aim of treaty interpretation is to ensure that the objectives pursued by the treaty are achieved, which in the public international law jargon is commonly referred to as “the principle of effectiveness”. However, the treaty’s object and purpose are only one of the various factors that the interpreter must consider in construing the terms of the treaty. According to leading commentators, it is even only a secondary factor. The treaty’s object and purpose function as a means to shed light on the ordinary meaning of the terms of the treaty where those terms are eligible for multiple interpretations, rather than merely as an indicator of a general approach to be taken to treaty interpretation.

As a result, article 31 of the Vienna Convention (1969) does not allow a teleological interpretation that goes beyond what is expressed or implied in the terms of the treaty. Consequently, the requirement that the meaning of a treaty term is to be determined in light of the treaty’s object and purpose does not mean that the treaty’s objectives permit to override its text. The consideration of the object and purpose may only be used to bring the possible meanings of a treaty term in line with the treaty’s objectives. This was made clear by the Iran/US Claims Tribunal (IUSCT) in the following words:

The object and purpose of a treaty is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text. It follows that under Art. 31 VCLT, a treaty’s object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text.

10. Article 32 of the Vienna Convention (1969) includes the secondary non-mandatory resources, i.e. the so-called supplementary means of interpretation that may include preparatory work to the treaty and the circumstances of treaty’s conclusion to which recourse may be had to confirm the meaning resulting from the application of article 31 or to determine the meaning when the interpretation under article 31 leaves that meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result.


13. Hume, supra n. 11, at pp. 1300-1303; Gardiner, supra n. 11; and Dorr & Schmalenbach eds., supra n. 4 at p. 585.


15. The WTO AB decision in US Shrimp (1988), supra n. 12 is an example of a tribunal choosing a wide interpretation of a treaty term ("exhaustible natural resources") that may diverge from the plain meaning of that term, as it included living creatures in the scope of that term. For a discussion, see Hume, supra n. 11, at pp. 1307-1312.

16. Gardiner, supra n. 11, at pp. 186-187. The author also draws the attention to the fact that sometimes preambles impose interpretive obligations such as in a protocol stating “Emphasising that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements”.


19. A.E. Villiger. Commentary on the 1969 Vienna Convention on the Law of Treaties (Marinus Nijhoff Publishers 2009), who states that “Interpretation in light of the treaty’s object and purpose finds its limits in the text of the treaty itself. One of the (originally many possible) ordinary meanings will emerge as the precise. In other words, Article 31 avoids an extreme functional interpretation which may, in fact, lead to ‘legislation’ or the revision of the treaty”. The ICJ confirmed that the Vienna Convention (1969) prevents it from engaging into judicial law making through the interpretation of the treaty (see LR/ZA: ICJ, 20 May 1961, South West Africa Case [1962], ICJ Reports, paras. 48-49.

20. The Commentary on the 1966 Draft Vienna Convention (1969) confirms that the principle of effectiveness is implied in article 31 of the Vienna Convention (1969), but adds that “Properly limited and applied, the maxim does not call for an ‘extensive’ or ‘liberal’ interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty”. See YBILC, 1966-II, supra n. 3, p. 219, at para. 6.

Similarly, the International Court of Justice (ICJ) decided that:

the Court cannot adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and object.\(^{22}\)

Or as Gardiner (2008) writes:

...the preamble is part of the treaty, and the role of the preamble is to provide an interpretation of the treaty as a whole.\(^{23}\)

Any interpretation that gives effect to the object and purpose of the treaty should, therefore, be supported by the text of the treaty. However, the practice of arbitral tribunals interpreting the standard of “fair and equitable treatment” (FET) in bilateral investment treaties (BITs) has shown that vague and subjective treaty language combined with firm preamble language as to the treaty's objectives may give rise to controversy concerning whether courts and tribunals assert too much power to the preamble and disregard the parties' intentions as expressed in the terms of the treaty.\(^{24}\) Authors have criticized these decisions as being too investor-friendly as they significantly reduce a state's ability to respond to internal or external developments through changes in law that permit them to continue to exercise their normal functions.\(^{25}\)

### 2. Title and Preamble of the OECD Model before the Adoption of the MLI\(^{26}\)

The legal power of a preamble for purposes of interpretation of treaties obviously depends on whether there is a preamble in the treaty and on its content. Some preambles are well negotiated and carefully drafted, but others are cobbled together more or less as afterthought at the end of the negotiation process.\(^{27}\) In that respect, until the amendments made to the OECD Model (2017) following the adoption of the “Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI) or the "Multilateral Convention", see section 4.), the title and preamble of the different versions of the OECD Model are not very helpful in interpreting the terms of the treaty, particularly not in matters of treaty abuse.

The titles of the OECD Draft (1963)\(^{28}\) and the OECD Model (1977)\(^{29}\) included a reference to the elimination of double taxation as an objective of the Convention. The preamble to the OECD Draft (1963) and the OECD Model (1977) did not include a reference to their object and purpose. The Conventions included the following note: “The preamble of the Convention shall be drafted in accordance with the constitutional procedure of both Contracting States”. The Commentary on Article 1 of the OECD Model (1977) stated that: “The purpose of double taxation conventions is to promote, by eliminating double taxation, exchanges of goods and services, and the movement of capital and persons”.\(^{30}\) In what follows in this contribution I will call this “the treaty’s overarching economic objective”. As a kind of afterthought the OECD Commentary on Article 1 (1977) added that: “they should not, however, help tax avoidance or evasion”.\(^{31}\) It may be a bit overstretched to say that, because of such a statement in the OECD Commentary on Article 1 (1977), the stated object and purpose of the OECD Model (1977) includes the prevention of tax avoidance and evasion. It should also be borne in mind that, at that time, only a limited number of provisions of the Conventions were in the nature of anti-avoidance measures\(^{32}\) and that only the provision on the mutual assistance between tax authorities could be regarded as measure capable of preventing tax evasion, in addition to the prevention of tax avoidance.\(^{33}\)

22. Rights of US Nationals in Morocco Case (1952), supra n. 12, at p. 196. Similarly, the ICJ decided: “...although the two States had expressed in general terms in the Preamble of the Arbitration Agreement their desire to reach a settlement of their dispute, their consent thereto had only been given in the terms laid down by Article 2”. See GW/SN: ICJ, 31 July 1989, Arbitral Award of 31 July 1989 (Ganue-Bissau v. Senegal), ICJ Reports [1991], 72, para. 56. See also Land, Island and Maritime Frontier Dispute Case (El Salvador v. Honduras, Nicaragua intervening), supra n. 3, p. 584, at paras 375-376.

23. Gardiner, supra n. 11, at p. 190.

24. In BITs, states commit to adhere to FET, but the term is commonly not defined in the treaty. Investors whose activities have suffered from changes in the laws by the state in which they were operating at the beginning of the 21st century, for example, Argentina and Chile, have based their claims against those states on the theory that FET requires a treatment in line with their reasonable expectations when making the investment formed in reliance on the legal landscape of the state at that time. The vagueness of the FET standard has forced arbitral tribunals to resort to the object and purpose of the BIT to give a meaning to the FET standard in light of the facts of the case. In noting that the preamble language sets out the objective of the BIT as “the protection of investment and investors” and that it clarifies that FET aims “to maintain a stable framework for the investment”, tribunals have concluded that the stability of a state’s legal regime is part of the objective of promoting and protecting investment and awarded damages to the investors affected by the changes of law. See, for example, the decision of the International Centre for Settlement of Investment Disputes (ICSID) in A.R. ICSID, 12 May 2005, CMS Gas v. Argentina, ICSID Case No. ARB/01/8, Award, para. 274. AR. ICSID, 22 May 2007, Enron Creditors Recovery Corp. v. Republic of Argentina, ICSID Case No. ARB/01/2, paras. 259-282; and CL. ICSID, 25 May 2004, MTD Equity Sdn Bhd v. Republic of Chile, ICSID Case No. ARB/01/7, Award, para. 113; and the decision of the London Court of International Arbitration (LCIA) in E.C. July 1, 2004, Occidental Exploration and Production Company v. Republic of Ecuador, LCIA Case No. 3467, Final Award, paras. 183-186.

25. Hum, supra n. 11, at pp. 1312-1320. Other ICSID tribunals have, however, disagreed with their colleague tribunals and held, for example, that: “Signatories of such treaties do not thereby relinquish their regulatory power nor limit their responsibility to amend their legislation in order to adapt it to change and the emerging needs and requests of their people in the normal exercise of their prerogatives and duties. Such limitations should not lightly be read into a treaty which does not spell them out clearly nor should they be presumed.” See AR. ICSID, 27 Dec. 2010, Total S.A. v. Republic of Argentina, ICSID Case No. ARB/04/1, Decision on Liability, para. 115.

26. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (7 June 2017), Treaties & Models IBFD (hereafter the MLI or Multilateral Convention).

27. Gardiner, supra n. 11.


29. OECD Model Convention on Income and on Capital (11 Apr. 1977), Treaties & Models IBFD.

30. OECD Model Convention on Income and on Capital: Commentary on Article 1, para. 7 (11 Apr. 1977), Treaties & Models IBFD.

31. Id.

32. Articles 1(6) and 12(4) of the OECD Draft (1963) could be said to be examples of the earliest anti-avoidance measures. Articles 9(1) and 7(2) of the OECD Draft (1963) were in essence rules that properly allocate profit rather than anti-avoidance rules. The addition of the beneficial ownership requirement to articles 10 to 12 of the OECD Model (1977) and the addition of the second sentence to articles 4(1) are other examples of anti-avoidance rules.

In recognition of the fact that the OECD Model has several other objectives than the elimination of double taxation, for example, the prevention of discrimination and mutual assistance, in OECD Model (1992), the title of the Convention was changed and a short and neutral title was used, i.e. “Convention between (State A) and (State B) with respect to taxes on income and capital”. However, the Commentaries on the OECD Model (1992) stated that, in view of the widespread practice of states to include a reference to the avoidance of double taxation or to both the avoidance of double taxation and the prevention of fiscal evasion in the title and the preamble of their bilateral tax treaties, states wishing to do so could continue to use such title and/or preamble.

In the Commentary on Article 1 of the OECD Model (2003), the previously referred to paragraph of the Commentary on Article 1 of the OECD Model (1977), stating the treaty’s overarching economic objective, was amended as follows:

The principal purpose of double taxation conventions is to promote, by eliminating double taxation, exchanges of goods and services, and the movement of capital and persons. It is also a purpose of tax conventions to prevent tax avoidance and evasion.

So, in 2003, still neither the title nor the preamble of the OECD Model included a reference to the prevention of tax avoidance and evasion as one of the stated objectives of the Convention. However, the OECD Commentary on Article 1 (2003) lifted the prevention of tax avoidance and evasion to a stated objective of tax treaties, albeit secondary to the “principal” objective, which is the encouraging of cross-border trade and investment that is to be achieved by the elimination of double taxation. That may be more to the point for bilateral tax treaties of which the preamble makes clear that the prevention of tax avoidance and evasion is included amongst the treaty’s objectives. However, it must be admitted that the purpose of a tax treaty should in the first place be derived from a careful analysis of the substantive provisions of the tax treaty in question and that the fact that a preamble lacks a reference to the prevention of tax avoidance and evasion in itself does not mean that such may not be part of the treaty’s objectives.

3. Case Law on Tax Treaties before the Adoption of the MLI

3.1. Introductory remarks

An overview of the selected cases discussed in sections 3.2. to 3.5. demonstrate that courts around the world take a different approach to treaty interpretation in matters involving treaty shopping in general and to the value of the preamble of the tax treaty in particular. In all the cases, the preamble included the prevention of fiscal evasion amongst the treaty’s objectives. The cases concerned treaty shopping or round tripping. No signs of fiscal evasion (tax fraud) were present. It is not clear to what extent this has affected the courts’ decisions. The Australian and Canadian courts either pay no attention to the preamble or – where they do – they do not assert legal value to it because they are of the opinion that it merely indicates a vague policy objective, which is hardly reflected in the substantive provisions of the treaty or unhelpful to determine the underlying objectives of the substantive provisions which are allegedly abused. Although the structure led to double non-taxation and had little or no economic substance, courts did not feel compelled to depart from a literal interpretation of those provisions and gave the terms of those provisions their plain and ordinary meaning. On the other hand, the French court did not pay attention to the preamble either, but decided that the overarching economic objective of the tax treaty is to foster cross-border trade and investment and that accordingly, transactions devoid of economic substance should not enjoy the benefits offered by the tax treaty.

3.2. Full Federal Court of Australia: Lamesa (1997)

Lamesa is a treaty shopping case. The purpose of the structure was to be able to sell Australian real estate interests without incurring Australian tax on the gains. For that purpose, a chain of Australian companies was set up of which the bottom company held gold mining leases. The shares of the top Australian company were sold by Lamesa, a Dutch holding company. The choice for the Netherlands as residence of that holding company was not coincidental. The Netherlands did not impose capital gains tax on the gain derived from the sale of the shares. The Dutch company was interposed to obtain a benefit unavailable to the US owners of Lamesa under the Australia–United States Income Tax Treaty (1982). The taxpayer argued that a literal reading of article 13(2)(a)(iii) of the Australia–Netherlands Income Tax Treaty (1976) – the look-through provision for real estate holding companies – only applied to real property held by the company.

34. OECD Model Convention on Income and on Capital (1 Sept. 1992), Treaties & Models IBFD.
36. OECD Model Convention on Income and on Capital: Commentary on Article 1 para. 7 (28 Jan. 2003), Treaties & Models IBFD.
37. De Broe, supra n. 33, at sec. 3.3.1.2.2., p. 330. More anti-abuse measures had been added to the OECD Model Convention on Income and on Capital (28 Jan. 2003), Treaties & Models IBFD, for example, articles 13(4) and 17(2).
41. Agreement between Australia and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (17 Mar. 1976), Treaties & Models IBFD [hereinafter the Austral.-Neth. Income Tax Treaty (1976)]. In its relevant part, article 13(2)(a)(iii) of the Austral.-Neth. Income Tax Treaty (1976) provides: ‘For the purposes of this Article: (a) the term “real property” should include … (iii) shares or comparable interest in a company, the assets of which consists wholly or principally of direct interests in or over land in one of the States or of rights to exploit, or to explore for, natural resources in one of the States’. The underlined part of this phrase is the expression that needed interpretation.
whose shares were sold, i.e. the first-tier holding company, and that it was only possible to look through the first tier. The Australian Tax Office (ATO), relying on article 31 of the Vienna Convention (1969), asserted that such a literal interpretation would defeat the purpose of the tax treaty and that a departure of the clear terms of article 13(2)(a)(iii) of the Australia-Netherlands Income Tax Treaty (1976) was needed. That argument was put in two ways. The first was that the purpose of article 13 of the Australia-Netherlands Income Tax Treaty (1976) was to allow the state of situs of the real property to tax any gain from the alienation of such property. The second was that the structure was designed to achieve double non-taxation of the gains.

According to the preamble of the Australia-Netherlands Income Tax Treaty (1976), the purpose of the tax treaty is the avoidance of double taxation and the prevention of fiscal evasion.42

In deciding the meaning of article 13(2)(a)(iii) Australia-Netherlands Income Tax Treaty (1976), on appeal the Full Federal Court of Australia (FFCA) found that the only issue was whether the literal interpretation prevailed or whether it could go beyond that to exclude the double non-taxation. The FFCA decided that the literal wording of the tax treaty should be given effect and it observed that the fact that the title or preamble of the tax treaty indicates that the purpose of the tax treaty is the prevention of fiscal evasion does not require a different interpretation. One should agree with the FFCA on that last point as the case is a treaty shopping case and is not concerned with fiscal evasion. The FFCA held that the tax treaty merely allocates taxing rights and does not impose an obligation to tax. The fact that the structure allowed the gain to escape from tax in both states did thus not affect the FFCA’s interpretation:

**The Agreement is an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital. Although, therefore, the Agreement has this dual object, the Agreement substantially concerns allocation of taxing powers... The allocation is of the right to tax. There is nothing in the Agreement which compels a jurisdiction to exercise that right... Save for its operation to allocate taxing power, the Agreement is little concerned directly with fiscal evasion. However, Art. 25 provides for an exchange of information between competent authorities of each State, which exchange is vital to countering fiscal evasion....**

Despite the clear treaty shopping nature of the structure and the fact that prevention of fiscal evasion is included amongst the treaty’s stated objectives, the FFCA did not detract from a literal interpretation of the look-through provision. It gave the terms of that provision their plain meaning, in particular, “direct interest in or over”. According to the FFCA the tax treaty’s main purpose is the allocation of taxing rights amongst the Contracting States and this purpose should prevail:

It seems to us quite consistent with rational policy that the Agreement was intended to assimilate as really only one tier of companies rather than numerous tiers. Separate legal personality is a doctrine running not only through the common law but the civil law as well. That is consistent with the plain and quite unambiguous language which the treaty has employed... In these circumstances the language of the Agreement should be given effect. This is not to adopt a narrower “illiberal” view of the Agreement. It is only to interpret the language of the Agreement in the light of the broad purposes of juridical allocation which the Agreement embodies.44

### 3.3. Tax Court of Canada and Federal Court of Appeal: Mil Investments (2006 and 2007)45

The case involves a series of transactions, including (1) the sale by a Cayman Island company of its shares in a Canadian mining company which reduced its shareholding to less than 10%, (2) the transfer of the seat of effective management of the Cayman Island company to Luxembourg and (3) the sale by all shareholders, including the Luxembourg company, of all shares in the Canadian mining company. The sale triggered an important capital gain, which, under article 13(5) of the Canada-Luxembourg Income and Capital Tax Treaty (1989),46 was only taxable in Luxembourg.47 As under Luxembourg domestic law gains on shares are not taxable, the structure resulted in double non-taxation. The Canadian tax authorities argued that the scheme amounted to an abuse of the tax treaty because the sole purpose of transfer of the company’s residence to Luxembourg was to escape from Canadian capital gains tax. They argued, inter alia, that, despite the fact that the plain meaning of terms of article 13 of the Canada-Luxembourg Income and Capital Tax Treaty (1989) did not allow Canada to tax, there is an inherent (implied) anti-abuse rule in the tax treaty, which was grounded on articles 26, 31 and 32 of the Vienna Convention.

44. Id. The judgement of the Belgian Hof van Cassatie/Cour de Cassation (Supreme Court, HvC/CC) in BE: HvC/CC, 5 Dec. 2003, FJF, 2004/4/4 is another example of a court refusing to depart from a literal interpretation of the terms of the tax treaty in question, despite the clear tax avoidance motive of the taxpayer and the double non-taxation resulting from a change of residence. The Belgian tax authorities applied an exit tax on pensions that was adopted with the avowed purpose to override the pensions article of the Convention between Belgium and France for the Avoidance of Double Taxation and the Establishment of Reciprocal Rules of Administrative and Judicial Assistance in Respect of Taxes on Income (unofficial translation) (10 Mar. 1964). Treaties & Models IBFD to claim back tax jurisdiction on Belgian sourced pensions paid to French residents which Belgium had relinquished under the tax treaty to France, but which France did not tax. The HvC/CC found that, under the pensions article, Belgium had not relinquished its taxing rights on the condition that France effectively taxes the pension. The Court saw no reason to hold differently because to interpret residence permitted double non-taxation. Holding otherwise, the HvC/CC said, would be endorsing a violation by Belgium of its treaty obligations which articles 26 and 27 of the Vienna Convention (1969) expressly forbid.

45. See the decisions of the Tax Court of Canada (TCC) in CA: TCC, 18 Aug. 2006, Mil Investments S.A. v. Her Majesty the Queen, 9 ITLR 25, Case Law IBFD and the Federal Court of Appeal (FCA) in CA: FCA, 13 June 2007, Mil Investments S.A. v. Her Majesty the Queen, 9 ITLR 1111, Case Law IBFD.


47. Article 13(5) of the Can.-Lux. Income and Capital Tax Treaty (1989), which is the provision to be interpreted, reads as follows: “Gains from the alienation of any property, other than that mentioned in paragraphs 1 to 4, shall be taxable only in the Contracting State of which the alienator is a resident.”
tion (1969), according to which benefits are to be denied to structures that abuse the rules of the treaty. In other words, the Canadian tax authorities argued a teleological interpretation of the Canada-Luxembourg Income and Capital Tax Treaty (1989) beyond the ordinary meaning of the terms of article 13 to prevent abuse of the tax treaty. According to the preamble of the Canada-Luxembourg Income and Capital Tax Treaty (1989), the objectives of the tax treaty include the avoidance of double taxation and the prevention of fiscal evasion. As to the latter, the Tax Court of Canada (TCC) held:

[87] In particular in light of the OECD Commentary and the decision by Canada and Luxembourg not to include an explicit reference to anti-avoidance rules in their carefully negotiated tax treaty, I find there is no ambiguity in the Treaty permitting it to be construed as containing an inherent anti-abuse rule. Simply put the ‘ordinary meaning’ of the Treaty allowing the appellant to claim the exemption must be respected.

The TCC, therefore, holds that, despite the reference in the preamble to the tax treaty’s objective of prevention of fiscal evasion, the tax treaty does not include an implied anti-abuse rule. In order to give effect to the tax treaty’s objective, Canada and Luxembourg ought to have preserved the application of their domestic anti-abuse measures in the Canada-Luxembourg Income and Capital Tax Treaty (1989) or to have included an explicit anti-avoidance rule in the tax treaty.

On appeal, the Federal Court of Appeal (FCA) decided as follows:

[5] We are unable to see in the specific provisions of the Income Tax Act...and the Tax Treaty, to which we were referred, interpreted purposively and contextually, any support for the argument that the tax benefit obtained by the respondent was an abuse or misuse of the object and purpose of any of those dispositions”...[6] The appellant urges us to look behind this textual compliance with the relevant provisions to find object or purpose whose abuse would justify our departure from the plain words of the disposition. We are unable to find such an object and purpose.

Accordingly, like the Australian, the Canadian courts, despite the clear treaty shopping nature of the structure and the fact that the prevention of fiscal evasion was included amongst the treaty’s objective, did not depart from the literal interpretation of the wording of article 13(5) of the Canada-Luxembourg Income and Capital Tax Treaty (1989). The courts did not pay specific attention to the preamble.

3.4. TCC and FCA: Alta Energy Luxembourg (2018 and 2020)50

This is another treaty shopping case involving the Canada-Luxembourg Income and Capital Tax Treaty (1999). A US limited liability company (LLC), which pooled the investments of a group of co-investors, held all the shares of Alta Energy Partners Ltd., a Canadian company carrying on a shale oil business in Canada. The insertion of this US holding company gave rise to adverse US tax consequences for the US co-investors under US Subpart F-rules. The holding was restructured and a Luxembourg holding company was interposed which acquired all the shares of the Canadian company. At a later stage, the Luxembourg holding sold the shares in the Canadian company with a capital gain. Under article 13(5) of the Canada-Luxembourg Income and Capital Tax Treaty (1999) only Luxembourg can tax that gain, but it did not under its domestic law (see section 3.3.). Under the Canada-United States Income and Capital Tax Treaty (1980), Canada would have been entitled to tax the gain. The Canadian tax authorities claimed to have the right to tax the gain under the Canadian general anti-avoidance rule (GAAR). The Luxembourg holding conceded that it obtained a tax benefit from the restructuring, i.e. the exempt capital gain, and that the restructuring was arranged to obtain that benefit, and, therefore, that it qualified as an avoidance transaction. The only issue that the TCC had to address was whether the avoidance transaction was abusive. The Canadian tax authorities asserted that the restructuring abused, inter alia, articles 1 (Scope), 4 (Residence) and 13 (Capital gains) of the Canada-Luxembourg Income and Capital Tax Treaty (1999). According to the tax authorities, the abuse of article 4 of the Canada-Luxembourg Income and Capital Tax Treaty (1999) resulted from the fact that, the Luxembourg company, although it was a resident of Luxembourg for the purposes of that article, was created and became the owner of the shares for no other purpose than avoiding Canadian income tax on the gain. Still according to the authorities, the rationale and purpose of the Canada-Luxembourg Income and Capital Tax Treaty (1999) was to prevent or reduce double taxation on transactions that may be subject to tax in both states, not to promote double non-taxation. As the Canadian tax authorities applied the GAAR, the TCC engaged in an interpretation process to determine the object, spirit and purpose of the rules of the Cana-
da-Luxembourg Income and Capital Tax Treaty (1999) and whether the transaction frustrated the rationale of those rules. The TCC took particular notice of the wording of the preamble and decided that:

[77] A tax treaty is a multi-purpose legal instrument. The preamble states that the two governments desired “to conclude a convention for the avoidance of double taxation and the prevention of fiscal evasion”. While indicative of the general purpose of the Treaty, this statement remains vague regarding the application of specific articles of the Treaty. Under the GAAR analysis, the Court must identify the rationale underlying Article 1, 4 and 13, not a vague policy supporting a general approach to the Treaty as a whole... [84] Parties to a tax treaty are presumed to know the other’s country tax system when they negotiate a tax treaty; they are presumed to know the tax consequences of a tax treaty when they negotiate amendments to that treaty. The OECD commentaries highlight that some states – like Luxembourg – generally do not tax capital gains... It is then the responsibility of the state that does tax capital gains to prevent a double exemption if it wishes to do so... [85] Canada and Luxembourg did not choose this option. It is certainly not the role of the Court to disturb their bargain in this regard... [100] The Minister argues that the Restructuration constitutes an abuse of Articles 1, 4 and 13, because, absent the Restructuration, the gain would have been taxable in Canada. I do not find this result contrary to the rationale underlying Articles 1, 3 and 14. [...]

With regard to the limited role and the lack of substance of the Luxembourg holding company and their bearing on the Luxembourg tax residence of the holding, the TCC stated that:

[80] Article 4 does not include a limitation rule that denies access to treaty benefits as is the case for many of the treaties that Canada has entered into... [90] The Respondent takes issue with the fact that the Appellant held the Shares for a short period of time, sold them when the Co-Investors wished to do so, and distributed the proceeds to its shareholders. I find nothing unusual with these transactions. Holding companies are often established for a single purpose which includes the holding of shares of a single corporation. When that task comes to an end following the sale of the investment, the corporation is often wound up and the proceeds of sale are distributed to the shareholder... [91] There is nothing in the Treaty that suggests that a single purpose holding corporation cannot avail itself of the benefits of the Treaty. There is also nothing in the Treaty that suggests that a holding corporation, resident in Luxembourg, should be denied the benefit of the Treaty because its shareholders are not themselves residents of Luxembourg. [...]

The case is particularly interesting because of the dicta of the TCC regarding the preamble for purposes of interpreting the treaty to prevent treaty shopping. The TCC decided that the language of the preamble is too vague to shed light on the underlying purposes of the treaty provisions that are allegedly abused. The fact that a Luxembourg holding was interposed in the transaction for a limited period of time to benefit from a double exemption of the capital gain was no reason for the TCC to detract from a literal interpretation of articles 4 and 13(5) of the Canada-Luxembourg Income and Capital Tax Treaty (1999). There is a clear suggestion in the TCC’s dicta that if Canada wanted to prevent treaty shopping it should add a specific provision to its tax treaties to that effect, in particular where it enters into treaties with shoppable countries like Luxembourg.

On appeal to the FCA, the Canadian tax authorities elaborated on why the transaction frustrated the object, spirit and purpose of the relevant treaty rules. [...]

According to the tax authorities:

[38] Articles 1, 4 and 13(4) of the Convention, together, are intended to grant a particular treaty benefit to Luxembourg investors whose investment in specific taxable Canadian property gives rise to gains for them, in Luxembourg. Those provisions are not intended to benefit entities who do not have the potential to realize income in Luxembourg, nor have any commercial or economic ties therewith. Such situations are wholly dissimilar to the relationships or transactions that are contemplated by those provisions of the Convention.

The FCA decided that in doing so, the Canadian tax authorities had added three requirements to the rule of article 13(5) of the Canada-Luxembourg Income and Capital Tax Treaty (1999), according to which the capital gains were only taxable in Luxembourg. [...]

According to the FCA, the Canadian GAAR can change the tax consequences from what they would otherwise be, but the GAAR cannot be used to justify adding requirements that are not present in the treaty. In this respect, the FCA said:

[49] The requirements of the Luxembourg Convention are simply that the person claiming the exemption (who holds the substantial interest) is a resident of Luxembourg and that the company (whose shares were sold) satisfies the asset test as set out in Article 13(4). There are no further requirements... [65] There is no distinction in the Luxembourg Convention between residents with strong economic or commercial ties and those with weak or no commercial ties.

Like the TCC, the FCA concluded that it was:

also unable to find any object, spirit, or purpose other than as reflected in these words. The object, spirit, or purpose of Articles 1, 4 and 13(4) is that a person will qualify for the exemption in issue in this appeal... if: (a) that person is a resident of Luxembourg for the purposes of the Luxembourg Convention and (b) the value of the shares is principally derived from immovable property... situated in Canada in which the business of that corporation is carried on.

3.5. French Conseil d’État (Supreme Administrative Court): Verdannet (2017)

Mr Verdannet was a French tax resident and had agreed to buy land situated in France. On the same day, he set up a Luxembourg company of which he was the sole shareholder and director. Following an agreement with the seller, he nominated the Luxembourg company to replace him as the purchaser of the land. On the same day, he became a resident of Switzerland. The Luxembourg
company’s sole activity consisted of the holding of the French real property. About a year later, the Luxembourg company sold the property to a newly formed company controlled and managed by Mr Verdannet’s former wife and realized a capital gain on that sale. Under article 4 of the France-Luxembourg Income and Capital Tax Treaty (1958)\(^{63}\) as applicable at that time, the capital gain was not taxable in France as the company had no permanent establishment (PE) in France.

The French tax authorities considered that the interposition of the Luxembourg company had no other purpose than to avoid French tax and assessed Mr Verdannet directly on the gain. They did so on the basis of French domestic general rule against abuse of law under which they can disregard arrangements the sole purpose of which is to avoid taxation and which are not compliant with the rationale of the law that is relied on.\(^{64}\) This “round tripping” case concerned the France-Luxembourg Income and Capital Tax Treaty (1958), the purpose of which is set out in its title and preamble to include the avoidance of double taxation and the establishment of rules of reciprocal administrative assistance.

The tax authorities won their case on appeal, but it was further appealed by the estate of Mr Verdannet to the Conseil d’Etat (Supreme Administrative Court, CE), the highest court regarding direct tax matters in France. In his opinion to the CE, the Rapporteur Public observed that the primary function of the tax treaty, beyond its immediate purpose, i.e. the avoidance of double taxation, was to facilitate international economic exchanges.\(^{65}\) He concluded that it was, therefore part, of the very logic that it was read as not intending to apply to taxpayers who artificially create the conditions of foreignness allowing them to claim, according to a literal interpretation, the benefit of its clauses. Accordingly, the Rapporteur Public, therefore, concluded that the Cour Administrative d’Appel (Administrative Court of Appeal, CAA) was right to deny the treaty benefits to the Luxembourg seller. The CE followed suit and decided that France and Luxembourg could not be regarded as having admitted, in the distribution of the power of taxation in the France-Luxembourg Income and Capital Tax Treaty (1958), the application of its provisions to situations arising from artificial transactions devoid of economic substance. Accordingly, the CE held that, in finding that the operation in question was contrary to the objectives pursued by the two signatory states, the CAA had not committed any error of law in its judgement.\(^{66}\)

3.6. Interim conclusions

Although the French CE (see section 3.5.) did not refer to the preamble, it had no difficulty to deny the treaty benefits to the interposed Luxembourg company under the French abuse of law rule, as the structure was devoid of economic substance. It, therefore, conflicted with the overarching economic aim of the France-Luxembourg Income and Capital Tax Treaty (1958), i.e. the development of investment, trade and business between France and Luxembourg.

The Australian and Canadian Courts in their cases (see sections 3.2. to 3.4.) failed to consider this overarching economic objective of their treaties, which - if they had done so - may have led to a different outcome.\(^{67}\) Where, as in these cases, a chain of companies with little or no substance is set up or use is made of interposed companies with no commercial activity in their state of residence, eventually for a relatively short period of time, the author believes that article 31 of the Vienna Convention (1969) offers flexibility to consider the overarching economic objective of the treaty to deny treaty protection to such artificial structures that only formally comply with the treaty terms but that add little or no value to the economic development of the Contracting States.\(^{68}\) That supposes that, in such cases, courts are amenable to set aside the plain meaning of the treaty terms. The foregoing overview indicates that courts are reluctant to do so. Several factors may explain this. Courts may be uncomfortable with regard to whether article 31 of the Vienna Convention (1969), on which the tax authorities relied in Lamesa and Mil Investments and which in essence requires a textual interpretation, permits such a far-reaching result that disregards the plain meaning of the terms of the treaty (see section 1.). In these circumstances, Courts may wish to avoid being blamed for having engaged in an impermissible teleological interpretation. In none of these cases did the preamble say that the prevention of tax avoidance is an objective pursued by the tax treaty in question, as it referred to fiscal evasion which was not present in any of these cases. Finally, none of the tax treaties under consideration included any pertinent anti-avoidance rule that would have confirmed a purpose of prevention of tax avoidance. On the other hand, if there is a solid legal basis for an interpretation that permits the prevention of tax avoidance, as in the French case, i.e. the domestic general rule against abuse of law (see section 3.5.), a court might be prepared to engage in a less literal interpretation of a tax treaty to prevent abuse of the treaty.


64. FR: Livre des Procédures fiscales. (Tax Procedures Code), art. L 64.


66. Compare to the decision of the Swiss Bundesgerichti Tribunal federal (Federal Supreme Court, BgTf) in CH: BgTf, 28 Nov. 2005, A Holding ApS, 8 ITRL, 536. Case Law IBFD, in which the BgTf said that there is a general principle implied in tax treaties which is part of the principle of good faith that the law should not be abused. The Rapporteur Public in Verdannet, supra n. 65 disagreed with the Swiss BgTf on that point.

67. I say “may” because in Alta Energy Luxembourg, supra n. 50, where the Canadian tax authorities made use of the GAAR, a court must have regard to the object and purpose of the rules that the taxpayer allegedly abused which may preclude it from considering the overarching purpose of the tax treaty in question.

4. Title and Preamble of the OECD Model after the Adoption of the MLI

As a result of Action 6 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project, the minimum standard, i.e. the minimum level of protecting against treaty abuse, consists of the following two elements: (1) an inclusion in the preamble of tax treaties that parties have the common intention not to create opportunities for taxpayers to abuse their treaties; and (2) the implementation of that intention through the inclusion of a limitation on benefits (LOB) provision and/or a GAAR, i.e. the principal purpose test (PPT). Articles 6 and 7 of the MLI provide for the relevant language to be included by the signatories of the Multilateral Convention in their covered tax treaties. 69

The title and the preamble of the OECD Model (2017) have been modified to reflect this new approach. Henceforth, the OECD Model has the following title:

Convention between A & B for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance

and includes the following preamble:

Desiring to further develop their economic relationship and to enhance their cooperation in tax matters. Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital 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 the Convention for the indirect benefit of residents of third States).

As the Commentaries on the OECD Model (2017) confirm, these changes are to be explained by the desire to bring the prevention of tax avoidance under the general rule of interpretation of article 31(1) of the Vienna Convention (1969):

Since the title and the preamble form part of the context of the Convention and constitute general statements of the object & purpose of the Convention, they should play an important role in the interpretation of the provisions of the Convention. According to the general rule of interpretation contained in Article 31 (1) of the Vienna Convention on the Law of Treaties... 70

There are further references to the preamble and the object and purpose of the OECD Model (2017) in, for example, the OECD Commentaries on Articles 17 and 29 (2017). 72

5. Will the New Mandatory Title and Preamble of Tax Treaties Make a Difference?

The changes discussed in section 4. obviously beg the question of how important the role of the new title and the preamble will be for the interpretation of tax treaties that have been modified pursuant to the MLI or new treaties that follow the amended OECD Model with the aim of preventing their abuse and/or double non-taxation. It is obvious that the mere fact that a treaty includes the new title and preamble will not in itself have a major impact 73 on the interpretation of its substantive provisions. 74 If there will be an effect, this will follow from the fact that the objective of striking down treaty abuse is now clearly materialized in article 29 of the OECD Model (2017) and the fact that tax treaties must include a PPT rule or an LOB clause, or both, to prevent abuse. For the rest of the discussion, I assume that the tax treaty in question provides for a PPT rule.

A first and important observation is that the new preamble is of little or no help to interpret the language of the PPT itself. All the preamble does is making clear that the prevention of treaty abuse, amongst others by way of treaty shopping, is an objective pursued by the tax treaty. Such a general policy statement does not shed any further light on the terms of the PPT. As the TCC rightly observed in Alza Energy Luxembourg (see section 3.4.), such a form of preamble is not helpful in assisting in ascertaining the objectives underlying the treaty provisions that the taxpayer's arrangements allegedly abuse, i.e. second prong of the PPT test, as the preamble is entirely silent on this. As the travaux préparatoires to tax treaties are usually not available, only the Commentaries on the OECD Models and other OECD material, for example, the Reports on the BEPS Actions and the 1987 Report on conduit companies, 75 interpretation memoranda jointly prepared by the Contracting States and interpretive mutual agreements remain to reveal these objectives.

All tax planning involving tax treaties is based on a literal interpretation of the treaty terms with a view to claiming treaty benefits which the Contracting States may not have

69. Article 6(1) of the MLI reads: “A Covered Tax Agreement shall be modified to include the following preamble text: 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 the agreement for the indirect benefit of residents of third jurisdictions).”

70. OECD Model: Commentaries (2017), Introduction, para. 16.2. See also De Broe & Luts, supra n. 38.

71. See paragraph 34 of the OECD Model: Commentary on Article 1 (2017), which slightly amends and renumbers former paragraph 7. states, inter alia, that overarching economic objective of the OECD Model (2017) is: “The principal purpose of double taxation conventions is to promote, by eliminating international double taxation, exchanges of goods and services, and the movement of capital and persons. As confirmed in the preamble, it is also part of the purposes of tax conventions to prevent tax avoidance and evasion”. See also paragraph 61 of the OECD Model: Commentary on Article 1 (2017).


73. I say “major impact” because I do not exclude that courts may – based on the tax treaty’s stated objective of prevention of tax avoidance and independently from the PPT – deny the status of beneficial owner to a recipient of income whose right to use and enjoy the income is not constrained by a legal or contractual obligation to pass on the payment received to another person, but where the facts and circumstances show that in substance the recipient pays on most of the income which he receives (see, for example, paragraph 12.4 of the OECD Model: Commentary on Article 10 (2017).

74. I therefore agree with J. Schwartz, who writes in his contribution to this special issue of the Bulletin that the amended preamble would most likely not have an impact on the judgement of the TCC in Alza Energy Luxembourg (2018), supra n. 50 (see section 3.4.). The provision that is abused most prominently in that case was article 4 (Residence) of the OECD Model. However, as long as there is no additional language in the substantive provisions of the tax treaty that excludes a treaty taxpayer from treaty protection, it is not evident to deny the treaty benefits, at least not if a Canadian court continues to adhere to a literal interpretation of the treaty and disregards its overarching economic objective which, as the French CE made clear, justifies the denial of treaty benefits to artificial structures lacking economic substance (see section 3.5.).

intended for that particular structure. The interpretation of a tax treaty to prevent its abuse makes it necessary to abandon such a literal interpretation and to step beyond the ordinary meaning of the provisions of the tax treaty, in particular the provisions on residence and the allocation of taxing rights and relief for double taxation, to ensure that the tax treaty is not improperly used.76 Where abuse of the tax treaty is prevented by the PPT, the ordinary meaning of the terms of the tax treaty can only be set aside if there is clear evidence that the conditions to apply the PPT are satisfied. Of course, determining whether such conditions are met depends on the factual circumstances of each case. This may be a difficult exercise. Alita Energy Luxembourg (see section 3.4) and the various examples in the Commentary on Article 29 of the OECD Model (2017) make it clear that often the tax motive, i.e. the first prong of the PPT – “obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit” – is present, but that the taxpayer’s conduct does not defeat the object and purpose of the provisions on which he relies, i.e. the second prong of the PPT.77 It should be observed that the OECD Commentary on Article 29 (2017) adds to the confusion. While article 29(9) of the OECD Model (2017) requires the interpreter to consider whether the arrangement defeats “the object and purpose of the relevant provisions of this Convention”, the OECD Commentary on Article 29 (2017) concludes in Examples C, D and M that the granting of treaty benefits is in accordance with the overarching economic objective of the treaty as a whole because the arrangement is found to have the necessary commercial rationale and economic substance, without exploring the underlying objectives of the treaty provision at stake.

Another complicating factor is that tax treaties have multiple objectives as has been amply highlighted by some of the judgements discussed in section 3. These objectives may conflict with each other. An interpretation that curbs tax avoidance but conflicts with other treaty objectives that are also, and even more prominently, set out in the substantive provisions of the OECD Model, such as the elimination of double taxation and the prevention of discrimination, should not be sustained. Even after the amendments to the OECD Model (2017), the Commentaries on the OECD Model (2017) still state that the avoidance of double taxation is the principal purpose of tax treaties, while the prevention of tax avoidance is only referred to as a secondary purpose.78 Accordingly, a claim by a Contracting State that its tax treaty is being abused that results in unresolved double taxation defeats the tax treaty’s primary objective and is not a good faith interpretation of the tax treaty under article 31(1) of the Vienna Convention (1969). Therefore, such an approach should not be endorsed.79

If states continue to curtail treaty abuse through the use of domestic anti-avoidance measures, conflicts between such measures and treaty provisions will continue to arise, in particular, if use is made of specific anti-avoidance rules (SAARs), which are drafted only with reference to objective facts. The Commentaries on the OECD Model (2017) provide several checks and balances that offer reasonable solutions for these conflicts, but rightfully it is concluded that some conflicts may not be resolved and that, in that case, under articles 26 and 27 of the Vienna Convention (1969) ("pacta sunt servanda"), the treaty rule must prevail and abuse is not prevented.80 The fact that the title and preamble include the prevention of tax avoidance amongst the tax treaty’s objectives cannot override that conclusion as an interpretation to that effect would contradict the clear terms of the treaty and breach article 31 of the Vienna Convention (1969) (see section 1).81

An observation must also be made with regard to the interpretation of tax treaties with the aim of preventing double non-taxation. It is not a purpose of the OECD Model to prevent double non-taxation.82 Tax treaties only allocate taxing rights amongst the Contracting States, but do not impose an obligation to actually levy tax. This is a matter left to domestic law of the states. In addition, article 23A of the OECD Model provides that the state of residence should exempt income that "may be taxed" in the other state, the effect of which is that the former state must exempt income that has not effectively been taxed in the other state. Accordingly, the preamble does not permit an interpretation of the tax treaty to avoid double non-taxation beyond what is clearly expressed in its terms. Only cases of double non-taxation that result from structured tax evasion or avoidance, including through treaty shopping, are intended to be caught. In the absence of an abusive arrangement, a denial of treaty benefits because there is a double non-taxation, would override the clear terms of the tax treaty and breach article 31 of the Vienna Convention (1969). As a result, transactions involving the use of entities that result in double non-taxation, but that otherwise have the necessary economic rationale and substance, i.e. actual involvement in operations by means of experienced board members, skilled personnel, adequate office space and equipment, assumption of risk, etc., and that respect the conditions concerning residence and beneficial ownership of income, cannot be regarded as abusive, as they do not frustrate the overarching economic

76. This is nicely illustrated by the example in S. van Weeghel, A Deconstruction of the Principal Purposes Test, 11 World Tax J. 1, especially section 4 (2019), Journal Articles & Papers IBFD.
77. Paras. 176, 180 and 182, Examples A to L. OECD Model: Commentary on Article 29 (2017). It can be wondered, though, whether, in some of these examples, for instance, Examples C, G and M, the conclusion not to apply the PPT is based on the absence of a principal purpose to obtain a tax benefit or whether that purpose is present but granting treaty benefits would be in accordance with the object and purpose of the treaty (provisions). For a critical assessment of these examples, see Van Weeghel, supra n. 76, in particular section 8.
78. Para. 54 OECD Model: Commentary on Article 1 (2017).
80. See paragraphs 68-75, in particular, paragraph 74 of the OECD Model: Commentary on Article 1 (2017).
82. This does not hold true if bilateral tax treaties deviate from the OECD Model, as they include subject to tax-requirements or switch over-clauses.
objective of the tax treaty. For that reason, I disagree with the Commentary on Article 1 of the OECD Model (2017) on tax-motivated transfers of residence. According to the OECD Commentary on Article 1 (2017), a taxpayer abuses a tax treaty where, in anticipation of realizing an important capital gain on a sale of a substantial shareholding, the taxpayer transfers residence to a state that is entitled to tax that gain under article 13(5) of the OECD Model, but where such a gain is subject to little or no tax. It is submitted that if the taxpayer – even where the sale is consummated shortly after he transferred his fiscal residence – becomes a genuine long-term resident of the new state, as opposed to a temporary resident or a round tripper, such a taxpayer does not frustrate the objectives underlying articles 4 and 13(5) of the tax treaty in question. If states are unhappy with this outcome, but conclude tax treaties with states not levying capital gains tax, they have a wealth of choices such as imposing exit taxes, adding a subject-to-tax requirement to article 13(5) of the OECD Model or preserving their taxing rights on gains realized within, for example, five years after the transfer of residence.

6. Conclusions

In the post-BEPS era, the interpretation of tax treaties to prevent their abuse is not the same as before. This position is not explained by the new title and preamble of tax treaties but by the fact that the OECD Model and bilateral tax treaties as amended by the MLI have now been loaded with anti-avoidance measures. The new preamble is of little or no help in interpreting the language of the PPT. The preamble is also not helpful in assisting to ascertain the objectives underlying the treaty provisions, which the taxpayer’s arrangement allegedly abuses, i.e. the second prong of the PPT. As tax treaties have several objectives and the elimination of double taxation is their primary objective, an interpretation based on ground that treaty abuse is to be prevented, but which results in unresolved double taxation, cannot be supported by the terms of the preamble and the wording of article 31 of the Vienna Convention (1969). Only cases of double non-taxation that result from structured tax evasion or avoidance, including treaty shopping, are intended to be caught by the preamble. In the absence of an abusive arrangement, a denial of treaty benefits because there is a double non-taxation, would override the clear terms of the treaty and would be in breach of article 31 of the Vienna Convention (1969).