The entry into force of the Multilateral Instrument (MLI) will entail the massive incorporation of a general anti-avoidance rule (the principal purpose test) into a significant number of double taxation conventions. However, these conventions often contain other clauses of different origin that have traditionally been used to deal with the phenomenon of treaty abuse. This article describes the ‘problems of coexistence’ between the principal purpose test and these other clauses when their conditions of application and legal consequences may be different. Finally, it also offers legal solutions to these conflicts.

1 INTRODUCTION: SCOPE OF THIS CONTRIBUTION

More than two years after the entry into force of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), with ninety-five signatories and sixty-one jurisdictions having ratified it, academia continues to question whether this normative product is an unprecedented success or miserable failure.[1] What is unquestionable, in any case, is that the design of its minimum standards and, in particular, of those referred to in the Final Report of Action 6[2] and the concretion of these standards in the text of the MLI[3] explain the massive incorporation into covered tax agreements (CTAs) of a general anti-avoidance rule, specifically the one known as the principal purpose test (PPT). Indeed, although the ways of complying with the Base Erosion and Profit Shifting (BEPS) minimum standards for treaty abuse are varied, practice shows that, ultimately, the incorporation of the PPT into the CTAs is the one selected by most signatory jurisdictions.[4] Although, for many, this incorporation may not seem like much,[5] the truth is that the MLI has brought about a profound change, especially when compared to the pre-BEPS situation in which tax administrations were forced to perform conceptual pirouettes,[6] to force mysterious legal concepts[7] or, in the best of cases, to apply antiquated and imperfect rules to deal with situations of treaty abuse.[8] However, a provision’s success is not measured or at least should not be measured solely based on its greater or lesser incorporation into a legal text, in this case, a Double Taxation Convention (DTC).

Of all the General Anti-Avoidance Rule (GAAR) models available, the PPT is probably the worst choice.[9] However, this article intends to focus on another very problematic aspect of the PPT, namely, how this rule relates to other anti-abuse rules of a general or special nature that were already in the DTCs prior to the MLI or that will be incorporated into the DTCs once the MLI provisions come.

It would be unfair and certainly not in keeping with reality to state that the MLI and other materials related to the PPT have not taken this necessary accommodation into account. Firstly, and at a very general level not referred explicitly to the PPT, Article 1 of the MLI provides that the convention (the MLI) modifies all covered tax agreements. Secondly and in direct reference to the PPT itself: (1) Article 7(2) of the MLI clarifies that the PPT in paragraph 1 replaces existing provisions of CTAs that deny all or part of the benefits otherwise provided under the covered tax agreement for which the principal purpose or one of the principal purposes of any arrangement or transaction or of the parties to an arrangement or transaction was to obtain those benefits or is added where such provisions do not exist in CTAs[10]; (2) BEPS Action 6 Final Report[11] and the contents thereof that were finally incorporated into the Commentaries to the 2017 OECD Model Tax Convention[12] make it clear that the fact that a person is entitled to benefits under the limitation on benefits clause contained in paragraphs 1 to 7
of Article 29 of the OECD Model Tax Convention 2017 (OECD Model 2017) does not mean that these benefits cannot be denied under the PPT.

The above rules and interpretations may solve some of the problems posed by the ‘coexistence’ of the PPT with other anti-abuse rules in CTAs whether they are prior to or contemporaneous with the entry into force of the PPT. However, this article aims to raise new ‘coexistence problems’ of the PPT with other conventional (anti-abuse) rules and, concerning them, also to question the somewhat simplistic solutions offered by the OECD. Indeed, on many occasions, in the face of facts that could presumably constitute treaty abuse, the application of other anti-abuse rules could be considered in addition to the PPT. If these other rules and the PPT have different application conditions or legal consequences, what we call in this article a conflict of coexistence arises.

Section II of this article describes the possible conflicts of coexistence between the PPT and: (1) beneficial ownership in Articles 10, 11, and 12 of the OECD Model; (2) special anti-avoidance rules pre-existing in the CTAs or incorporated into them as a consequence of the MLI itself; and (3) the clauses existing in a substantial number of CTAs that declare the compatibility of domestic GAARs with the corresponding DTC. Section III of this article offers an interpretative solution to these problems of coexistence or questions the solution proposed by the OECD.

2 THE PPT, OTHER (ANTI-ABUSE) PROVISIONS IN TAX TREATIES, AND WHY THEIR COEXISTENCE CAN BE A PROBLEM

Until the implementation of the changes arising from the BEPS Plan – in the 2017 OECD Model Tax Conventions and the MLI – it cannot be said that the OECD acquis offered a ‘systematic’ response to the problem of abuse of treaties. Indeed, apart from some Special Anti-Avoidance Rules (SAARs) referring to particular rule shopping problems, the commentaries to the model merely offered a catalog of possible rules that contracting states could eventually incorporate into DTCs to address the problem of abuse of the convention or proposed the interpretation of already existing rules built upon a different purpose to achieve the same result. Many jurisdictions, concerned about the phenomenon of treaty abuse and lacking a clear treaty policy on the issue, would resort to these anti-abuse rules and doctrines haphazardly. Indeed, except in very few jurisdictions, tax authorities drew upon what was available to them, whether it was their domestic GAARs, outdated conventional anti-abuse clauses (and very different in the various DTCs of a particular country’s network), or rules that were never designed in principle to counteract convention abuse such as, for example, the beneficial owner clauses in Articles 10, 11, and 12 of the OECD Model Convention. The massive incorporation of the PPT into tax treaties should theoretically eliminate these problems. Tax authorities now have a powerful tool to address treaty abuse problems. The very design of the MLI, the possibility for the contracting states to renegotiate their DTCs and the interpretative power of the Commentaries to the OECD Model Convention should be enough to clean up the mess and leave the PPT as the only normative reference in this area.

However, this purifying effect of the PPT is more theoretical than real. The compatibility clauses following an “in place of” an existing provision of a Covered Tax Agreement structure come with their interpretative problems, besides the fact that the provisions to be replaced by the PPT under Article 7(2) of the MLI will be necessarily limited. On the other hand, bilateral renegotiations of CTAs can be enormously expensive, especially in terms of time, and contracting states may not have a strong interest in removing GAARs from the CTAs that they believe reinforce the integrity of the treaty itself even though they may conflict with the PPT. Finally, the 2017 Commentaries to Article 29(9) of the OECD Model Convention have referred almost exclusively to the relationship between the PPT and the limitation on benefits rule contained in paragraphs 1 to 7 of Article 29 itself. This leaves, in principle, the question unanswered concerning how the PPT relates to other treaty SAARs that were already contained in the CTAs or incorporated into them as a consequence of the MLI.

It is precisely in this context of disorderly accumulation of anti-abuse resources in the CTAs where the problems referred to in this article arise. These issues of coexistence are essentially reduced to two phenomena that are analysed in detail below.
2.1 The Accumulation of Conventional GAARs with Different Application Conditions and/or Legal Consequences

In principle, the accumulation in the same CTA of the PPT and other general anti-abuse clauses need not necessarily be problematic. If all of these GAARs share the same application conditions and have the same legal consequences, the problem is merely nominal and, therefore, legally immaterial. The problems arise precisely when those conditions or consequences may be different in such a way that the application of the PPT or another GAAR may be legally relevant. In order to illustrate this problem in practice, the conditions of application and the legal consequences of the PPT should be reviewed and contrasted with those of other anti-abuse instruments.

With all of the necessary technical nuances,[21] the abuse test incorporated in the PPT results from the combination of a subjective component – *the obtaining of a benefit under the Convention was one of the principal purposes of the arrangements* – and an objectively formulated escape clause – *granting the benefit would be in accordance with the object and purpose of the relevant provisions of the Convention*.

For its part, the terminology of the PPT under both Article 29(9) of the OECD Model and Article 7(1) of the MLI describes the consequences of its application in a rather simple manner by merely stating that the benefit under the convention shall not be granted. This legal configuration of the consequences of the application of the PPT – which has been elsewhere described as having limited effects[22] – admits, however, an alternative configuration referred to in the Commentaries to the OECD Model[23] and reflected in Article 7(4) of the MLI[24].

In the absence of the latter provision, the limited effects of the PPT are apparent when dealing with rule shopping strategies: in effect, the taxpayer will not be able to access the benefits of the convention that it was seeking but also those that would have been available had he conducted business that was not considered abusive. The problem becomes more complex in cases when the PPT applies to transactions that follow the typical pattern of treaty shopping as, in these cases, it may not be clear whether the ultimate taxpayer will find protection under the treaty between their residence state and the source state.[25] This problem and the arguments and counterarguments that follow will be better understood with a simple example:

**Example 1.** Ultimate taxpayer is a resident in State R and holds shares in T, a company resident in State T. The treaty between R and T provides for a maximum rate of 15 percent on dividends. Ultimate taxpayer transfers its share to I, a subsidiary company resident in State I. The treaty between I and T provides for a maximum rate of 10 percent on dividends. T pays dividends to I. Subsequently, I distributes dividends to Ultimate taxpayer.

If the conditions for the application of the PPT are met, the benefits of the DTC between T and I will not be applied to the dividends paid by T to I. Moreover, it is undoubtedly true that the PPT text does not explicitly prevent the application of the benefits of the convention existing between the source state (T) and the residence state of Ultimate taxpayer (R). However, there are strong arguments to understand that the application of the PPT also excludes these benefits under the treaty between the source state (T) and the residence state Ultimate taxpayer: i) As a result of the PPT application, I does not lose its status as a resident in I as the direct consequence of the application of this rule is only that a benefit under the convention (between T and I) shall not be granted; ii) As a result of the PPT application, the dividend has not been paid to the ultimate beneficiary resident in State R.[26] However broadly, the term ‘paid to’ is interpreted[27] the dividend has still been paid to I, a resident in State I. It is more than questionable whether T would be willing, in these circumstances, to apply the maximum rate of 15% on dividends provided for in the treaty between T and R. Equally dubious is the obligation and predisposition of State R to credit taxes withheld in State T[28], and iii) It does not seem to make much sense that treaty shopping and rule shopping strategies have different legal consequences as far as the PPT application is concerned. Indeed, if the source state (T) applies the maximum rate of 15% on dividends provided
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for in the treaty between T and R and the residence state Ultimate taxpayer (R) credits that tax accordingly, taxpayers who deploy treaty shopping strategies would access treaty benefits available even in the case of not having used abusive arrangements. As was seen above, this would never occur in a rule shopping case. If rule shopping strategies do not seem more serious in terms of fiscal policy than treaty shopping strategies, there appears to be no argument to justify such an asymmetry. This conclusion is remarkably consistent when the two hypothetically applicable DTCs (DTC T-I and DTC T-R) contain a PPT such as the one analysed. Indeed, in this case, both T and R have agreed, particularly among themselves but also with third states, that taxpayers intending to abusively shop treaties will have access to neither the benefits of the shopped DTC nor to those of the DTC that might apply in the absence of an abusive transaction.[29]

If the legal design of the PPT just described is compared with the conditions of application and the legal consequences of other pre-existing anti-abuse rules in CTAs, the ‘conflicts of coexistence’ between the PPT and the other anti-abuse rules referred to in this article can rapidly be noticed. These conflicts are particularly evident concerning the beneficial ownership clause in Articles 10, 11, and 12 of the OECD Model and the clauses existing in a significant number of CTAs that declare the compatibility of domestic GAARs with the corresponding DTC. A brief analysis of both types of clauses will clarify the nature and seriousness of these conflicts.

2.1.1 Beneficial Ownership and PPT

It is now generally agreed that introducing the beneficial owner clause in Articles 10, 11, and 12 of the OECD Model Convention was a pure and unfortunate accident.[30] However, the absolute lack of precision of the concept and the desperate search for legal mechanisms to deal with the phenomenon of treaty abuse turned the beneficial owner concept into a sort of GAAR that tax authorities in some jurisdictions have used to deny access to the benefits of DTCs to conduit companies in certain circumstances, often with the consent of the courts.[31] The changes made in 2014 to the Commentaries to the OECD Model Tax Convention seeking to limit this expansive use by returning the concept of beneficial ownership to its original contours[32] – those that prompted its introduction into the Model in 1977 – do not appear to have established a limit on this uncontrolled use; a use that, right or wrong, Member States will want to see justified in the most recent case law of the European Court of Justice (ECJ) in the so-called Danish withholding cases.[33] In short, an entire set of factors combine to prevent a universally acceptable agreement from being reached on the conditions of application of the beneficial ownership rule; among them is its complete lack of specificity – two isolated words are being deal with rather than with a genuine legal concept – the lack of normative references in domestic law.[34] and, last but not least, the change in the declared purpose of the DTCs as a result of the BEPS Plan[35] have played a significant role. Precisely for this reason, it is possible, in principle, and it is the most common in the practice of several jurisdictions.[36] for the beneficial ownership clause to be, de facto, used as a GAAR, allowing the source state to deny the application of the benefits of the DTC – referred to dividends, interest, and royalties – to residents of the other contracting state who do not ultimately and economically enjoy the specific item of income. However, what is characteristic (and disturbing) of this particular interpretation of the concept of beneficial ownership is that, since it lacks any normative referent, it ends up becoming a GAAR without conditions of application or, to state it more clearly, an anti-abuse rule that does not define what is abuse. As Vann explains, the consequence has been an aggressive and essentially discretionary use by tax administrations of beneficial ownership in recent times to deny treaty benefits.[37] If the absolute lack of precision of the concept of beneficial ownership are now contrasted with the conditions of application – very indeterminate but, in any case, existing – of the PPT, the conflict of coexistence that is referred to can be perceived. Indeed, when a dividend, interest, or royalty is paid to a resident of the other contracting state who might a priori be thought of as acting as a conduit for another person who, in fact, receives the benefit of the income concerned, either (1) the PPT that would require verification of whether the obtaining of the benefits under the convention is one of the principal purposes of the arrangements (i.e., the interposition of the conduit) and granting the benefit would not be in accordance with the
object and purpose of the relevant provisions of the convention or (2) the beneficial ownership concept for which the conceptual contours are unknown could be applied.

If the conditions for applying the beneficial ownership concept are problematic, even more uncertainties arise when delimiting its legal consequences. It could be thought that its legal design in Articles 10, 11, and 12 of the OECD Model Convention point to a limited effect of its application. This would mean that treaty benefits concerning dividends, interest, and royalties would not be available to those who are not considered beneficial owners of such income without the beneficial owners (residents in the other contracting state or a third state) being able to access them either.\[38\] This vision, however, comes up against some obstacles. Perhaps the clearest of these is the position (traditionally) held by the Commentaries to the OECD Model Convention concerning this issue and which, because of its importance, deserves a literal quote:

Subject to other conditions imposed by the Article and the other provisions of the Convention, the limitation of tax in the State of source remains available when an intermediary, such as an agent or nominee located in a Contracting State or in a third State, is interposed between the beneficiary and the payer but the beneficial owner is a resident of the other Contracting State (emphasis added).\[39\]

In a strict interpretation of beneficial ownership meaning as that allegedly derived from the Commentaries to the OECD Model Convention since 2014, this definition of the effects of the clause is logical. As stated by some scholars,\[40\] the 2014 Commentaries on Articles 10–12 of the OECD Model have attempted to bring the concept of beneficial ownership closer to its original meaning. This excluded from tax treaties cases in which the recipient of income was not the actual legal owner of it. Therefore, it makes perfect sense for the DTC to apply between the source state and the residence state of the legal owner of the income. However, as indicated above, if the beneficial ownership clause is frequently used in the practice of most jurisdictions as a GAAR, the consequences of its application may be different. Following this interpretation, in strictly literal terms which are also referred to above, it would have to be concluded that the beneficial ownership clause is designed as a GAAR with effects limited to the non-application of the treaty benefits intended by the taxpayer. However, as Professor Martín Jiménez has described once again,\[41\] most jurisdictions have wanted to read the beneficial ownership concept in the key of their domestic anti-abuse clauses. In these circumstances, the concept’s legal consequences would subsequently depend on how effects are described in the domestic GAARs of the source state and the residence state of the beneficial owner. In any case, and will be seen later, at least most of the domestic GAARs are legally designed with unlimited effects and therefore impose granting all benefits to which the taxpayer would have had access if it had not entered into an abusive transaction. In short, whichever interpretation (broad or strict) of the beneficial ownership concept is used, it seems that its effects are always unlimited. These legal consequences again pose a problem of coexistence with the PPT for which the effects, as has seen above, are limited also in cases of treaty shopping to the denial of the benefits of the treaty claimed by the taxpayer.

### 2.1.2 Conventional Clauses Declaring the Compatibility of Domestic GAARs and the PPT

After decades spent defending the idea that states wishing to preserve the application of their domestic anti-avoidance provisions in situations governed by a tax treaty must insert a specific provision to that effect in their treaties, the 2003 OECD Commentary made a 180-degree turn to finally admitting compatibility between domestic GAARs and DTCs. The truth is that the arguments used by the commentaries in 2003 to reach that conclusion were unconvincing;\[42\] the same applies, in the author’s view, to the new arguments used by the commentaries in their 2017 version to support the same interpretation.\[43\] However, either because the conventions were signed before the changes made to the commentary in 2003 or because the contracting
states intended that there should be no doubt in this regard, many DTCs incorporate express clauses declaring compatibility with the conventions of domestic legal provisions on the prevention of tax avoidance.

The coexistence conflicts between the PPT and the general domestic anti-abuse rules – or, more precisely, clauses declaring compatibility with the conventions of domestic legal provisions on the prevention of tax avoidance – will logically depend on the latter’s legal design. In short, it relies on whether their conditions of application and legal consequences are more or less similar to those of the PPT. In this respect, if there is general consensus among those who have analysed domestic GAARs from a comparative perspective, it is to conclude that there is an enormous disparity in the design of these rules, particularly concerning their application conditions. These incongruities make it very difficult to compare the PPT and domestic GAARs and, therefore, to conclude whether or not there are coexistence conflicts such as those analysed in this article. It is, nevertheless, worth mentioning some features, perhaps not universal but certainly very generalized, of GAARs in domestic law:

1. The conditions of application of domestic GAARs are, as a general rule, very different from that of the PPT and normally incorporate a much more demanding abuse threshold in the context that, under these GAARs, it is more difficult for a transaction or set of transactions to be considered abusive. This occurs, of course, with GAARs that construct their conditions of application and, therefore, the legal threshold of abuse, based on objective characteristics of the transaction under analysis. It then resorts to concepts such as artificiality, contrivance, lack of commerciality, abnormality, or lack of genuineness. In a work of this nature, it is not possible to contrast the conditions of application of all of these domestic GAARs with the double test of abuse of the PPT referred to above. However, using a simple example, it is possible to illustrate how some transactions to which, in principle, the PPT would be applicable could hardly be considered abusive based on the simple application of the domestic GAARs.

Example 2. A is an individual resident in State R who holds a relevant share in a company resident in State R. A finds a buyer willing to pay a significant amount for his share. Before selling his share, A transfers his residence to State S with which State R has signed a DTC containing a provision patterned according to Article 13(5) of the OECD Model. After transferring his residence to S, A alienates his share to the buyer. This implies that State R is not attributed taxing rights according to the DTC whereas, particularly if the taxpayers is well-advised, it is very likely the capital gains generated by this alienation remain untaxed or minimally taxed by State section A GAAR such as the PPT would be easily applicable to facts such as those described here. It could always be concluded that one of the main purposes of the change of residence was to obtain the benefits under the convention and this regardless of whether such change of residence might have other relevant purposes or other relevant legal or economic (non-tax) effects. According to a domestic GAAR based upon objective characteristics of the transaction such as artificiality, contrivance, lack of commerciality, abnormality, or lack of genuineness, it would be complicated to correct this transaction, Except in rare cases, it would be difficult to conclude that the change of residence operated by A was artificial, contrivance, abnormal, or lacks of commerciality or genuineness.

The conditions of application of the PPT and domestic GAARs will also be different when the latter are constructed based on a strictly subjective abuse test. This is so because the subjective abuse tests of the domestic GAARs are usually much more demanding. They referring to the tax purpose being the sole, the essential, the principal, or the predominant purpose of a transaction. The PPT is essentially based on an analysis of the purpose of the transaction – i.e. whether or not one of the principal purposes of an arrangement is to obtain benefits under the DTC.

1. Although it is also difficult to generalize when analysing the legal consequences of the various national GAARs, it can be stated that they more or less widely all follow the pattern of a GAAR with unlimited effects; in that sense, most domestic GAARs require replacing the abusive fact pattern construed
by the taxpayer with a different (not abusive) fictive fact pattern. Indeed, as complex as it may be to determine (or speculate on) the ‘appropriate’ legal form to be put in place of the disregarded tax avoidance scheme, what seems clear is that most, if not all, domestic GAARs are not limited as was the case seen earlier with the PPT disregarding the transaction presented by the taxpayer and the tax savings intended by it.

In short, with all of the relevant nuances arising from the diversity of national GAARs, it can be concluded that the application of the PPT or one of these GAARs to a case of treaty abuse will not lead to the same results. Both the concept of abuse contained in them and their legal consequences may be very different.

2.2 The PPT and (New) Special Anti-Avoidance Rules (Saars) in Treaties

The relationship between GAARs and SAARs is a classic problem in tax law. These tensions already appeared at the conventional level before the MLI was adopted. However, the emergence of the MLI and the incorporation of its contents into CTAs has intensified the problem for the following reasons: (1) The very existence of the PPT and its massive incorporation into CTAs; and (2) The emergence of new conventional SAARs in the MLI and their (selective) incorporation into CTAs.

Apart from the fact that the approval and implementation of the MLI will increase the problems of coexistence between the PPT and the SAARs contained in the DTCs, what is more worrying, in this author’s opinion, is that the Commentaries to the 2017 OECD Model Convention have taken sides on this technical issue. They analyse the relationship between the PPT and the detailed or simplified versions of the limitation on benefits clause incorporated in Articles 29(1) to 29(7) of the OECD Model Convention. In this regard, the commentaries to the model begin by stating, correctly in this author’s opinion, that a benefit that is denied in accordance with the Limitation on Benefits Clause (LoB) is not a benefit under the convention that paragraph 9 (the PPT) would also deny. However, the commentaries proceed far beyond this assertion by adding that the fact that a person is entitled to benefits under the LoB does not mean that the benefits of the convention cannot be denied under the PPT. Indeed, the LoB rules focus primarily on the legal nature, ownership in, and general activities of residents of a contracting state but do not imply that a transaction or arrangement entered into by such a resident cannot constitute an improper use of a treaty provision. These statements may raise uncertainties about the coexistence of the PPT and other conventional SAARs incorporated into the CTAs. Neither the theoretical basis for them is clear nor is it known whether the commentaries intend that the conclusions they reach regarding the relationship between the PPT and the LoB also apply to other conventional SAARs incorporated into the CTAs as a consequence of the implementation of the MLI.

3 PROPOSALS FOR PEACEFUL (LEGAL) COEXISTENCE

In very general terms, the coexistence problems described in the previous paragraph refer to the complex and sometimes difficult coexistence between anti-abuse rules of very different content. However, as has already been anticipated, these problems have very dissimilar technical characteristics that should be considered when offering a solution to them. This is so because the coexistence problems derived from the juxtaposition of GAARs already contained in the CTAs before the MLI and the PPT have nothing to do with the relationship between the PPT and the many SAARs existing before the MLI or incorporated by it. For this reason, the two problems are analysed separately below.

3.1 The Accumulation of Conventional GAARs. One-size-fits-all?

Notwithstanding the strange statement contained in the Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Explanatory Statement) that the MLI will be applied alongside existing tax treaties and therefore not directly amend the text of the corresponding CTA, However, the OECD Directorate for Legal Affairs had already expressed its opinion on
the possible conflicts between the MLI and the CTAs. It stated that the approach in the MLI follows the general principle that, when two rules apply to the same subject matter, the later in time prevails (lex posterior derogat legi priori). This rule contained in Article 30(3) of the 1969 Vienna Convention on the Law of Treaties would mean that a rule included in a subsequent treaty (the MLI) prevails over other rules contained in a previously concluded treaty between the same parties (the CTA). Based on these statements, a simple conclusion could be drawn regarding the problem at hand. To the extent that the PPT and other GAARs previously contained in the CTAs are incompatible, the former prevails over the latter as subsequent law. This conclusion is as simple and practical as it is controversial from a legal standpoint. Not surprisingly, it has been stated that the use of the *lex posterior* principle in this context raises more questions than it resolves. Without wishing to be exhaustive, some of the most salient problems are as follows: (1) International doctrine and jurisprudence have recurrently stated that, for resolving conflicts in applying successive treaties relating to the same subject matter, Article 30 of the Vienna Convention on the Law of Treaties (VCLT) was never intended to be exhaustive as it is possible to apply other principles of interpretation and conflict-resolution rules; (2) Prior to the Vienna Convention, there were several cases in which the *lex prior* doctrine was considered more appropriate in a treaty conflict situation than the *lex posterior* doctrine. This would imply a significant problem for the application of the *lex posterior* principle, at least in those jurisdictions that, having signed the MLI, are not signatories to the VCLT; and (3) Notwithstanding the foregoing, the *lex posterior* rule in Article 30(3) of the VCLT comes with its own problems. Indeed, Article 30 of the VCLT requires, in order to be applicable, that the two successive treaties refer to the same subject matter. This requirement has given rise to a considerable discussion in the internationalist doctrine between those who defend a broad concept of treaties referring to the same subject matter and those who opt for a strict interpretation. Considering this uncertainty, it is not surprising that, when verifying the application of Article 30(3) of the VCLT to the problem at hand, some authors contend that it is not even debatable that the MLI and the CTAs refer to the same subject matter while others deny it more or less categorically. It should also be borne in mind that Article 30 of the VCLT not only requires the existence of two treaties referring to the same subject matter but also that the provisions of the two treaties be incompatible. Again, the concept of (in)compatibility is not free of controversy either. In contrast to those who have traditionally held that incompatibility exists only when a party to the two treaties cannot simultaneously comply with its obligations under both treaties, in recent times, a less strict notion seems to be gaining ground.

Given the above circumstances, to claim that the problems of coexistence between the PPT and other conventional GAARs can be solved, without further ado, based on the *lex posterior* principle may be too simplistic. Surely it would be more reasonable to separately analyse each of the problems described in the previous section, reaching a solution that, while being less controversial, will provide legal certainty.

### 3.1.1 Beneficial Ownership and PPT: Lex Posterior, Lex Specialis or Contextual Interpretation?

The coexistence of the PPT and the beneficial ownership clause is perhaps the most explicit demonstration of how the *lex posterior* principle can hardly, on many occasions, resolve possible conflicts between the MLI and the CTAs. Indeed, if it was defended that the PPT, as a subsequent rule, displaces (or implicitly repeals) the beneficial ownership clause as a prior rule as there is a conflict between the two, it would be complicated to explain why the Commentaries to the OECD Model Convention continue to refer, in their 2017 version, to the relationship between the two rules. Much more challenging still is why the new DTCs negotiated and ratified in the Post-BEPS era continue to contain both clauses systematically.

Other methods of resolving the conflict are also unsatisfactory. It could be argued that the *lex specialis* principle would favour the application of the beneficial ownership clause to conduits where the application of Articles 10, 11, or 12 of the OECD Model Tax Convention or any other to which the clause might be applicable under a DTC is in question. There is no doubt that the clause is a special rule as opposed to the PPT; indeed,
it is a special rule in a double sense. Firstly is because, at least in the OECD Model Convention,\(^{[72]}\) it applies only to dividends, interest, and royalties; secondly is because it is intended to deal exclusively with abuses of conduit structures.\(^{[73]}\) The PPT, on the other hand, is designed to deal with the abusive obtaining of any conventional benefit (even other than limitations on taxation at source) whether this is articulated through a conduit or through any other transaction that may be considered abusive. According to this interpretation, abuses referring to dividends, interest, or royalties articulated through conduit strategies would be dealt with through the beneficial ownership clause (whatever the conditions of application and legal consequences\(^{[74]}\)). Any other abusive transaction – conduits referring to other distribution rules or rule shopping cases – would require the application of the PPT. Impeccable as this solution might appear from a purely technical point of view, it should not be forgotten that conflicts between norms (also between successive treaties) must be resolved employing the general mechanisms of interpretation. In essence, they are still interpretative problems, so that mechanically accepting the results of the application of the *lex specialis* principle may be a mistake.\(^{[75]}\) In these circumstances, the question is whether it makes sense that certain transactions (conduits) that allow specific tax savings to be obtained (usually referring to dividends, interest, and royalties) be confronted using a rule (the beneficial ownership) of which the conditions of application and legal consequences are undetermined – and typically dependent on local practice – while the abusive nature of any other transaction will be scrutinized based on a rule, such as the PPT, that, despite its notable ‘insecurities’, has an anti-abuse test defined in detail in the MLI and more or less clear legal consequences.\(^{[76]}\) In principle, it could be thought that dividends, interest, and royalties as passive income are more suited to abusive conduits precisely because of the ease with which the legal and beneficial owners may be separated. This would subsequently serve to justify that these treaty shopping cases could be dealt with by more expeditious anti-abuse techniques such as the beneficial ownership clause.\(^{[77]}\) However, this justification does not seem satisfactory either if it is taken into account that: (1) There are other items of income different from dividends, interest, and royalties (both passive and active) that, in principle, could give rise to artificial conduits that the beneficial owner clause could address.\(^{[78]}\) However, perhaps for purely historical reasons and out of a desire to limit the effects as much as possible of such an indeterminate concept as beneficial ownership, it was never introduced for other types of income;\(^{[79]}\) (2) Even if the above justification could be acceptable in general terms, it would not support the existence of a specific GAAR, such as the beneficial ownership clause, for dividends, interest, and royalties. This is so because, as indicated above, the absolute lack of definition of the conditions of application and legal consequences of the clause determines that its application as a GAAR depends almost exclusively on local practice. This may result in the beneficial ownership clause being more or less demanding than the PPT so that, once again, it would make no sense for there to be a different GAAR only for dividends, interest, and royalties which, depending on the case, might be more or less tolerant than the PPT. Indeed, if it is true that dividends, interest, and royalties are more conducive than other items of income to achieve tax savings through abusive conduits, it might make sense to have a GAAR with a lower abuse test or more burdensome legal consequences for the taxpayer.\(^{[80]}\) Additionally, its application based upon local GAARs causes, in many cases, that the reality is precisely the opposite, i.e., that such GAARs and, therefore, also the beneficial ownership clause is a ‘softer’ rule than the PPT.

Paradoxically and despite the apparently chaotic situation described thus far, the introduction of the PPT in the CTAs presents a unique occasion to close one of the most unfortunate controversies in the (recent) history of the DTCs. Until recently, in the absence of a clear link to concepts (tax or otherwise) in the domestic law of the contracting states,\(^{[81]}\) the beneficial ownership clause is completely ambiguous. Indeed, the lack of any explicit normative reference and the little help that the context of the term beneficial owner could offer in this respect has meant that the precise meaning of the clause has been left entirely to the interpreter.\(^{[82]}\) This helps to understand the very diverse interpretations that the concept has undergone since its introduction in the models and in bilateral DTCs.\(^{[83]}\) In these circumstances, the introduction of the PPT in a CTA provides, for the first time, a clear context to the beneficial owner clause. Indeed, the clause is now accompanied by treaty language that
helps to understand its precise meaning or, at least, the meaning that should rationally be attributed to such a clause. Along these lines, the most recent and complete work on the concept of beneficial ownership concludes that the scope of beneficial ownership is much narrower than that of the PPT and is limited to some specific cases of treaty shopping (cases functionally equivalent to agents or nominees), adding, in the same vein, that the drafters of the Commentary on Article 29(9) regard beneficial ownership as having a much more limited role than the PPT (or anti-conduit regulations) or as close to irrelevant in comparison to it. In short, the fact that the PPT now accompanies the beneficial owner clause is a somehow explicit endorsement of the idea. This was already the intention of those who introduced the concept in 1977 and those who significantly restricted its operational scope in the 2014 OECD Model Commentaries. The only intention and the only possible effect of the clause is to exclude from tax treaties those cases in which the recipient of income is not its real legal owner. This is the only way to resolve conflicts of coexistence between the PPT and the beneficial ownership clause, although, of course, at the cost of making the latter an unnecessary rule.

3.1.2 Domestic GAARs and PPT: Lex Posterior or a Solution Out of the Box?

As indicated above, the application of the PPT and domestic GAARs can lead to very different results insofar as the latter are usually much ‘softer’ rules than the former in the sense that they deal with a more demanding concept of abuse, and their legal consequences are less burdensome for taxpayers. In this context, it would seem rather obvious to resolve the blatant conflict between the PPT and the clauses in CTAs allowing for the use of domestic GAARs in a treaty context in favour of the former by direct application of the lex posterior principle. However, since 2003, the commentaries explicitly admit compatibility between domestic GAARs and DTCs. In this context, beyond the technical correctness of the arguments on which such compatibility is claimed to be based, the fact is that it may pose significant problems when the PPT is incorporated into the CTAs. Indeed, in these cases, there is no mention of a conflict between two successive treaty rules in time, which is precisely the starting point of Article 30(3) of the VCLT for the conflict to be resolved by applying the lex posterior principle. It is also not possible to speak of a conflict between the rule of a DTC and the domestic law of one of the contracting states that can be resolved through the usual mechanisms for resolving conflicts between international treaties and domestic law. Finally, and for obvious reasons, it is also impossible to solve the problem by applying the lex specialis principle. In this author’s opinion, however, this problem of coexistence can be solved in a simple way, in most cases, in favour of applying the PPT.

Since domestic GAARs are very often rules with milder effects than the PPT on allegedly abusive transactions, it could be concluded that, also in many occasions, the use of such GAARs to address treaty abuse does not meet the minimum standards required by BEPS Action 6. Indeed, it is possible that certain transactions that allow obtaining a treaty benefit may not be subject to correction through the application of a domestic GAAR – because they do not meet its conditions of application – whereas they would have been if the PPT had been applied. On the other hand, given the conclusions reached in the previous section, the legal consequences of applying the PPT are always more burdensome for the taxpayer than those that would correspond to the application of a domestic GAAR. It is evident that the minimum standard of BEPS Action 6 not only requires the existence of a GAAR treaty to address abuses thereof but, on the contrary, requires a certain level of protection that is precisely identified with the conditions of application and the consequences of the PPT as these are regulated in Articles 29.9 of the 2017 OECD Model Convention and 7 of the MLI. It is questionable whether a harsher domestic GAAR meets the minimum standard, however, what is not questionable is that a more lenient domestic GAAR does not. This conclusion is not altered, in this author’s view, by the fact that the minimum standard of BEPS Action 6 can also be met by the inclusion of an LoB rule supplemented by anti-conduit legal mechanisms. In any case, this alternative for it to reach the minimum standard requires that the alternative anti-conduit mechanism (a treaty rule that might take the form of a PPT restricted to conduit arrangements, domestic anti-abuse rules, or judicial doctrines) achieve a similar result. It seems logical to
think that domestic GAARs that follow the patterns described above do not achieve the same results as the PPT, either in terms of the type of transactions they correct or the consequences of their application.

3.2 The PPT and (New) Special Anti-Avoidance Rules (Saars) in Treaties. Lex Specialis and Beyond

As has already been anticipated, the problems of coexistence of the PPT with conventional or domestic SAARs are different from those analysed thus far. In these cases, if the conditions for the application of a SAAR are met, rules will apply with their corresponding legal consequences. These include the LoB rules of Articles 29(1) to 29(8), the rule referring to capital gains from the alienation of shares in land-rich companies of Article 13(4), or the minimum holding periods for the application of the reduced withholding tax rates on dividends of article 10(2); all of them of the OECD Model Convention in its 2017 version. This follows clearly from the *lex specialis* principle, and it is what the Commentaries to the OECD Model Tax Convention state emphatically. [93]

However, the most serious legal problem is another one, in particular, to determine whether the PPT can be applied when the corresponding SAAR – the LoB or any other – does not apply to the facts carried out by the taxpayer. As argued elsewhere, [94] there is no legal problem when the allegedly abusive conduct displayed by the taxpayer is radically different from the indicators of abuse used by the SAAR to design its conditions of application. [95] In this context, for example, the use by certain artists of complex contracts that include artistic and non-artistic services and in which the former are attributed a negligible value in order to avoid the application of Article 17 of the model tax conventions [96] would not prevent the use of the PPT (or any other GAAR). Simply because Article 17(2) of those models contains a SAAR designed for those cases in which the income of such artists accrues to persons different from those artists is of no relevance. In these cases, the possible abusive nature of the taxpayer’s transactions – artificial allocation of payments in complex contracts – has nothing to do with the indicators on which the SAAR is built, i.e., the interposition of companies. However, the situation can become much more complicated when the taxpayer makes use of the safe harbour contained in the SAAR, the taxpayer abuses the very SAAR, or the SAAR is not applicable for certain taxpayers or transactions due to, for example, EU law constraints. Even though reputable authors have expressed a different opinion, [97] in these cases, it seems evident that the *lex specialis* principle does not come into play as far as a situation is not faced in which two rules apply to the same facts. This is a typical situation in which the *lex specialis* principle and, in general, all dispute resolution principles find application rather just one (the PPT). In order to resolve these situations, different solutions must be sought.

There are many authors who, in resolving this situation, give decisive weight to the words that head the literal language of the PPT and, according to which, the rule applies ‘... notwithstanding the other provisions of this convention’. [98] Whether or not they agree with the result, in terms of tax policy – and, in fact, many of these authors do not agree [99] – these authors conclude that the heading mentioned above facilitates the application of the PPT to cases that pass the abuse tests contained in SAARs. As has been argued in previous works, the phrase ‘... notwithstanding the other provisions of this convention’ has no bearing on the problem at hand. In this author’s view, those *other provisions of the convention* could be identified not with the LoB provision(s) – or whatever SAARs – but rather with the distributive rules for which the taxpayer aims to provoke the application by means of abusive arrangements. According to this interpretation, the benefits intended by the taxpayer would be denied notwithstanding the provisions of the convention that would be applicable at first glance if the PPT did not exist [100]. This alternative interpretation has a number of advantages: (1) It allows the problem to be solved based on the applicable general principles and the most convenient solutions from a legal and legislative policy point of view [101]; (2) This would be consistent with the wording of certain treaties that already incorporate a GAAR (more or less similar to the PPT) containing the same heading without also incorporating an LoB provision. Therefore, it is apparent that the expression ‘... notwithstanding the other provisions of this convention’ cannot refer to the relationship between the PPT and the LoB [102]; (3) Interpreted as the authors
mentioned above do, the clause for which the meaning is being discussing would have no value whatsoever. Indeed, if a SAAR is not applicable because its application conditions are not met, there is, in principle, no legal inconvenience for the PPT to be applied if the corresponding requirements (subjective and objective tests) are met. The above expression would be confirming the obvious. As will be seen later, it is a different matter whether the existence of a SAAR that is not applicable may condition how the PPT is applied; and (4) Contrary to what has been argued by some authors[103] – incorrectly in this author’s opinion – the position of the Commentaries to the OECD Model Convention regarding the relationship between the PPT and the LoB is not based on the paragraph referred to here. Paragraphs 171 to 173 of the Commentaries to Article 29 of the OECD Model Convention, which are precisely those that refer to the relationship between the PPT and the LoB, at no time mention the expression ‘… notwithstanding the other provisions of this convention’ and attempt to resolve the problem following the applicable general rules and principles.

Thus, the starting point can only be to recognize that, when a (treaty) SAAR is not applicable, the PPT is applicable. The lex specialis principle does not change this, nor do the words at the beginning of the PPT confirm it. However, this does not mean that the existence of the SAAR and its non-application to the transactions carried out by the taxpayer are irrelevant when applying the PPT. In these cases, the (legal) logic imposes to distinguish different scenarios:

1. As explained above, when the allegedly abusive conduct displayed by the taxpayer is radically different from the indicators of abuse used by the SAAR to design its conditions of application, the PPT is applicable without further ado.

2. If the SAAR, as is often the case, uses quantitative or temporary thresholds – consider, for example, the thresholds of Articles 10(2)(a) or 13(4) of the OECD Model Tax Convention – and the taxpayer is left ‘on the edge of the abyss’ – with, for instance, a 366 days holding period or a company deriving 49.99% of its value from immovable property – it does not seem reasonable to apply the PPT. Indeed, even if, in purely dialectical terms, the PPT could be applied in these cases, it would make no sense if, on the one hand, the SAAR contained a clear indication of when a transaction is abusive and, on the other hand, the PPT ‘submits this indication to review’ considering that also, and regardless of these thresholds, these transactions may be abusive. As the German doctrine has rightly pointed out, applying a GAAR in these circumstances would be contrary to the aims of simplification and increased legal certainty pursued by the SAARs.[104] However, there is one exception to this conclusion, and that is the case in which the taxpayer abusively avoids the application of a SAAR.[105] Think, for example, of the transactions that sought to circumvent Article 13(4) of the OECD Model Convention in its pre-2017 version that ended up prompting the reform of the precept in the 2017 Model and the introduction of MLI Article 9.[106] This author has argued elsewhere concerning the application of the Spanish GAAR to some instances of thin-capitalization – but fully applicable to the problem at stake here. It seems reasonable to apply the GAAR in cases of the kind as far as legal certainty and the bona fide application of the SAARs may never justify its very abuse. In short, if the SAAR is not applicable due to an artificial arrangement settled by the taxpayer, it could never be argued that the legislator considered that arrangement to be non-artificial a contrario.[107]

3. Apart from these two clear cases, the relationship between the PPT and SAARs remains complex. Although these ‘in-between’ cases may not be widespread – at least regarding conflicts between the PPT and treaty SAARs - they do exist. The example used by the Commentaries to the OECD Model Tax Convention to illustrate their view on the relationship between the PPT and the LoB demonstrates this. In this regard, the commentaries refer to a case in which a bank for which shares are regularly traded on a recognized stock exchange in the contracting state of which the company is a resident, enters into a conduit financing arrangement intended to indirectly provide the benefits of lower source taxation under a treaty to a resident of a third state. In relation to this case, the commentaries indicate that the LoB focuses primarily on the legal nature, ownership in, and general activities of residents of a contracting state. However, the fact that a public company is a qualified person does not mean...
that benefits could not be denied under the PPT for reasons that are unrelated to the ownership of the shares of the company. Additionally, in accordance with all of the above, it concludes that the PPT would apply in this case because the publicly traded companies provision under the LoB cannot be considered as having the purpose of authorizing treaty-shopping transactions entered into by public companies.\[108\] In this author’s view, these statements in the commentaries seek to illustrate with examples the position held by academics in abstract terms that a GAAR can be applied when the transaction contains abusive elements that differ from the indicia of abuse used by the relevant SAAR.\[109\] As logical as this statement might initially appear, its practical application (apart from the two extreme cases mentioned above) may be difficult if not impossible to implement. The clearest demonstration of these practical difficulties is precisely the example given in the commentaries. Indeed, the approach and the resolution of the described example, in an undoubtedly circular way, attempt to present the case as obvious abuse. They indicate, without further support, that it is a conduit intended to indirectly provide the benefits of a treaty or that the analysed transaction is a case of treaty-shopping. This is a conclusion that will require compliance with the requirements on which the application of the Principal Purpose Test (PPT) is based and, mainly, the demonstration that obtaining the benefits of the treaty is the main or one of the main purposes pursued by the transaction under scrutiny. The example does not pay any attention whatsoever to this last aspect. However, beyond this captious approach, the fact is that the resolution of the example has not succeeded in proving that the transaction contains abusive elements that differ from the indicia of abuse used by the relevant SAAR (the LOB). In this regard, the PPT is being applied for reasons that are unrelated to the ownership of the shares of the company. However, what the commentaries cannot ignore is that the benefit of a DTC is being denied to a company that is traded on a recognized stock exchange. These entities are considered by the Commentary to the OECD Model Tax Convention, in another of its passages, unlikely to be established for treaty shopping purposes.\[110\] The example given by the commentaries raises the same problems as those discussed above in relation to SAARs built upon quantitative or temporary thresholds. These are contradiction with the aims of simplification and the increased legal certainty pursued by the SAARs (in this case, the publicly traded companies provision under the LoB).

In summary and apart from those cases in which the allegedly abusive conduct displayed by the taxpayer is radically different from the indicators of abuse used by the SAAR, the PPT can only be applied in those cases in which the taxpayer has abusively avoided the application of a SAAR.\[111\]

Footnotes

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3 Particularly in Arts 7(1) to 7(5) and 7(15) of the MLI.


5 Zornoza Pérez, *supra* n. 1, at 335.

6 The author refers to the old controversy about the compatibility of domestic GAARs with DTCs. On this issue, in critical terms with the conceptual pirouettes mentioned in the text: J. J. Zornoza & A. Báez, *The 2003 Revisions to the Commentary to the OECD Model on Tax Treaties and GAARs: A Mistaken Starting Point*, in *Tax Treaties:
Building Bridges Between Law and Economics 129–158 (M. Lang et al. eds, IBFD 2010). A. Báez Moreno,
GAARs and Treaties. From the Guiding Principle to the Principal Purpose Test: What Have We Gained from

7 Such as the Beneficial Owner to which we will refer in detail later.

8 The author refers here to the conventional GAARs that some jurisdictions had managed to introduce in their
DTC networks to deal with situations of treaty abuse and for which the lack of international standardization
– neither their design nor their scope of application could be homogeneous – have sometimes posed more
problems than they have been able to solve. Regarding these conventional GAARs and some of their problems
in the Spanish DTCs network: A. Báez Moreno & J. J. Zornoza Pérez, Spain, in: Anti-avoidance Measures of
General Nature and Scope – GAAR and Other Rules, IFA Cahiers vol. 103A, 6–7, 11 (IFA 2018)).

9 Báez Moreno, supra n. 6; A. Báez Moreno, La cláusula del propósito principal (Principal Purpose Test).
Un análisis crítico de la acción 6 del proyecto BEPS, 404 Estudios Financieros. Revista de Contabilidad y
Tributación, 5–52 (2016).

10 Article 7(2) of the MLI and Explanatory Statement, paras 93–96. For its part, Art. 7(17) of the MLI describes
notifications that are required to ensure clarity as to the application of the PPT.


13 Referring only to the latest version prior to 2017: OECD Model Tax Convention (2014): Commentaries to Art. 1,

14 On this unsatisfactory situation: D. Blum, Treaty Shopping and Prevention in a Post- BEPS World, Int'l Tax

15 The United States, with the limitation of benefits clause contained in its Model and incorporated into most of the
DTCs in its network and its proverbial reluctance to GAARs, is a paradigmatic case of countries that do have a
conventional policy regarding treaty abuse.

16 With the elimination of pre-existing conventional GAARs that entails the configuration of the compatibility
clause applying to Art. 7 of the MLI as a ‘provision of the Convention which applies “in place of” an existing
provision of a Covered Tax Agreement’ (see Explanatory Statement, para. 15).

17 A possibility provided for in Art. 30 of the MLI which, at least theoretically, should make it easier for the parties
to a CTA to bilaterally solve compatibility problems of the rules incorporated into the DTC as a result of
changes imposed by the MLI and other rules that were already incorporated into that CTA previously.

18 Resolving, by way of interpretation, compatibility problems of the rules incorporated into the DTC as a result of
changes imposed by the MLI and other rules that were already incorporated into that CTA previously or also
incorporated into the DTC as a result of changes imposed by the MLI.

19 According to Art. 7(2) of the MLI just ‘provisions of a CTA that deny all or part of the benefits that would
otherwise be provided under the Covered Tax Agreement where the principal purpose or one of the principal
purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction,
was to obtain those benefits’.


21 In descriptive and critical terms: Báez Moreno, supra n. 6, at 435–440.

22 This limited effect would be merely denying the application of the convention benefit sought by the taxpayer
instead of identifying a non-abusive fact pattern and applying the convention benefits to which it might be
entitled (see Báez Moreno, supra n. 6, at 440–441).


24 According to which: ‘Where a benefit under a Covered Tax Agreement is denied to a person under provisions
of the Covered Tax Agreement (as it may be modified by this Convention) that deny all or part of the benefits
that would otherwise be provided under the Covered Tax Agreement where the principal purpose or one of
the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement
or transaction, was to obtain those benefits, the competent authority of the Contracting Jurisdiction that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income or capital, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person in the absence of the transaction or arrangement [...]'.


26 As Lang implicitly acknowledges by stating that the more far-reaching question is whether the PPT ultimately feigns that the dividends from the company resident in the source state are paid directly to Ultimate taxpayer (Lang, supra n. 25, at 662.

27 Indeed, the Commentaries to Arts 10 and 11 of the OECD Model Tax Convention provide that the term ‘paid’ has a wide meaning since the concept of payment means the fulfillment of the obligation to put funds at the disposal of the shareholder (OECD Model Tax Convention (2017): Commentaries to Art. 10, par. 7 and to the creditor (OECD Model Tax Convention (2017): Commentaries to Art. 10, par. 5) in the manner required by contract or custom.

28 Lang, supra n. 25, at 662–663.

29 However, the situation would be more complex if the DTC between T and R lacked any GAAR or if it had a GAAR with unlimited effects. The length and characteristics of this work prevent us from considering these situations in detail.

30 Very recently on this subject and with abundant bibliographical references: A. Martín Jiménez, Beneficial Ownership, IBFD Global Tax Treaty Commentaries, 2.2.1. and 2.2.2. (2020).

31 Indeed, as concluded by Martin Jiménez, a majority of cases in different courts all over the world and the positions taken by many tax administrations have defended a broad reading of ‘beneficial ownership’ (see Martín Jiménez, supra n. 30, at 5).

32 In any case and as has been correctly stated, these new commentaries are also ambiguous and giving rise to divergent interpretations (see Blum, supra n. 14, 9. These changes are now incorporated in OECD Model Tax Convention (2017): Commentaries to Art. 10, para. 12.4, OECD Model Tax Convention (2017): Commentaries to Art. 11, para. 10.2 and OECD Model Tax Convention (2017): Commentaries to Art. 12, para. 4.3.

33 As warned by Martín Jiménez (Martín Jiménez, supra n. 30, at 5.9) and recently illustrated by the Spanish practice; on these influences, see also A. Martín Jiménez, Beneficiario efectivo, cláusulas generales antiabuso, Directivas UE, CDI y «sentencias danesas» del TJUE: cómo integrar las piezas evitando conflictos e inseguridad jurídica (que no elimina el caso Colgate), 452 Revista de Contabilidad y Tributación 103–108 (2020).

34 Based on these last factors, the only truly universal agreement on the conditions of applying the beneficial ownership rule is that it should be interpreted in its context and not be referred to any technical meaning that it could have had under the domestic law of a specific country or contracting state (OECD Model Tax Convention (2017): Commentaries to Art. 10, para. 12.1).

35 The inclusion of new language in the preamble of CTAs referred to the avoidance of non-taxation or reduced taxation through tax evasion or avoidance – also as a consequence of the MLI – might well influence the interpretation of the concept of beneficial ownership, particularly in light of the commentaries when they indicate that: ‘The term beneficial owner is not used in a narrow technical sense, rather, it should be understood in its context and in the light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance (emphasis added)’ (OECD Model Tax Convention (2017): Commentaries to Art. 10, para. 12.1 in fine).

36 Martín Jiménez, supra n. 30, at 6.3.
In fact, this 'literalist' interpretation has been defended on occasions: N. Carmona Fernández, Ámbito de Aplicación de los Convenios de Doble Imposición, in: Convenios de Doble Imposición. El impacto BEPS. Análisis y evolución de la red española de tratados fiscales 170 (J. M. Calderón Carrero et al. eds, Wolters-Kluwers España 2019).


In the fact, the Commentaries to the OECD Model Tax Convention themselves conclude the possibility of applying the PPT to this case: OECD Model Tax Convention (2017): Commentaries to Art. 29, para. 180.

Details on the design of these subjective tests can be found in: Krever, supra n. 44, at 7, 9. Rosenblatt & Tron, supra n. 45, at 17.

On the concepts of GAAR with limited/unlimited effects see Báez Moreno, supra n. 6, at 441–442.

Although not always made explicit with sufficient clarity, this conclusion can be drawn from the comparative work on GAARs published in recent years: Krever, supra n. 44, at 11–12. Rosenblatt & Tron, supra n. 45, at 21.

As they rightly point out in: Rosenblatt & Tron, supra n. 45, at 21.

The statement contained in the Commentaries to Art. 1 of the 2017 OECD Model Convention to the effect that the main aspects of domestic GAARs may be similar to those of the PPT (OECD Model Tax Convention (2017): Commentaries to Art. 1, para. 77) may be true in theoretical terms but becomes indistinct when the design of such domestic GAARs is seriously analysed.

As has already been indicated elsewhere, this problem had been there since the OECD Commentaries began to defend that domestic GAARs were compatible with tax treaties inasmuch as the OECD Model counted on longstanding conventional SAARs (e.g., Art. 13(4) or 17(2) of the OECD Model Convention (2017)) (see Báez Moreno, supra n. 6, at 440).

A very important part of the contents of the MLI is made up of special anti-abuse clauses of a very diverse nature among which it is worth mentioning the simplified limitation on benefits provision (Arts 7(8) to 7(14) of the MLI), the Dividend Transfer Transactions Rule (Art. 8 of the MLI), the rule on Capital Gains from the Alienation of Shares in Land Rich Companies (Art. 9 of the MLI), the Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions (Art. 10 of the MLI) and the Splitting-up of Contracts Rule (Art. 14 of the MLI).
typical lex specialis derogat generali situation, and the SAAR (the LoB) should be applied (see Báez Moreno, supra n. 6, at 440).


57 OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Functioning under Public International Law Legal Note (OECD Publishing 2017), para. 16.


61 Govind & Pistone, supra n. 60, at 115.

62 Although Art. 30(3) of the convention does not refer to this requirement, it is clear that the first paragraph of the same article contains an entire series of elements — among others, the same subject matter requisite — that apply to the successive paragraphs of the article. Indeed, Art. 30(1) reads as follows: ‘Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs’ (emphasis added).


65 Blum, supra n. 58, at 133–134. Zornoza Pérez, supra n. 1, at 327.


69 This, although, as the most reliable doctrine maintains (Martín Jiménez, supra n. 30, at 3.6 and 7; R.J Danon 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, EC and International Tax Law Series Vol. 18 662 (G. Maisto ed., IBFD 2020), the most reasonable thing to do would be to eliminate the beneficial ownership clause from the model agreements and, obviously, also from the agreements to be negotiated in the future.

70 It should be noted that, e.g., Art. 12A of the UN Model Tax Convention (2017) referring to Fees for Technical Services or Art. 21 of the US Model Tax Convention (2016) referring to Other Income also contain the beneficial ownership clause.

71 Danon proposed this hypothesis in purely technical terms (R. J. Danon, Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups, 72(1) Bull. for Int’l Tax’n 54–55 (2018), although he later criticized it with good arguments.
Although, in the UN Model Convention, it is contained in other distribution rules – notably Art. 12 A on Fees for Technical Services - the beneficial ownership clause has always been limited, also in this model, to specific distribution rules. In fact, in 2008, the UN Tax Committee expressly decided not to extend the clause to other distribution rules or configure it as a general clause referring to any rule of a DTC (see United Nations, Committee of Experts on International Cooperation in Tax Matters, Report on the Fourth Session (20–24 Oct. 2008), E/2008/45 E/C.18/2008/6 (2008), para. 46).

Danon, supra n. 69, at 656.

See para. II.1.a.

In this vein: Lang, supra n. 56, at 628.

This question has already been answered in the negative by Professor Danon in the analysis of one of the examples in the Commentaries to Art. 29 of the OECD Model Convention, contrasting the results of applying the PPT and the beneficial owner clause, as interpreted in Switzerland, to the facts described therein: Danon, supra n. 71, at 54–55; Danon, supra n. 69, at 658–660.

In this regard, e.g., Professor Arnold has criticized, rightly in my opinion, the introduction of the beneficial owner clause in an article devoted to Fees for Technical Services (active income), such as Art. 12A of the UN Model Tax Convention: see B. Arnold, The New Article on Fees for Technical Services in the United Nations Model Convention, in Celebrating Twenty Years of the International Tax Program of the New York University School of Law 169 (H. David Rosenbloom ed., New York University School of Law 2016).

In this regard, see in particular, the analysis conducted by Baker: United Nations, Committee of Experts on International Cooperation, Note by the Coordinator of the Subcommittee on Improper Use of Treaties: Proposed Amendments, E/C.18/2008/CRP.2/Add.1 (17 Oct. 2008), 17–32, Annex The United Nations Model Double Taxation Convention Between Developed and Developing Countries: Possible Extension of the Beneficial Ownership Concept.

Martin Jiménez, supra n. 30, at 4 6.5.

Some authors go so far as to state that, even in such cases, there are no good reasons for the differences between the PPT and the beneficial ownership clause: Danon, supra n. 71, at 55. Danon, supra n. 69, at 660.

Although the term beneficial ownership is defined in some domestic legal systems (see E. C. C. M. Kemmeren, Preface to Articles 10 to 12, in Klaus Vogel on Double Taxation Conventions: Fourth Edition 719 (E. Reimer & A. Rust eds Wolters Kluwer 2015)), one of the few almost universal consensuses on its content states that it should be given an autonomous conventional interpretation (See recently with a vast bibliography: Danon, supra n. 69, at 599–600).

The fact that the historical legislator in 1977 had in mind an exact (and strict) meaning for the concept of beneficial owner does not change anything in this respect. Indeed, i.e., however much the internationalist doctrine remains wedded to the principle of contemporaneity according to which the terms of a treaty are to be interpreted according to the meaning that they possessed and in light of current linguistic usage at the time when the treaty was originally concluded (see O. Dörr, Article 31: General Rule of Interpretation, in Vienna Convention on the Law of Treaties, A Commentary 572 (O. Dörr & K. Schmalenbach eds, Springer 2018)) – there is a broad consensus, at least among DTC scholars, that the objective character of the object and purpose of the treaty allows transcending the subjective intent of the parties (see K. Vogel & A. Rust, Introduction, in Klaus Vogel on Double Taxation Conventions 39 (E. Reimer & A. Rust eds, Wolters Kluwer 2015); J. F. Avery Jones, Treaty Interpretation, Global Tax Treaty Commentaries (IBFD 2019, at 3.4.10).


Martin Jiménez, supra n. 30, at 3.3.

See ibid., at 2.2.1., 2.2 and 2.3.
This was already evident when the clause was incorporated into the model (J. F. Avery Jones, *The Beneficial Ownership Concept Was Never Necessary in the Model*, in *Beneficial Ownership: Recent Trends* 339 (M. Lang et al. eds, IBFD 2013)) and today advises its elimination, as many academics maintain: Martín Jiménez, *supra* n. 30, at 7; Danon, *supra* n. 69, at 662.

This author believes, in any event, that the compatibility rules of Arts 7(2) and 7(17)a of the MLI cannot cause the PPT to apply in place of clauses in CTAs providing for the possible use of domestic GAARs in treaty contexts insofar as domestic GAARs cannot, as a general rule, be qualified as ‘provisions […] that deny all or part of the benefits that would otherwise be provided under the Covered Tax Agreement where the principal purpose or one of the principal purposes […] was to obtain those benefits’. This is the interpretation derived, with specific nuances, from the Explanatory Statement (pars 93–96) and, above all, the understanding of many signatories of the MLI. For example, Spain has not notified, as provisions described in Art. 7(2) MLI, the many existing clauses in its CTAs that allow the use of domestic GAARs in a conventional context (see The Kingdom of Spain, *Status of List of Reservations and Notifications at the Time of Signature* (2017), [https://www.oecd.org/tax/treaties/beps-mli-position-spain.pdf](https://www.oecd.org/tax/treaties/beps-mli-position-spain.pdf) (accessed 23 June 2021).


See example 2 *supra*.

In a negative sense: Danon, *supra* n. 69, at 660.


A. Báez Moreno and J. J. Zornoza Pérez, *Chapter 33, Spain*, in *GAARs – A Key Element of Tax Systems in the Post-BEPS World* 33.4 (M. Lang et al., eds, IBFD 2016) (60).

As has been precisely described in German doctrine, SAARs typically serve to determine the abusive character of frequently recurring patterns in a given regulatory context based on certain specific and typical application conditions thereby achieving a legally secure demarcation from acceptable transactions (R. Seer, J. Hey, J. Englisch & J. Hennrichs, *Tipke/Lang, Steuerrecht* 256 (Dr Otto Schmidt 2021).

For a description of these mixed contracts, see A. Báez Moreno, *Contract Splitting and Article 17 of the OECD Model: Is Source Taxation of Artistes and Sportsmen a New Dummensteuer?*, 68(3) Bull. for Int'l Tax'n (2014).


Lang, *supra* n. 25, at 658; De Broe & Luts, *supra* n. 97, at 133; Danon, *supra* n. 71, at 52–53.

Báez Moreno, *supra* n. 6, at 441.

As indicated above, the authors who claim to attribute to this heading a determining effect for the solution of the problem under discussion criticize the effects to which it leads; particularly: Lang, *supra* n. 25, at 658; De Broe & Luts, *supra* n. 97, at 133.

However, this argument may turn out to be the weakest of all those put forward since it could always be argued that the expression, in these treaties, does not refer to the LOB but to other SAARs contained therein.

For instance, Prof Palao when stating that: ‘The PPT rule states that it applies’ notwithstanding the other provisions of this Convention. paras 3 and 4 of the Commentary on the PPT rule (Prof Palao refers to original
BEPS documents) explain the meaning of this phrase with regard to the LOB provision (emphasis added) (Palao Taboada, supra n. 98, at 605).


105 In this vein: Ibid., at 146.


107 Báez Moreno & Zornoza Pérez, supra n. 94, at 33.4.


109 This is, in this author’s view, Professor Danon’s position in stating: ‘In the author’s opinion, para. 173 may be construed as meaning that the PPT rule remains applicable to the factual elements that are not covered by the relevant SAAR’. (Danon, supra n. 71, at 53).


111 As, in fact, German doctrine has ended up concluding: Englisch, supra n. 94, at 256.