The Meaning of the Principal Purpose Test: One Ring to Bind Them All?

Due to the introduction of the Multilateral Convention (MLI), an ever-growing number of the world’s international tax treaties will contain a treaty-based anti-avoidance rule known as the principal purpose test (PPT). These PPT provisions will almost certainly play an extremely important role in preventing international tax avoidance. With the introduction of such broad and powerful anti-avoidance rules comes the risk of individual countries, through their revenue authorities and their courts, developing divergent and state-centric views as to the interpretation of the PPT. This risk is quite considerable, and there are many reasons why a harmonized basis of interpretation may not, in reality, emerge. If courts pursue an individual and diverse approach to the interpretation of the PPT, the same transaction will be viewed as being effective in one jurisdiction and ineffective in another. From a broader perspective, this is undesirable, and it should not occur for policy and interpretative reasons. Why is the case for interpreting the PPT consistently, with a common meaning, so compelling? There is one major reason, and it is an obvious one: the PPT can now be found in thousands of treaties, and it is exactly the same test in all of these. It is clear that an international autonomous meaning is intended to be introduced through the uniform adoption of the PPT. A universal interpretation may be possible if courts and revenue authorities apply a consistent approach to interpretation. The approach, detailed in this article, suggests that international tax treaties should be interpreted in accordance with (i) the ordinary meaning of the text of the PPT; (ii) due consideration of the context and the MLI’s object and purpose; and (iii) consideration of how the MLI, as a successive treaty, relates to the covered tax agreement (CTA) that it amends. This article analyses the PPT rule from a normative position and sets out an appropriate basis for the approach to interpreting the PPT. Using all available sources and reports, including examples of the application of the test, this article provides a comprehensive framework for interpreting the PPT and answers the following questions, amongst others: (i) How is the PPT designed to override other provisions in the CTA (including other general anti-avoidance rules)? (ii) Is the substantive test based on an objective assessment of the arrangement or transaction or on the subjective position/mind of the taxpayer? (iii) Does the proviso place an onus of proof upon the taxpayer?

Craig Elliffe is a Professor of Taxation at the Faculty of Law at the University of Auckland and a consultant with Chapman Tripp, New Zealand. He would like to thank the Editor, Casey Plunket (in his individual capacity rather than that of the New Zealand Inland Revenue), Callum Burnett (in his individual capacity rather than that of a Judge’s clerk of the New Zealand High Court) and the anonymous reviewers for their comments while acknowledging that any errors are attributable only to himself.
1. Introduction

1.1. The Multilateral Instrument

In late 2015, the OECD and G20 countries adopted a 15-point Action Plan to address weaknesses in international tax rules. From that time on, the focus of international tax policymakers switched from diagnosing major problems and providing possible solutions to implementation of the Action Plan and monitoring behaviour.¹

On 7 June 2017, more than 70 countries participated in the historic signing of the Multilateral Convention (MLI).² This is a key part of the implementation strategy of the 15-point Action Plan.

The MLI is a remarkable achievement in the short history of the OECD BEPS Project and brings into play some new (for international tax people at least) treaty technology involving successive treaties that facilitates significant change in a very efficient manner. Time will tell whether the complexity of the MLI and, in some cases, its limited application to some


2. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (7 June 2017), Treaties IBFD [hereinafter MLI].
countries’ covered tax agreements (CTAs) make it as effective as it was originally intended. The MLI was originally discussed over a decade ago by the distinguished UK international tax lawyers Avery Jones and Baker.  

There are a number of items in the BEPS Action Plan that address issues that can only be implemented by changes to tax treaties themselves, and hence the need for the MLI. These include:

1. preventing the granting of treaty benefits in inappropriate circumstances. This work is described in the Final Report on Action 6;  
2. preventing the artificial avoidance of permanent establishment status. This work is described in the Final Report on Action 7;  
3. neutralizing the effects of hybrid mismatch arrangements that have a treaty facet. This work is described in the Final Report on Action 2; and  
4. providing improved mechanisms for dispute resolution. This work is described in the Final Report on Action 14.

Points (1) and (4) above (Action 6 and Action 14) contain two of the four minimum standards with which countries that have committed to the inclusive framework must comply. Accordingly, many countries have seen the MLI as a means to quickly and efficiently amend a significant number of their double tax agreements to meet these new minimum standards. Not just large countries have adopted the vehicle of the MLI as an instrument for change. Small countries, like New Zealand, find the MLI efficient to put these changes into effect, given their limited resources and their difficulty in attracting the attention of their larger trading partners.  

Whilst this might allow them to meet the minimum standards quickly, the question of the amount of resources required in administering the MLI and its changes remains unknown.

8. For an explanation of the objective and role of the Inclusive Framework, see http://www.oecd.org/tax/beps/beps-about.htm. As of Mar. 2018, the number of countries that are part of the Inclusive Framework was 113 and this list included most, if not all, of the major economies in the world.  
9. This view was expressed by Mike Williams, Director, Business and International Tax, HM Treasury at the International Fiscal Association Congress in Rio de Janeiro in Aug. 2017 with regard to the United Kingdom’s tax policy in respect of the MLI.  
10. When the MLI was referred to the New Zealand Parliament for ratification on 8 Aug. 2017, the accompanying National Interest Analysis advised the New Zealand Parliament as follows:  

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Craig Elliffe

The particular minimum standard that is the focus of this article is the requirement in Action 6. This is the obligation stating that countries should implement the common intention of eliminating double taxation “without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty shopping arrangements)” by adopting particular anti-avoidance rules in their treaty networks.

Three options are provided in Action 6. Countries could adopt (i) a principal purpose test (PPT) only; (ii) a PPT and either a simplified or detailed limitation-on-benefits (LOB) provision; or (iii) a detailed LOB provision, supplemented by a mechanism that would deal with conduit arrangements not already dealt with in tax treaties.

The anti-avoidance requirement of this minimum standard was met through the adoption of articles 6 and 7 of the MLI (designed to prevent treaty abuse).

The MLI introduces significant changes, but, arguably, the most significant of them is the introduction of the PPT, a view expressed by Baker when he wrote: “[U]nquestionably, the modification that is likely to have the most far-reaching effect is Article 7 on the prevention of treaty abuse.” The PPT has been universally adopted by jurisdictions that have entered into the MLI. In August 2017, the OECD reported, at the International Fiscal Association Congress in Rio de Janeiro, that all 70 signatories to the MLI had adopted the PPT.

1.2. Risks of inconsistent and diverse interpretations

One of the most significant debates in international tax scholarship is the extent to which an international tax regime exists and whether countries are constrained by their domestic tax legislations. The introduction of the PPT can be seen as a critical part of this discussion because, despite becoming widely incorporated into the world’s tax treaties, it is unclear how much discretion is being devolved from an international consensus to domestic, individual, state-centric views relating to the interpretation of the PPT.

The concern is that individual countries might develop inconsistent and irreconcilable views on the interpretation of the PPT. Commentators point out that this can occur at both the level of the tax authorities (officials) and at the level of judicial decision-making. Hattingh sees a potential problem in the transfer of discretionary power from national courts to fiscal authorities.

12. Id., at para. 22.
13. Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting p. 22, paras. 89-90 (7 June 2017), Treaties IBFD [hereinafter Explanatory Statement]. Of course, some countries may meet the minimum standard of preventing treaty abuse by other means, such as their bilateral treaty networks. The United States, which is not a signatory to or participating in any way in the MLI, but is a member of the Inclusive Framework, will presumably meet the minimum standard obligations by virtue of its extensive inclusion of limitation-on-benefits clauses in its treaty network.
15. Per M. Evers, an OECD adviser, as reported by S. Soong Johnston in Tax Notes International, p. 956 (2017). There are 70 signatories and 71 jurisdictions (with China having signed on behalf of Hong Kong), with 12 jurisdictions opting to supplement the principal purpose test (PPT) with a simplified limitation-on-benefits test. The OECD reported that an additional 30-40 countries were in the process of working towards signing at that time.
Baker sees the potential for the unpredictable interpretation of tax treaties in the application of the PPT to “undermine the whole system of tax treaty benefits.”

The possibility of countries not adopting an international autonomous meaning and substituting their own domestic views is very real, and the consequences are very problematic. Having inconsistent treatment of tax avoidance in different jurisdictions raises, on the one hand, issues of potential tax competition and, on the other hand, tax aggression to raise revenue. Countries might develop decisions that foster tax treaty shopping, for example, or alternatively create a general tax treaty anti-abuse doctrine. Eduardo Baistrocchi’s major book, which analyses a significant number of international tax treaty dispute cases, describes both types of behaviour as significant forms of “judicial activism” in tax treaty law.

However, even if this behaviour is not deliberate, inconsistency in interpretation is a concern when there is a clear intention for a common meaning amongst treaty partners. The lack of consistency in interpretation leads to a string of problems: costly litigation, commercial uncertainty, expensive administration and a potential reduction in cross-border investment.

One such area in which this recently occurred was in the interpretation of the term “beneficial ownership”. Even though the OECD has expressly stated that the meaning of beneficial ownership should be an internationally recognized common meaning (“it was intended to be interpreted in this context and not to refer to any technical meaning that it could have had under the domestic law of a specific country”), courts and tax authorities continue to develop the law in a way that, arguably, is at variance with the views expressed by the OECD.

The risk of domestic law (and practice) departing from an international autonomous meaning is particularly acute in the area of general anti-avoidance rules (GAARs), such as the PPT. This is because a GAAR is always drafted broadly and therefore cannot provide certainty of outcomes to taxpayers, revenue officials and the judiciary in the way that ordinary black-letter law provisions provide. The purpose of a treaty-based anti-avoidance rule is to anticipate and defeat unacceptable tax planning, which necessarily involves a test that is somewhat broad and imprecise in its legal language, together with the administration of the rule requiring a significant exercise of judgment.

### 1.3. The case for an autonomous common meaning

Given the above, if courts pursue an individual and diverse approach to the interpretation of the PPT, the same transaction will be viewed as being effective in one jurisdiction and
ineffective in another. From a broader perspective, this is unconscionable. If ever there was a need to examine the ordinary meaning of text in context and with the object and purpose of the treaty in mind, this is it.

Why is the case for interpreting the PPT consistently with a common meaning so compelling? There is one major reason, and it is an obvious one: it is exactly the same test found throughout the treaty networks around the world as a result of its introduction by the MLI. In other words, there are now anti-avoidance rules that have exactly the same wording in all of the thousands of treaties they are found in. Other ancillary reasons are linked to this major reason. Each PPT article has also exactly the same genesis, developed in the same BEPS framework and discussed in a series of documents prepared as part of the BEPS Project.

Against that background, this article sets out to provide some guidance on the interpretation of the PPT from a normative perspective. In section 2., the article introduces the text of the PPT. In section 3., the article considers the ordinary meaning of the test in the PPT. In section 4, it examines the context for interpreting the rule and, after assessing which aids in interpretation are appropriate, analyses the OECD’s view of when the test should be applied. Section 5. looks at the examples provided by the OECD in the application of the PPT and seeks to draw key conclusions on how the rule should be applied, before concluding in section 6.

2. What is the Principal Purpose Test?

The principal purpose test is contained in article 7 of the MLI and reads as follows:

Article 7 Prevention of Treaty Abuse

Notwithstanding any provisions of a Covered Tax Agreement, a benefit under the Covered Tax Agreement shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement.

A replica provision up for adoption in bilateral treaties is contained in the 2017 update to the OECD Model Tax Convention. As indicated in section 1.1., the Action 6 Final Report of the OECD/G20 proposed a variety of strategies to prevent the granting of treaty benefits in inappropriate circumstances. These include the introduction of a preamble in treaties that expressly provides that states enter into a tax treaty to eliminate double taxation without creating opportunities for tax evasion and avoidance, as well as the introduction of LOB clauses and the PPT. It is perhaps surprising that the vast majority of countries have elected solely to use the PPT, because while some countries are familiar with broad-based GAARs, other countries are not.
The PPT, as a GAAR, is designed to catch transactions where the LOB rule cannot extend and “to address other forms of treaty abuse, including Treaty shopping situations that would not be covered by the LOB rule”. The OECD Report states that the LOB rule has particular strengths, which include objective criteria that provide more certainty, together with a specific anti-abuse rule aimed at treaty shopping situations identified on the basis of criteria referencing the legal nature, ownership in and general activities of certain entities. The PPT is desirable when it goes places where the LOB rule does not, attacking forms of treaty abuse other than treaty shopping, as well as certain forms of treaty shopping, such as conduit financing arrangements.

Where does the PPT come from? It appears to have a mixed lineage. Certainly, there is a connection between the PPT and the so-called “guiding principle” that emerged from the changes made to the 2003 OECD Commentary. This principle provides that the benefits of a double tax convention “should not be available where a main purpose for entering into certain transactions” was to obtain a tax advantage contrary to the object and purpose of the provisions. In addition to this OECD connection, PPTs are found in both the US and UK treaty networks.

Hattingh references US tax treaty practice as a source of the PPT. A number of US treaties refer to the “principal purposes” of obtaining benefits. As a result, US jurisprudence discusses the PPT in the context of determining entitlement to treaty benefits and treaty shopping. The 2017 decision in "Starr International Company Inc. v. the USA" by the US District Court for the District of Columbia is a case in point, with the taxpayer attempting to persuade the court to review a decision taken by the US competent authority not to grant treaty benefits under the 1996 tax treaty between the United States and Switzerland.

Baker points to the PPT arising from the United Kingdom’s practice of including in their tax treaties “main purpose” provisions dealing with the passive income provisions (dividends, interest and royalties). This treaty practice significantly predates the guiding prin-

26. The limitation-on-benefits provision provides that only certain "persons" who meet strict requirements qualify for the benefits of the double tax treaty. By making sure that only certain people qualify, it significantly decreases the risk of treaty shopping and the use of conduit investments.
28. Id., at p. 19, para. 20.
29. Id.
31. Sec. 6 discusses the OECD’s tentative custodial claim to parentage (of the PPT as a child of this guiding principle) as a key aspect of interpretation.
34. US: District Court for the District of Columbia, 14 Aug. 2017, Case No 14-cv 01593 (CRC), 20 ITLR 94, "Starr International Company Inc. v. the USA".
ciple by some 20 years, but the lineage of the PPT is important only if it gives extra insight into how it should operate.

3. The Approach to Interpreting the PPT

The PPT, like any anti-avoidance rule, is drafted in a broad manner. This raises certain questions, such as how it relates to the black-letter distributive provisions of the covered tax agreement. There are three considerations required in interpreting the PPT. This interpretation involves, first, examining the ordinary meaning of the words in the test. Secondly, one must look at these words in a certain light. This is in light of what the parties intended when they concluded the treaties and used particular language. This teleological and contextual approach examines the ordinary meaning in a broader context, and in section 3.2., the author enquires as to where this context is to be found. Lastly, one must consider that they are interpreting two treaties and not just one. Article 30 of the Vienna Convention (VCLT) applies when there are successive treaties that apply to the same subject matter. Accordingly, in section 3.3., the author discusses how the MLI influences and overrides the existing treaty.

Although these considerations are listed sequentially, this is not necessarily the order that must be followed. Rather, it is necessary to consider all three aspects at some point in time in the process of interpretation.

3.1. The ordinary meaning of the text of the PPT

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. In many legal systems, this (i) has led to a focus on the clear meaning of the words used in the treaty, and then (ii) this focus is combined with due consideration of the purpose of the particular article and the treaty as a whole. This approach is summarized in the United Kingdom’s Supreme Court judgment in Anson v. Commissioners for Her Majesty’s Revenue and Customs (per Lord Reed), as follows:

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36. An example of this is the New Zealand Double Taxation Relief (United Kingdom) Order 1984, which is still in force after more than 3 decades. Para. 11(6) provides as follows: “The provisions of this Article shall not apply that was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the shares or other rights in respect of which a dividend is paid to take advantage of this Article by means of that creation or assignment.”
37. This is discussed further in sec. 4.2., where reference is made to the general anti-avoidance rule (GAAR) of the United Kingdom.
38. An examination from the perspective of the object and purpose of the treaty.
39. An examination from the perspective of the context of the treaty, usually derived from clear statements in the treaty or documents or aids in interpretation prepared contemporaneously. See N. Shelton, Interpretation and Application of Tax Treaties p. 166 (LexisNexis UK 2004), where he discusses the three main approaches to treaty interpretation: (i) textual (the ordinary meaning of the words); (ii) the intention of the parties’ approach (the attempt to ascertain the parties’ intentions); and (iii) teleological (the attempt to ascertain the treaty’s aims and objectives).
41. Art. 31(1) VCLT.
42. R. Gardiner, Treaty Interpretation p. 164 (OUP 2015): “It is the treaty which is to be interpreted; it is the terms whose ordinary meaning is to be the starting point, their context moderating selections of that meaning, and the process being further eliminated by the treaty’s object and purpose.”
44. UK: Supreme Court, 1 July 2015, [2015] UKSC 44, Anson v. Commissioners for Her Majesty’s Revenue and Customs, para. 56.
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56. Put shortly, the aim of interpretation of the treaty is therefore to establish, by objective and rational means, the common intention which can be ascribed to the parties. That intention is ascertained by considering the ordinary meaning of the terms of the treaty in their context and in the light of the treaty’s object and purpose. 45

In ascertaining the ordinary contextual meaning, a treaty should be construed in a broad manner, indicating its international origin, reflecting “the fact that a treaty is a text agreed upon by negotiation between the contracting governments”. 46 This can allow for a degree of pragmatism that may be necessary in “some circumstances if the object of the Convention is to be achieved”. 47 In common law jurisdictions, courts have generally taken the view that it is not a narrow domestic view of the words that are required, but rather a broad purposive interpretation of the goals and objects of the Convention. 48

As indicated above in the Anson decision, it is essential to consider why the PPT has been introduced.

3.2. Context and the treaty’s object and purpose

While international tax treaties have dual purposes, 49 the MLI is an instrument designed specifically to counter concerns of BEPS. The MLI’s full title expressly states that the purpose of the treaty is singular, namely to implement measures designed to prevent tax avoidance. Consequently, it is in this general context that the various provisions of the MLI are be interpreted. In addition to the full title defining the purpose of the treaty, the preamble provides context.

Article 6 of the MLI introduces new preamble language. 50 The treaty is intended to apply “without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions)”. 51

The VCLT not only makes it clear that treaties shall be interpreted “in their context” and in light of their “object and purpose” in article 31(1), but clarifies, in article 31(2), that the

45. Lord Reed continues in para. 56 to discuss how subsequent agreement as to the interpretation of the treaty and subsequent practice that establishes agreement can be taken into account together with a broader range of references in order to confirm the meaning arrived at with the primary approach or in circumstances in which there is an ambiguous or obscure meaning or that leads to a result that is manifestly absurd or unreasonable.


47. Id., at [114].


49. Significant changes were made to the OECD Commentary in 2003. The position now taken by the OECD is that the purpose of a tax treaty is twofold: (i) to eliminate international double taxation; and (ii) to prevent tax avoidance and evasion (see para. 7 OECD Model: Commentary on Article 1 (2017)).

50. Most signatories to the MLI have adopted art. 6, which provides language that reflects a minimum standard for protection against the abuse of tax treaties. It is possible for a party to reserve the right for the preamble text not to apply in accordance with para. 4 of art. 6, but this is limited.

51. Art. 6(1) MLI.
“context for the purpose of the interpretation of a treaty” shall “include its preamble”.52 The new preamble will replace any existing preamble (or the absence of any existing preamble).53

In addition to the full title and preamble that are part of the context of the treaty, various aids in the interpretation of the PPT exist.54 These include three important documents, prepared roughly at the same time as the text of the PPT, in the MLI and the 2017 OECD Model update.55 They are the Explanatory Statement to the MLI,56 the Final Report on Action 6 and the draft contents of the 2017 update to the OECD Model Tax Convention (the 2017 OECD Commentary Update).57 They are all important, but they serve slightly different purposes.

The Explanatory Statement “is intended to clarify the operation of the Convention to modify Covered Tax Agreements”.58 Its primary function is to indicate how the MLI relates to the pre-existing double tax treaty. In this sense, it is an extremely important document, but it is more important in the next part of this process of interpretation: as discussed in section 3.3, how do successive treaties relate to each other?

The Explanatory Statement was not intended to address the actual interpretation of the underlying BEPS measures because the Final Report on Action 6 had already discussed many of the issues. The Final Report on Action 6, of course, proposed various anti-abuse rules expressly for inclusion in the MLI, but nearly 15% of that Final Report was exclusively devoted to discussing the PPT. This was “the commentary that was developed during the course of the BEPS Project and reflected in the Final BEPS Package”.59 Accordingly, the Final Report on Action 6 provides a great deal of assistance in the interpretation of the PPT, including ten examples of the application of the test in different factual situations.

The third source of interpretive assistance comes from the 2017 OECD Model update. Article 29 is a new article in the OECD Model, and its paragraph 9 provides a PPT that is the same as that in the MLI, modified only in ways that reflect the difference between a bilateral and a multilateral approach. The 2017 OECD Model update and, in particular, the commentary on it, provide an opportunity for the Committee of Fiscal Affairs to discuss the framework around the implementation of the PPT in a bilateral treaty. In particular, this enables an in-depth discussion about the relationship of the PPT with other anti-avoidance

52. The importance of the preamble is also noted in the Commentary on the 1966 Draft of the Vienna Convention on the Law of Treaties, where it states that the International Court of Justice “has more than once had recourse to the statement of the object and purpose of the treaty in the preamble in order to interpret a particular provision”. See United Nations, Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, vol. II, p. 221 (1966).
53. See sec. 3.3., where the issue of compatibility clauses in successive treaties is discussed.
54. Courts around the world seem to have no issue with referring to extrinsic materials to confirm the meaning of the text, but it should be noted that even in judicial systems that have regular recourse to extrinsic materials to assist in interpreting international tax treaties, the practice of doing so is inconsistent. A recent New Zealand Court of Appeal decision (NZ: Court of Appeal, 18 Mar. 2018, [2018] NZCA 38, Commissioner of Inland Revenue v. Lin), considering whether a tax credit was allowable, is a case in point. The Court of Appeal focused exclusively on the text of the treaty and refused to refer to any additional extrinsic material in order to determine the meaning of the terms of the treaty.
55. The updated OECD Model (2017) and the associated changes to the Commentary of course are subsequent to the Final Report on Action 6 and the Explanatory Statement.
57. Draft contents of the 2017 update to the OECD Model Tax Convention (11 July 2017), which was formally adopted by the OECD on 21 Nov. 2017.
58. Explanatory Statement, supra n. 13, at [12].
59. Id.
provisions. These include domestic legislation GAARs, the guiding principles previously established in the 2003 OECD Commentary and specific anti-avoidance rules in the treaty itself.

In summary, the most significant contextual aspects of the PPT and the clearest statements about the objects and purpose of the MLI are provided by the MLI itself in its full title and preamble. The second most directly important document, from the perspective of interpretation, is the Final Report on Action 6, because it reflects the view of the OECD and G20 countries in formulating and proposing the PPT. The numerous examples given in the Final Report on Action 6 are very helpful interpretive aids and give an opportunity, with a discretionary test, to provide some consistency of interpretation around the world.

The Explanatory Statement provides direct assistance on the relationship of the MLI to the affected bilateral treaties, whilst the 2017 OECD Model update provides helpful guidance on the relationship of the PPT to other existing (or proposed) anti-avoidance provisions.

3.3. How do successive treaties relate to each other?

As indicated in section 1.1., the MLI is an instrument designed to modify existing bilateral tax treaties. Accordingly, article 30 of the VCLT applies, with rules that govern the interaction of successive treaties dealing with the same subject matter. The rights and obligations of states that are parties to such successive treaties are made clearer by these rules. It is not intended in this article to fully discuss all of these principles, but to focus simply on a few critical issues relevant to the PPT. The two general principles are described in sections 3.3.1. and 3.3.2.

3.3.1. The compatibility principle

Article 30(2) of the VCLT provides that when a treaty specifies that it is subject to another treaty, that other treaty will prevail. It is also possible for a treaty to specify that it overrides an existing treaty. These interlocking or relationship-associated provisions are commonly known as “compatibility clauses”. There are four relevant compatibility clauses identified in the Explanatory Statement. Each of these clauses applies a type of interpretive “code”.

The relevant compatibility clauses for the PPT are those that apply “in place of or in the absence of” an existing provision in a CTA. When the PPT is introduced according to the MLI “in place of or in the absence of” an existing provision in a CTA, it means that the PPT will apply in all cases. This type of compatibility clause replaces an existing provision in the CTA with the PPT provision found in the MLI and, in the absence of any existing provision in the CTA, introduces the new text of the PPT.

61. Id., at pp. 57-65.
62. Id., at pp. 68-75.
63. For a more comprehensive discussion, see N. Bravo, The Multilateral Tax Instrument and Its Relationship with Tax Treaties, 8 World Tax J. 3, p. 279 (2016), Journals IBFD.
64. Explanatory Statement, supra n. 13, at para. 15.
65. For example, when a provision in the MLI applies “in place of” an existing provision in the covered tax agreement (CTA), the new provision will only apply if the existing provision exists in the CTA. If the existing provision in the CTA does not exist, then the new provision does not apply.
Overriding an existing treaty with a new rule or test by using the compatibility clause “in place of or in the absence of” an existing provision is really another form of the *lex posterior* principle, which is referred to in section 3.3.2.67

3.3.2. *The lex posterior principle*

In circumstances in which the new treaty is between the same parties as the earlier treaty and the first treaty has not been terminated, the ordinary rule of treaty interpretation contained in article 30(3) of the VCLT applies.68 This is known as the *lex posterior* rule and is based on the principle of contractual freedom and the right of states to change their treaty positions/agreements over time. Accordingly, the latest concluded agreement in time prevails over the earlier, suspending the provisions of the earlier treaty that are in conflict with the later provisions.

With these principles of interpretation in mind, the author now turns to the text of the rule with a view to ascertain its ordinary meaning.

4. Interpreting the PPT

The rule of interpretation for the terms used in a treaty that are not defined is that they shall have the meaning under the domestic law of the applicable state unless the context otherwise requires. This is often simplified to the question of whether one should use the domestic meaning of a term or an autonomous international meaning. The use of an international meaning is authorized by the agreement of many states and the common understanding shared by them when they use the term. Usually, this common understanding is recorded in the OECD Commentary, but it could be found in the Final Report on Action 6 or the Explanatory Statement. For the purposes of this discussion, these OECD materials are collectively referred to as the “new OECD Commentaries”.

Before embarking on this task of trying to determine the meaning of the words of the PPT, it is worth reflecting on whether the new OECD Commentaries have full authority to establish a reference point for this “common understanding”. There are several reasons why this might be problematic.

The first is what might be described as the legitimacy of the BEPS programme and the potential that it is not universally accepted. Valderrama has raised arguments to suggest that while the G20 and OECD countries are politically bound by the decisions of their international organizations in setting the agenda for the BEPS Project and agreeing on the formulation of the new OECD Commentaries, the same cannot be said for the many countries that have signed the MLI that are not members of either of the two bodies that conceived the BEPS Project.69 Other scholars raise notes of caution about the small number of countries that seem to hold tight control over the policy-making process, suggesting that such a new international tax order in which a defined group of controlling countries in the

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67. Id., at para. 16.
68. Art. 30(3) VCLT reads as follows: “When all the parties to the earlier treaty parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”
OECD and G20 cannot be easily reconciled to a general common understanding held by others outside this defined group.\textsuperscript{70}

The second reason to be cautious about relying on the explanatory statements provided by the OECD is their sheer newness. Vogel suggested that statements in the new OECD Commentaries could only attain the status of an “international tax language” when “enough time had lapsed for the amendment to seep through to the common consciousness of international tax experts who are not members of Working Party No. 1”.\textsuperscript{71} He suggested that a period of 10 years might be necessary to elapse before the term could constitute a “special meaning” as referred to in paragraph 4 of the VCLT.\textsuperscript{72} He also cautioned that commentaries that acquire a “special meaning” should only be assumed “between OECD Member countries”.\textsuperscript{73}

The third problem is the universal application of the new OECD Commentaries to domestic legal systems different than those of the United States and the United Kingdom, from which the PPT originates. Countries that have domestic GAARs or judicial concepts of anti-abuse will be more familiar with the approach taken by the PPT. It cannot be assumed that all jurisdictions will have consistent concepts of law, court processes (even if the court is the tribunal for the substantive proceedings) or even the same procedures for evidence.

As a result of these types of problems, it is still very early to speculate that the guidance embedded in the new OECD Commentaries will acquire a high status as a source of common understanding, particularly for non-OECD member countries. The process may, as Vogel suggested, take a longer period and even then be less harmonized than one might imagine or view as desirable. It is possible that tax treaty jurisprudence from different jurisdictions will converge, but it is equally possible that autonomous meanings for the various terms in the PPT will not be readily established.

As indicated, this article seeks to analyse the PPT from a normative position, and thus the starting point is to analyse what we have in front of us, recognizing that a harmonized interpretation and application of the PPT is somewhat idealistic and may not be a shared viewpoint.

Turning to this task, apart from the term “covered tax agreement”, there are no defined terms in article 7(1) of the MLI. Article 2(2) of the MLI says that if one is dealing with undefined terms, “unless the context otherwise requires”, the term should have the meaning that it has at that time under the relevant CTA.\textsuperscript{74} In effect, unless the exclusion of context is

\begin{footnotesize}
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\item 72. The view of Vogel of requiring a period of time before the new Commentary is assimilated with the common understanding of international tax experts was described as a “fundamental change” from that previously expressed in his writing. His earlier position was that the Commentary reflected either the ordinary meaning of the treaty terms (art. 31(1) VCLT) or a special meaning (art. 31(4) VCLT) and could be relied upon as a meaning that the parties intended. See the obituary by K. van Raad, \textit{Klaus Vogel 1930-2007}, 36 Intertax, p. 154 (2007).
\item 73. Vogel, supra n. 71.
\item 74. The use of the words “at that time” requires an ambulatory approach to interpretation and using the meaning under domestic taxation law at the time at which the CTA is being applied to the transaction.
\end{itemize}
\end{footnotesize}
applicable, the MLI refers us to article 3(2) of the 2014 OECD Model Tax Convention. In the case of the PPT, however, context is very important, supporting the use of an autonomous international meaning rather than a domestic meaning.

In most cases, the PPT is an introduction of a brand new treaty-based GAAR, and therefore there will not be a similar provision or similar language in the CTA. Even if there is an existing treaty-based GAAR in the CTA, the Explanatory Statement points away from a domestic law interpretation of any of the terms in the PPT. When discussing article 2(2) of the MLI, the Explanatory Statement describes the context as including the purpose of the MLI described in the Explanatory Statement, as well as those of the CTAs modified by article 6 of the MLI. The description in the Explanatory Statement is clear: “[I]n this regard, the object and purpose of the Convention (MLI) is to implement the tax treaty-related BEPS measures.” Therefore, in finding the meaning of an undefined term, the Explanatory Statement declares that “the commentary that was developed during the course of the BEPS Project and reflected in the final BEPS Package has particular relevance in this regard”.

Article 7(1) has three critical components. The override instruction occurs at the commencement of the test, which starts “notwithstanding any provisions of a CTA”. The second component is the “substantive test”, which has also been termed the “reasonableness test”. This test requires an objective assessment to see “if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement”. The third component is the exclusion clause, which begins “unless it is established that granting that benefit in these circumstances would be in accordance with the object and purposes of the relevant provisions of the CTA”.

The above discussion gives insight into how a court might approach interpreting the PPT using the various texts, contexts and aids in interpretation. The starting point – assuming that the court hears the dispute as a substantive matter – is the ordinary meaning of the various terms.

75. The OECD Model (2014) reads as follows:
   Article 3(2) As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that state for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.


77. Id., at para. 12.

78. Id.


80. The remedy for the taxpayer may not be a substantive tax avoidance case involving the PPT. Invoking the PPT by one state may potentially lead to a dispute between the competent authorities of both states if the other state does not agree. An example of a non-substantive tax avoidance case is the decision in US: District Court for the District of Columbia, 14 Aug. 2017, 14-cv 01593 (CRC), 20 ITLR 94, Starr International Company Inc. v. the USA. In that case, the competent authority denied the taxpayer’s request for treaty benefits on the basis that it could not “conclude that obtaining Treaty benefits was not at least one of the principal purposes for moving Starr’s management, and therefore its residency, to Switzerland”. The consequence of this was the need for the taxpayer to take administrative law action to determine whether the competent authority in the United States had been reasonable in its response of declining the benefits of the treaty.
4.1. The override

The PPT begins with a simple command that, “notwithstanding any provisions of a CTA, a benefit under the CTA shall not be granted”. The Oxford English Dictionary\textsuperscript{81} describes “notwithstanding” as meaning “in spite of” when used as a simple positional object, which is its use here. The PPT is therefore clearly designed to override “any provisions of a Covered Tax Agreement”. The ordinary meaning is so clear that there is no comment in the Final Report on Action 6 regarding this override. The purpose of an anti-avoidance rule is to prevent ordinary application of the substantive rules in the rest of the CTA that allocate (or limit) taxing rights.

Article 7(2) of the MLI is a compatibility clause. It reads, “paragraph 1 shall apply in place of or in the absence of provisions of a CTA that deny all or part of the benefits that would otherwise be provided under the CTA” [emphasis added]. This type of compatibility clause has the dual effect of introducing (or substituting) the PPT depending on whether the CTA has an existing general anti-avoidance provision.\textsuperscript{82} If there was previously no general or specific anti-avoidance rules in the CTA, the new PPT obviously applies, but existing PPTs in the CTA may apply in a limited way to specific articles, such as those on the dividends, interest, royalties, income from employment and other income and the elimination of double taxation provisions. The use of the term “all or part of the benefits” is intended to ensure that these narrower (more specific) avoidance rules are replaced with the broader PPT in article 7(1).\textsuperscript{83} The ordinary meaning of “notwithstanding any provisions of a CTA” would also strongly suggest that the PPT replaces any specific anti-avoidance rules found in the CTA.

While the override referred to above applies to the anti-avoidance rules found in the CTA, more complex issues relate to the relationship between domestic anti-avoidance rules and the PPT.\textsuperscript{84} The general proposition is that the provisions of the treaty override domestic law,\textsuperscript{85} but, since 2003 at least, it is strongly arguable that significant changes made to the OECD Commentary make it clear that GAARs will operate and can be reconciled with the provisions of double tax treaties when these treaties were entered into after that date.\textsuperscript{86} The Final Report on Action 6 encourages states to include “a savings clause” in their treaties\textsuperscript{87} to preserve their right to deny benefits to their residents who would otherwise claim that a domestic anti-abuse rule is overwritten by a treaty provision.\textsuperscript{88}

\textsuperscript{82} See sec. 3.3.; and Explanatory Statement, supra n. 13, at para. 15.
\textsuperscript{83} Explanatory Statement, supra n. 13, at para 94.
\textsuperscript{84} See L. De Broe, Fighting Treaty Shopping After the Multilateral Instrument, in Tax Treaties After the BEPS Project p. 91 (B. Arnold ed., Canadian Tax Foundation 2018). Although this important area is outside the scope of this particular article, clearly a court must consider the relationship between domestic law and GAARs and domestic anti-abuse measures (such as controlled foreign corporation rules, thin capitalization and exit taxes).
\textsuperscript{87} By including art. 1(3) OECD Model (2017) or adopting the optional savings clause in art. 11 MLI.
\textsuperscript{88} See De Broe, Tax Treaty and the EU Law aspects of the LOB and PPT provision, in R. Danon (ed.), Base Erosion and Profit Shifting (BEPS): Impact for European and International Tax Policy pp. 203-204 (Schulthess 2016); and De Broe, supra n. 85, at pp. 91, 94 and 104.
4.2. The substantive test

The PPT provides that a benefit under the CTA is not available “if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit”.

There are several key elements of the substantive test in the PPT. Looking first at the term “reasonable to conclude”, the Oxford English Dictionary defines “reasonable” to mean “within the limits of what it would be rational or sensible to expect; not extravagant or excessive; moderate”. The term “conclude” means “to arrive by reasoning at a judgement or opinion; to come to a conclusion, draw an inference, infer, deduce”. A court or tax authority should only come to such a conclusion after considering “all relevant facts and circumstances” (in other words, taking into account all relevant circumstances and rationally and sensibly coming to a conclusion). To what extent, then, should one consider the taxpayer’s intention or motive in undertaking the transaction?

4.2.1. An objective assessment: A reasonable conclusion, having regard to all relevant facts and circumstances

A subjective test is a test of a person’s conduct based on what the person actually believed or knew at the time of the conduct, whereas an objective test assesses the conduct, mental state or behaviour of a person or the quality of a thing by reference to a standard that is external to the person who or the thing that is being assessed. There has been some academic debate as to whether the PPT is a subjective or objective test. Before answering which of these two options the PPT applies, it is worth noting that the terms “subjective” and “objective” may have different meanings in different jurisdictions.

Many civil law jurisdictions have both objective and subjective elements regarding the concept of tax abuse. The Belgian GAAR, for instance, has two elements, one of which is subjective so that “the intention of the taxpayer matters”. In some jurisdictions, such as France, this subjective element is assessed on the basis of “the intended goals and not of all the effects of the operation”, although the intention of the taxpayer is still part of the subjective part of the test. The position in Germany is different, but is acknowledged by scholars as controversial. Although the requirement in German legislation is that the taxpayer must act with the intent to circumvent the applicable tax law, “some scholars reject the pre-

90. Id.
91. See Lang, BEPS Action 6: Introducing an Antiabuse Rule in Tax Treaties, 74 Tax Notes International 7, p. 658 (2014). In examining an early draft of the PPT, the learned author wrote that “the essential application requirement proposed rule is the subjective criterion”. It is also described as “the subjective test” in an excellent article by L. De Broe & J. Luts, BEPS Action 6: Tax Treaty Abuse, 43 Intertax 2, p. 134 (2015). In contrast, Weber, supra n. 79, prefers the objective analysis, which is a view shared by the author of this article.
92. M. Bourgeois & A. Nollet, Belgium, in GAARs – A Key Element of Tax Systems in the Post-BEPS Tax World p. 94 (M. Lang et al. eds., IBFD 2016), Online Books IBFD.
94. K. Druen, Germany, in GAARs – A Key Element of Tax Systems in the Post-BEPS Tax World p. 291 (M. Lang et al. eds., IBFD 2016), Online Books IBFD.
requisite of an intention of abuse, arguing that tax law should be purely objective and focus on economic facts and the effects of the taxpayer’s behaviour rather than on his motives.”

In some jurisdictions, therefore, the use of the term “subjective” may involve an assessment of the behaviour, structure or transactions that the taxpayer has embarked upon by reference to factors external to the taxpayer’s intention and motives. These would normally be described as objective factors. Mitroyanni, writing about the EU Commission’s recommendation of 6 December 2012 on Aggressive Tax Planning, illustrates the point that sometimes the two terms are used interchangeably:

This is worth clarifying because in contrast to what the term “subjective” suggests, the test for finding a tax avoidance purpose turns out to be based on objective evidence rather than an inference regarding the “personal” intentions of the taxpayer [...].

The Common law has had similar issues, but frequently uses the technique of “reasonableness” to clarify that the test should be objective. This legislative technique is particularly used in common-law general anti-avoidance provisions. As Krever describes:

Although the concept of a “purpose” sounds inherently subjective, it can be fashioned in a more objective manner by, for example, adopting an objective test such as whether it is reasonable to conclude the taxpayer’s main purpose was to obtain a tax benefit.

In his book, Orow set out three principal policy options in which the concept of “purpose” can be employed relating to a GAAR. The first is purpose as a state-of-mind requirement. This option provides that the requirement of purpose may be tested and proven not only by inference alone, but also by direct evidence of the taxpayer’s state of mind. The second is purpose as an objective state of mind. This is an intermediate state in which the taxpayer’s state of mind or purposes are tested or proven only by inference from all the surrounding circumstances, without any evidence or reference to the taxpayer’s testimony. The third option states that purpose is an attribute of the arrangement. This is a purely objective approach that looks to the specific and particular attributes of the arrangement and determines its effects by reference to such attributes.

This policy framework allows us to examine the approach in civil law jurisdictions and to conclude that, in many circumstances, they will be operating under the first and second policy settings. In contrast, common-law jurisdictions may operate under the second and third policy settings.

The question posed in section 4.2.1. was to what extent one should consider the taxpayer’s intention or motive in undertaking the transaction when applying the PPT. The answer is, at least in theory, not at all. The focus on the taxpayer’s intention is not helpful because the wording of the test does not refer to the taxpayer’s state of mind, but requires an objective assessment of the principal purposes of the arrangement or transaction. The policy setting most directly applicable to the PPT is the third one mentioned above (purpose as an attribute of the arrangement).
bute of the arrangement). While a taxpayer’s subjective intention or motive might indicate one or more purposes for the transaction, that is not the focus of the test, and there is a reason for this.

The test instead involves looking at two different concepts that are intertwined: (i) a reasonable conclusion on objective criteria, relating to (ii) the principal purposes of the arrangement or transaction. With respect to the latter concept, it should be noted that it is the purpose of the arrangement or transaction that is being examined and not the purpose of the taxpayer. This is not merely semantics, and although it is strange to be talking about a transaction with a purpose, that is what the test prescribes. Normally, one would ascribe a purpose to the taxpayer rather than to the transaction. The question asked by the PPT is different: what is the purpose of the transaction, objectively examined, in terms of what is the end goal or outcome?\(^\text{100}\)

In the view of Weber, the “principal purpose is objectified by the reasonableness test”,\(^\text{101}\) and the context that he points to in the commentary found in the Final Report on Action 6 supports this approach.\(^\text{102}\)

To determine whether or not one of the principal purposes of any person concerned with an arrangement or transaction is to obtain benefits under the Convention, it is important to undertake an objective analysis of the aims and objects of all persons involved in putting that arrangement or transaction in place or being a party to it.

The Final Report on Action 6 goes on to make it clear that it is not necessary to find conclusive proof of the intent of a person concerned with an arrangement, “but it must be reasonable to conclude, after an objective analysis of the relevant facts and circumstances, that one of the principal purposes of the arrangement or transaction was to obtain the benefits of the tax convention”.\(^\text{103}\)

Similar tests are found in domestic legislation, and there is great comparability with the PPT and the wording in part of the GAAR test of the United Kingdom.\(^\text{104}\) As indicated earlier in this article,\(^\text{105}\) Baker believes that the PPT has grown out of the United Kingdom’s practice of including “main purpose” provisions in the dividends, interest and royalties articles of UK tax treaties over the last 30 years.\(^\text{106}\) Guidance from Her Majesty’s Revenue

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100. The Action 6 Final Report, at para. 10, refers interchangeably to the principal purposes of any person “concerned with an arrangement or transaction” and “the purposes of an arrangement or transaction”. Despite the OECD’s commentary in the Final Report, the words used in the PPT objectify the purpose by making it the principal purpose of the arrangement or transaction and not the taxpayer.

101. Weber, supra n. 79.


103. Id., at p. 58, para. 10.

104. A good example is the United Kingdom’s GAAR contained in Part 5 of the UK Finance Act 2013. Sec. 107(1)(a) provides: ‘Arrangements are ‘tax arrangements’ if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.”

105. At sec. 2.

and Customs107 and academic commentaries108 all suggest, given the substantially similar wording found in the UK GAAR to that found in the PPT, that the PPT should be interpreted as an objective test.

An objective assessment increases the likelihood of consistency in decision-making between different jurisdictions. It would clearly be inappropriate if two identical transactions resulted in one being regarded as subject to the PPT because one taxpayer was shown to have the required tax-avoidance motive or intention whereas the other did not. If the assessment is truly objective, two similar arrangements undertaken in different jurisdictions should be treated the same. This decision-making process in turn creates the opportunity for substantial precedential value for decision-making bodies (tax administrators or courts). Objectivity also means that it does not matter whose purpose it is. As Rosenblatt points out in his book, if the enquiry was a subjective one, then relevant people might include the taxpayer, third parties or scheme promoters.109

One further comment on the subjective/objective tests is necessary. Although the test is an objective one, it will be very hard for courts, when confronted with clear evidence of a taxpayer’s intention or motive to avoid tax, to disregard such evidence. Sometimes practice differs from this theory. One such example can be found in the landmark New Zealand Supreme Court decision of Ben Nevis, in which the Court sought to objectively determine the purpose of the tax arrangement.110 In this decision, the Court (and the previous two lower courts) repeated the text of a troublesome draft business plan, which contained the following telltale indicia of tax avoidance:111 “The real benefits of the deal are tax concessions that can be obtained now by the investors and the foundation [...] The actual outcome of the deal in 50 years’ time is not considered material.”

The approach of courts to evidence such as this tends to suggest that even in circumstances in which a court tries to only examine objective evidence, they will sometimes be strongly influenced by subjective matters. Tax avoidance is a complex matter, and most avoidance jurisprudence is similarly complicated and multifaceted.

107. See Her Majesty’s Revenue and Customs, General Anti-Abuse Rule (GAAR) Guidance (approved by the GAAR Advisory Panel with effect from 31 Mar. 2017), sec. C3.3: “The expression ‘reasonable to conclude’ shows that this is an objective test … It is neither necessary nor appropriate to enquire whether any particular person (for example the taxpayer himself, or a promoter of the arrangements, if there was one) actually had that intention.”

108. J. Freeman, United Kingdom, in GAARs – A Key Element of Tax Systems in the Post-BEPS Tax World p. 749 (M. Lang et al. eds., IBFD 2016), Online Books IBFD: “The words ‘it would be reasonable to conclude’ show that the main purpose test is in an objective one. It was considered that a sole purposes test would have been too easy to manipulate; it is almost always possible for a well advised taxpayer to construct some commercial purpose alongside the tax purpose.” See also P. Harris, The Profits Tax GAAR: An aid in the “Hopeless” Defence Against the Dark Arts, in Studies in the History of Tax Law p. 229 (P. Harris & D. de Cogan eds., Hart Publishing 2017), who refers to the UK GAAR terminology: “While it has been historically accepted that this is a subjective test, the change to ‘it would be reasonable to conclude’ suggested turns this into an objective test.”


111. Id., at para. 136.
4.2.2. One of the principal purposes of any arrangement or transaction

As indicated above in section 4.2.1., the PPT requires a court (or, in the first instance, a tax authority) to reach a reasonable conclusion based on objective criteria that one of the principal purposes of the arrangement or transaction was to obtain a tax benefit under the tax convention. What is the ordinary meaning of the phrase “one of the principal purposes”? The first thing to note is the obvious possibility of there being more than one of these principal purposes. Given that the word “principal” may sometimes mean the most important,\(^\text{112}\) it is likely that the term in this context means “of a number of things or persons, or one of their number: belonging to the first rank; among the most important; prominent, leading, main”.\(^\text{113}\) In the view of the OECD, obtaining a benefit under a tax convention\(^\text{114}\) “need not be the sole or dominant purpose of a particular arrangement or transaction. It is sufficient that at least one of the principal purposes was to obtain the benefit”.

If one prominent, leading or main purpose is to obtain the benefit, the PPT can apply. The OECD, in the Final Report on Action 6, gives an example of a person who wishes to sell a property for various reasons but becomes a resident of a contracting state prior to the transaction, with one of the principal purposes for doing so being the benefits of being resident under the tax convention.\(^\text{115}\) In such circumstances, the OECD says that the PPT can apply to the taxpayer’s arrangement notwithstanding the fact that that person had other principal purposes for changing their residence, such as facilitating the sale of the property or the reinvestment of the proceeds from the sale.\(^\text{116}\)

The term “purpose(s)” means:\(^\text{117}\)

- that which a person sets out to do or attain; an object in view; a determined intention or aim, and/or
- the reason for which something is done or made, or for which it exists; the result or effect intended or sought; the end to which an object or action is directed; aim.

A central theme in both of these definitions is that the term “purpose” looks to the end object that the transaction or arrangement is seeking to achieve.

The interpretation of “purpose” has not been equated to “intention”. For many years, common law courts, including the Privy Council, have battled with the difference between these two words and their slight but significant difference in meaning.\(^\text{118}\) One of the more helpful decisions demonstrating the difference between purpose and intention is Plimmer.\(^\text{119}\)

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\(^{113}\) Id., when the term “principal” is used as an adjective.


\(^{115}\) Id., at para. 12.

\(^{116}\) The breadth of this test has been strongly criticized as being fundamentally problematic for denying treaty benefits to taxpayers merely because one of their principal motives was obtaining those benefits. It is argued that tax treaties are designed to provide opportunities for rational businesspeople to consider and that the PPT should only be applied if the transaction or arrangement was solely, or at least predominantly, inspired by tax benefits. See De Broe & Luts, supra n. 91, at p. 135.


taxing provision in the New Zealand legislation\(^\text{120}\) declared that if property was acquired for the “purpose of selling” then it would be taxable. In the Plimmer decision, the taxpayers sought to acquire all the ordinary shares in a newspaper company and thus acquire control. The taxpayer could only do so by buying both preference and ordinary shares, but it was always the intention of the taxpayers to sell the preference shares immediately in order to repay loans. Although they had the intention of selling the preference shares, it was held that the taxpayers had the purpose of purchasing the preference shares as part of a broader objective of enabling the acquisition of the newspaper company. Accordingly, the taxpayers did not have the required purpose of resale.

These cases suggest that when a court is looking to ascertain the purpose of a transaction or arrangement, it will examine the overall objective behind the transaction and not necessarily what the taxpayer intends. In this sense, the use of the term “purposes” reinforces the objective assessment of the arrangement and/or transaction by diminishing the subjective intention of the taxpayer.

4.2.3. Some broad terms: “Benefit”, “arrangement or transaction”, “resulted directly or indirectly”

The substantive test operates to prevent the granting of a “benefit” under a CTA. The word “benefit” can be used as either a noun or a verb, but it is used in the former capacity in the PPT. The ordinary meaning of the term is an “advantage, profit, good”.\(^\text{121}\) In the international tax world, the benefits under a treaty are usually the same as relief provided by the CTA from taxation (particularly double taxation).\(^\text{122}\) The Final Report on Action 6 confirms that the term “benefit” refers to “all limitations (e.g. a tax reduction, exemption, deferral or refund) on taxation imposed by the State of source under Articles 6 through 22 of the Convention”.\(^\text{123}\) In addition to the substantive provisions dealing with the allocation of taxing rights, the Final Report on Action 6 also includes benefits arising in respect of taxation imposed by the state of residence under article 23 (methods for elimination of double taxation) and article 24 (non-discrimination) of the OECD Model. Despite the broad definition of a “benefit”, it is always necessary to think about whether the benefit is provided under the relevant CTA, because a benefit provided under domestic law exclusively or under other treaties are outside the scope of the PPT.\(^\text{124}\)

The PPT can apply to “any arrangement or transaction”. The Final Report on Action 6 makes it clear that these terms should be interpreted broadly and include “any agreement, understanding, scheme, transaction or series of transactions, whether or not they are legally enforceable”.\(^\text{125}\)

\(^{120}\) NZ: Land and Income Tax Act 1923, sec. 79(1)(c).


\(^{122}\) Introduction to the OECD Model (2014):

\[\text{[17]}\] [...] The main part is made up of Chapters III to V, which settle to what extent each of the two Contracting States may tax income and capital and how international juridical double taxation is to be eliminated [...] \(^{123}\) Action 6 Final Report, Part B, at para. 7 at p 56. Specific examples given are the limited rights of taxation under the passive income articles ((10), (11) and (12)) and limitations on the taxing rights over a capital gain on the alienation of movable property (art. 13).

\(^{124}\) Lang, supra n. 91, at p. 656.

\(^{125}\) Action 6 Final Report, Part B, at 9 at p 57.
As the OECD notes, one transaction may result in a benefit, or it could be a whole series of transactions.\textsuperscript{126} The experience of jurisdictions dealing with domestic GAARs is that this question of “what is the arrangement?” becomes problematic when there is one dubious and obviously tax-related benefit that arises from one part of the transaction that is only a small component of a much larger series of commercial transactions. This may be relevant when the taxpayer is trying to establish that granting the benefit would be in accordance with the object and purpose of the relevant provisions of the CTA. The New Zealand Supreme Court grappled with such a case, concluding that even a single step in the transaction could be problematic for the overall series of transactions making up the overall arrangement.\textsuperscript{127}

Finally, the substantive test proposes that the disregarded benefit arises from any arrangement or transaction that “resulted directly or indirectly in that benefit”. The phrase is “deliberately broad and is intended to include situations where the person who claims the application of the benefits under a tax treaty may do so with respect to a transaction that is not the one that was undertaken for one of the principal purposes of obtaining that treaty benefit”.\textsuperscript{128}

An example is given of a parent company acquiring the shares and debts of a company resident in a source jurisdiction that does not have a treaty with the resident parent’s country. As a result, withholding tax on interest payable under the debt instrument is subject to 25% withholding tax. The transfer of the loan to a subsidiary of the parent company based in a country that does have a treaty with the source jurisdiction could be an example in which the benefit of reduced withholding tax results indirectly from the transfer of the loan. The decision to transfer the loan to a jurisdiction when the source jurisdiction has agreed to limit their withholding tax to nil could be one of the principal purposes of transferring the loan. The conclusion reached by the OECD in this example is that the PPT could apply notwithstanding the following valid commercially based transactions: (i) the original loan creating the obligation to pay interest; and (ii) the acquisition of the shares and debts by the parent company.

In summary, the terms “benefit”, “arrangement or transaction” and “resulted directly or indirectly” will be interpreted broadly and purposively based on this guidance.

4.3. The proviso

The substantive test has a proviso. It provides that the PPT shall apply “unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the CTA”. Several key terms in the proviso require consideration. The word “unless”, in its ordinary meaning, is a conjunction “used to introduce a statement expressing a case in which an exception to a preceding (or following)

\textsuperscript{126.} Id.
\textsuperscript{127.} See NZ: Supreme Court, 24 Aug. 2011, [2012] 1 NZLR 433, Penny v. Commissioner of Inland Revenue:
[33] The structure both taxpayers adopted when they transferred their businesses (orthopaedic practices) to companies owned by their family trusts was, as a structure, entirely lawful and unremarkable. The adoption of such a familiar trading structure cannot per se be said to involve tax avoidance. It was a choice the taxpayers were entitled to make […]
[34] Tax avoidance can be found in an individual step in a wider arrangement. That step, when taken, can make the wider arrangement a tax avoidance arrangement […]
\textsuperscript{128.} Action 6 Final Report, Part B, at 8 at p 57.
statement will or may exist: except if [...]”.129 “Unless”, accordingly, links the substantive test to the exception or proviso, meaning that the PPT will not apply if it is “established” that granting that benefit would be in accordance with the object and purpose of the relevant provisions of the Covered Tax Agreement. To “establish” something is “to place beyond dispute; to prove (a proposition, claim, accusation)”130

Another more contemporary meaning is “to determine or ascertain; to find out”131 or “to cause to be accepted”.132 A possible construction is that the PPT might not apply when the court simply accepts that the granting of the benefit would be in accordance with the object and purpose of the CTA, i.e. when there is no onus or burden placed on any party. This begs the question, however, of which party to the dispute will raise and argue that the proviso applies. Clearly, that will most likely be the taxpayer.133

In its ordinary meaning, the substantive PPT rule will apply unless someone can prove or cause to be accepted that the granting of the benefit meets the object and purpose of the relevant treaty provisions. There is a surprising lack of discussion in the Final Report on Action 6 on the proviso. All that is said is: “[T]he last part of the paragraph allows the person to whom the benefit would otherwise be denied the possibility of establishing that obtaining the benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention” [emphasis added].134

This OECD commentary in the Final Report on Action 6 suggests that it is, of course, the taxpayer (the person otherwise denied the possibility of the benefit) who must establish or prove that the granting of the benefit was in accordance with the treaty. It is unlikely that the tax authority that invoked the substantive test of the PPT would then be tasked with the need to prove compliance with the treaty’s object and purpose. To summarize, the language of the proviso, together with the commentary in the Final Report on Action 6, supports the view that there is an onus on the taxpayer to prove that the PPT rule should not apply. This onus can only be discharged by establishing that the granting of the benefit meets the object and purpose of the relevant treaty provisions.

Quite a few leading academic commentators have criticized the PPT regarding this aspect of the burden of proof falling on the taxpayer. For instance, it is argued that the PPT leaves too much discretionary power with the tax authorities and may not meet some countries’ constitutional requirements for “inconspicuously” altering the burden of proof regarding treaty abuse.135 In early drafts of the PPT, the difference in the procedural standards stimulated the comment that “the bias in favour of the tax authorities is downright palpable”.136

130. Id., see the definition of Establish, in the Oxford English Dictionary (3rd ed., 2003), at 6 (a).
131. Id.
133. While this may be true for a substantive PPT tax avoidance dispute, it may also be that the taxpayer seeks to challenge the actions of the Competent Authority by way of administrative law and a review of the decision-making process. In such a circumstance, the competent authority will need to show that his mind was rationally applied to every aspect of the PPT, including consideration of the object and purpose of the tax treaty. In such a circumstance, it is possible that the tax administration might need to establish the application (or lack thereof) of the proviso.
135. De Broe & Luts, supra n. 91, at pp. 132 and 146. See also De Broe, supra n. 85, at p. 101.
136. Lang, supra n. 91, at p. 660.
When the OECD’s Discussion Draft on Action 6 was released, many submitters (such as Business Europe and other advisors)\textsuperscript{137} also highlighted that the new PPT was establishing an onus on the taxpayer to establish that the granting of the benefit was in accordance with the treaty and that this was strongly undesirable.\textsuperscript{138}

Kuzniacki cautions about the strength of the reaction by commentators.\textsuperscript{139} He suggests that the outrage about this onus is a little overstated, arguing that the onus of proof frequently lies with taxpayers in their disputes. This is certainly true for common-law taxpayers in tax matters, and in civil law countries where anti-abuse rules are applied, it is common for the burden of proof to be switched from the tax authorities to taxpayers.\textsuperscript{140} Becoming used to onerous obligations does not make them any more palatable.

5. Application of the PPT

As was previously discussed in section 3., there is quite significant guidance on – and context to – the application of the PPT.\textsuperscript{141} This is found in various documents, including, of course, the MLI itself. Of particular interest to the practical application of the PPT rule are the ten examples of the application of the test provided in the Final Report on Action 6.\textsuperscript{142} Using examples to illustrate the application of a GAAR has proved to be a profoundly helpful device for tax administrators and taxpayers alike.\textsuperscript{143} Unfortunately, the examples in the Final Report on Action 6 tend to be somewhat plain, and they make rather obvious points about the application of the PPT. Clearly, it would be better if marginal arrangements were involved in the examples that allowed for a more nuanced analysis to be made on the application of the PPT. Notwithstanding this criticism, it is still much better that they exist than not, and they definitely can provide some assistance in interpretation.

Some brief observations about the ten examples follow. The first two are rather clear examples of treaty shopping. The first one involves an assignment of the right to the payment of dividends resulting in savings of 25% withholding tax,\textsuperscript{144} and the second involves a usufruct of newly issued non-voting preferred shares acquired by a financial institution. The second transaction is somewhat similar to the Bank of Scotland case\textsuperscript{145} (a French structured finance

\begin{footnotesize}
\begin{enumerate}
\item Id. See the Business Europe submission at p. 94.
\item See K-D. Drüen & D. Drissen, The Burden of Proof in Tax Law (G. Meussen ed., IBFD 2013), based on the proceedings of the annual meeting of the European Association of Tax Law Professors (EATLP) held in Uppsala from 2-3 June 2011.
\item See sec. 3.2.
\item An example can be found in the administration of HMRC, General Anti-Abuse Rule (GAAR) Guidance, at Part D – Examples with respect to the United Kingdom’s GAAR; and, similarly, the New Zealand GAAR, with Inland Revenue’s publication of its Interpretation Statement IS 13/01, Tax Avoidance and the Interpretation of sections BG 1 & GA 1 of the Income Tax Act 2007 (NZ) 13 June 2013.
\item Action 6 Final Report, at pp. 59–64, Example A. In some respects, there are features of this case that might be compared to the Swiss Supreme Court decision in Re Swiss Swaps I/A (2015) concerning beneficial ownership.
\end{enumerate}
\end{footnotesize}
decision), which also concerned substantial savings in dividend withholding tax.\textsuperscript{146} The OECD regards both of these as clear examples of when the PPT should be applied.

The third and fourth examples are commercial and investment-driven ones in which the PPT should not be applied. The fifth example is of a company that holds 24\% of another company and decides to increase its holding to 25\%, primarily in order to obtain the benefit of a lower rate of tax provided under article 10(2)(a) of a newly introduced treaty.\textsuperscript{147} This is an example in which it is a principal purpose of the transaction to obtain the benefit of reduced withholding tax, but the granting of the benefit in these circumstances meets the requirements of the proviso and is in accordance with the object and purpose of the dividend article.

Three more examples involve holding companies for which there is a genuine commercial purpose and the PPT does not apply. One of these three holding company examples involves establishing a traditional regional holding company. After a review of possible locations, a multinational decides to establish a regional company for the purpose of providing group services to a number of subsidiaries in different countries. These group services include accounting, legal, human resources, finance and treasury services (currency and hedging), as well as some non-finance-related services. The decision is driven by the skilled labour force, reliable legal system, business environment, political stability, banking arrangements in the relevant country, as well as the comprehensive double tax treaty network. On the assumption that the intra-group services constitute a real business involving the exercise of substantive economic functions, the OECD concludes that it would not be reasonable to deny the benefits of the treaties to the country of the regional holding company and its subsidiaries and that the purpose of the arrangements was not subject to the PPT.\textsuperscript{148}

5.1. Observations about the examples

As indicated above, the examples in the Final Report on Action 6 are simplified. For instance, in Example A, the company assigns the right to the payment of dividends that have been declared, but not yet paid, in order to obtain the benefit of the exemption from source taxation under the tax treaty. There is no discussion about any relevant background facts, such as the consideration paid by the independent financial institution for this assignment of income, nor any indication of the length of time or any commercial arrangements with respect to the risk of non-payment or default. Notwithstanding these obvious limitations, a few key points can be identified.

5.1.1. An objective assessment

In all the examples, the Final Report on Action 6 decides whether “it would be reasonable to conclude that one of the principal purposes for the arrangement … is to obtain the benefit”. The taxpayer’s subjective state of intention or motive is not known, nor is it relevant.\textsuperscript{149} It is the “reasonable” conclusion as to the purpose of the arrangement or transaction that is important. This conclusion is based on objective criteria determined after consideration of the various “facts and circumstances” that exist in the examples.

\textsuperscript{146} Action 6 Final Report, at pp. 59-64, Example B.
\textsuperscript{147} Id., at Example E.
\textsuperscript{148} Id., at Example G.
\textsuperscript{149} As discussed in sec. 4.2.
5.1.2. The treaty’s object and purpose in preventing treaty shopping

Article 6 of the MLI makes it clear that the preamble to CTAs will now include language that makes it clear that treaty shopping arrangements “aimed at obtaining reliefs provided in this agreement for the indirect benefit of residents of third jurisdictions” will not be tolerated. Examples A and B are illustrative of treaty shopping arrangements, although they are somewhat blatant.

Example H is an example in which the genuine nature of the investment means that the establishment of a holding company does not constitute treaty shopping. The multinational in this example establishes a new holding company as a base for developing its foreign business activities. There are significant commercial and business reasons for doing so, and the holding company is used as a vehicle to establish a new manufacturing facility. As a consequence, the benefits provided in the treaty (between the holding company and the manufacturing company) remain unaffected by the PPT, even though the multinational parent is in another jurisdiction.

What seems clear is that the PPT is the OECD’s weapon of choice to address treaty shopping using conduit structures. As Danon points out, the Final Report on Action 6 makes no reference to the concept of beneficial ownership and does not attempt to reconcile the PPT and the broad substance-orientated anti-abuse approach to beneficial ownership undertaken by some jurisdictions. He recommends that countries that have taken a substance-over-form approach, such as Switzerland, revisit their position with respect to beneficial ownership. This would mean that a more restrictive approach would be taken by such countries with respect to beneficial ownership consistent with the 2014 OECD Commentary, which focuses on the property rights associated with the income derived by the beneficial owner. In other words, the question is whether the beneficial owner of the income has the right to use and enjoy the income unconstrained by a contractual legal obligation to pass on the payment to another person. The OECD’s preference to prevent treaty shopping is clearly the use of the PPT.

5.1.3. Business purposes can displace tax purposes

In practice, decisions about where to locate new businesses or ownership and financing structures always involve consideration of the tax consequences. The PPT is aimed at situations in which obtaining a tax benefit is one of the principal purposes of the arrangement or transaction.

There are quite a few examples that illustrate that genuine business and commercial reasons for the transaction will mean that a principal purpose for the transaction is not to be ascribed to taxation and that it hence cannot reasonably be considered that a principal purpose of the arrangement or transaction is to obtain treaty benefits. Example C is illustrative of when a company considers establishing a manufacturing plant in a lower-cost jurisdiction but elects the country with which the parent company has a tax convention.

153. At least five of the ten examples illustrate this principle (C, D, F, G and H).
154. Example D is somewhat similar in the collective investment vehicle situation.
Likewise, Example G highlights that the decision to establish a regional holding company provided that it considers genuine business, legal and commercial imperatives – can also be based on the tax benefits extended by a tax treaty network without attracting the PPT.

Is it possible to reconcile the inconsistency between the broad language of the PPT that discusses obtaining a tax benefit as only “one of the principal purposes” with the examples of the PPT’s application in respect of business purposes? Probably not. De Broe correctly points to the examples referred to above as evidence of this inconsistency, saying: “It is striking – but at the same time confusing – that the report and the 2017 Update to the OECD Model Tax Convention contain examples in language that contradict the terms of the PPT [...].”

De Broe goes on to say that if a taxpayer can present genuine business reasons for a transaction then the “treaty benefit should not be denied merely because obtaining them is one of the principal purposes of the transaction”.

This is an important spin on the interpretation of the PPT and is a feature of many common law GAARs. A taxpayer who can demonstrate the types of genuine business reasons for his investment structure or transaction can demonstrate that these business purposes displace the tax purposes contemplated by the PPT or, alternatively, that the taxpayer is establishing that granting the benefit in these circumstances is in accordance with the object and purpose of the provisions of the treaty. Under the second explanation, the taxpayer has the burden of proof to establish the application of the proviso.

5.1.4. The “purpose” is the overall objective of the transaction

In section 4.2., it was pointed out that in common-law courts, the meaning of “purpose” has not always been equated to “intention”. These cases suggest that a court that is looking to ascertain the purpose of a transaction or arrangement will examine the overall goal or objective behind the transaction and not necessarily the intention of the taxpayer, nor the intention behind an intermediate step.

Example F suggests that the OECD is thinking along similar lines. This example involves a takeover of a company in which this target company is located in a jurisdiction that has favourable tax treaty benefits with its underlying subsidiary companies. The purpose of the transaction is the acquisition of the shares in the target company (the overall goal or objective). The OECD concedes that it may well be desirable to retain the existing tax-favourable treaty structure, which was an incidental outcome of the transaction and not the purpose of the transaction.

5.1.5. The proviso examples

Two of the examples illustrate the use of the proviso of the PPT. The best illustration, Example E, is of a company owning 24% of the shares of another company that decides to...
increase its ownership to 25%, meaning that it can benefit from the lower rate of tax provided by article 10(2)(a). It is clear from the example that the decision to acquire the additional shares was made primarily to obtain the benefits of the tax treaty, and thus it must be at least one of the principal purposes (if not the dominant purpose).

Notwithstanding the nature of the tax purpose, the taxpayer may establish that the granting of the benefit would be in accordance with the object and purpose of article 10(2)(a), which is an arbitrary threshold that provides benefits to investors who satisfy the requisite threshold of investment (25%).

In contrast, Example J illustrates the opposite, but without disturbing the concept of the proviso. A taxpayer cannot deliberately structure their contracts around the 12-month threshold for installation projects of a permanent establishment to obtain the benefit of article 5(3) by splitting the contracts into two (or more) shorter contracts. Here, the object and purpose of article 5(3) are to confirm that longer-period installation projects constitute permanent establishments, so the act of splitting the contracts is contrary to the object and purpose of the article.

It is worth noting an important feature of the proviso. Ascertaining the object and purpose of the relevant treaty provisions, as De Broe highlights,\textsuperscript{159} is usually not a straightforward task. One of the reasons for this is that it requires a focus on specific treaty provisions rather than the object and purpose of the treaty itself. As indicated above, a taxpayer can deliberately structure their arrangements to meet the requisite investment threshold and thus formally comply with the specific requirements of the relevant treaty provisions. In tax avoidance transactions, the taxpayer will always meet the formal requirements of specific provisions; otherwise, their scheme will fail under black-letter law. A GAAR, however, operates at a higher level, like some \textit{deus ex machina} refusing to accept the tax legitimacy of a transaction that is otherwise compliant. Courts will therefore have to carefully consider both the object and purpose of the relevant provision read in isolation, as well as when that provision is considered in the context of the broader objectives of the object and purpose of the tax treaty to, e.g. facilitate cross-border investment with genuine investment at an appropriate threshold.\textsuperscript{160}

6. Conclusion

The widespread introduction of the PPT is a hugely significant change to the global tax treaty network and is likely to be a most effective deterrent to treaty abuse. There is potential for divergent interpretations by individual countries’ domestic courts and revenue authorities, given the broad discretion commonly found in GAARs. A harmonized understanding of identically worded clauses in tax treaties is indeed a laudable goal, but it should be noted that it is unclear at this stage whether it is achievable. There are significant questions as to whether non-OECD member countries (and even some OECD member countries) regard the BEPS Project as legitimate. Can the new OECD Commentaries achieve the status of commonly understood guidance amongst countries after such a short period? Can tax


\textsuperscript{160} For further discussion on this point, see V. Chand, \textit{The Principal Purpose Test in the Multilateral Convention: An in-depth Analysis}, 46 Intertax 1, pp. 24-26 (2018).
administrators and judges familiar with domestic law concepts (which may or may not be similar, but in any event may have slight, albeit important, differences) adopt a consistent approach? Of course, this raises fundamental questions about how international tax treaty law is created.

Divergence in interpretation should be resisted because it is clear that an international autonomous meaning is intended to be introduced through the uniform adoption of the PPT. Common language may be possible only if courts and revenue authorities apply a consistent approach to interpretation. The normative approach, detailed in this article, suggests that international tax treaties should be interpreted in accordance with (i) the ordinary meaning of the text of the PPT; (ii) due consideration of the context and the MLI’s object and purpose; and (iii) consideration of how the MLI, as a successive treaty, relates to the CTA it amends.

In addition to the full title and the preamble, which are part of the context of the treaty, the OECD has provided significant guidance on the interpretation of the PPT. Of the three documents prepared roughly at the same time as the text of the PPT, the most important is the Final Report on Action 6. Not only does the Final Report discuss key aspects of the interpretation of various words and phrases used in the test, but it also provides ten examples of the application of the test in different factual scenarios. The Explanatory Statement provides an explanation of the relationship of the MLI with the bilateral treaties that it amends, while the 2017 OECD Model update provides helpful guidance on the relationship of the PPT with other existing (or proposed) anti-avoidance provisions and the opportunity to discuss new examples as they emerge.

This article shows that, firstly, the PPT is designed to override the other provisions of a CTA. This will apply not only to provisions allocating or limiting taxing rights, but also to any general or specific anti-avoidance rules in the CTA. Secondly, a court will be asked whether it is reasonable to conclude that, based on objective criteria, one of the principal purposes of the arrangement or transaction was to obtain the benefits of the tax convention. The taxpayer’s subjective state of mind may or may not indicate a purpose for the transaction, but that is not the test. Rather, based on the commentary in the Final Report on Action 6 and other comparable tests in other jurisdictions, it is clear that the substantive rule is an objective analysis of all the relevant facts and circumstances.

Lastly, the PPT has a proviso, meaning that the PPT will not apply if it can be established that granting the benefit is in accordance with the object and purpose of the relevant provisions of the CTA. The language of the proviso clearly supports the view that there is an onus of proof placed upon the taxpayer. This onus can be discharged by establishing that the granting of the benefit meets the object and purpose of the relevant treaty provisions.

The examples provided in the Final Report on Action 6 are consistent with the above analysis, but still leave many questions unanswered. The taxpayer’s subjective state of mind, intention or motive is not known, and it is not relevant. It is an objective test that is relevant, with a reasonable conclusion drawn as to the purpose of the arrangement or transaction. Many of the examples reinforce the new article 6 preamble to the MLI and make it clear that treaty shopping arrangements will not be tolerated. Other examples illustrate that business purposes can displace tax purposes. Genuine business and commercial reasons for a transaction result in an inability to ascribe tax benefits as a principal purpose of a transaction. Two of the examples illustrate the use of the proviso in which one of the principal purposes...
of the transaction is to obtain a tax benefit, but the PPT does not apply because granting the benefit is in accordance with the object and purpose of the treaty.

Revenue authorities, judicial officers and courts are obliged to interpret the treaty-based PPT rule in good faith in accordance with the ordinary meaning to be given to the terms in the treaty, as well as in accordance with the treaty’s context and in light of its object and purpose. This could result in a uniform view of the PPT in accordance with the principles set out above, but the broad terms of the test leave open the risk of great uncertainty and wide-ranging disputes.