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CANADIAN BRANCH

BENEFICIAL OWNERSHIP IN INTERNATIONAL TAXATION

Origins, Evolution and Future Role

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GUEST LECTURERS:

Błażej Kuźniacki

Global Tax Policy & International Tax Services at PwC Netherlands |
Professor of Law at Lazarski University | Senior Research Affiliate at
Singapore Management University

Robert Raizenne

Tax Partner, Osler, Hoskin & Harcourt LLP, Adjunct Professor of Tax Law
at the Faculty of Law at McGill University

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ROBERT RAIZENNE

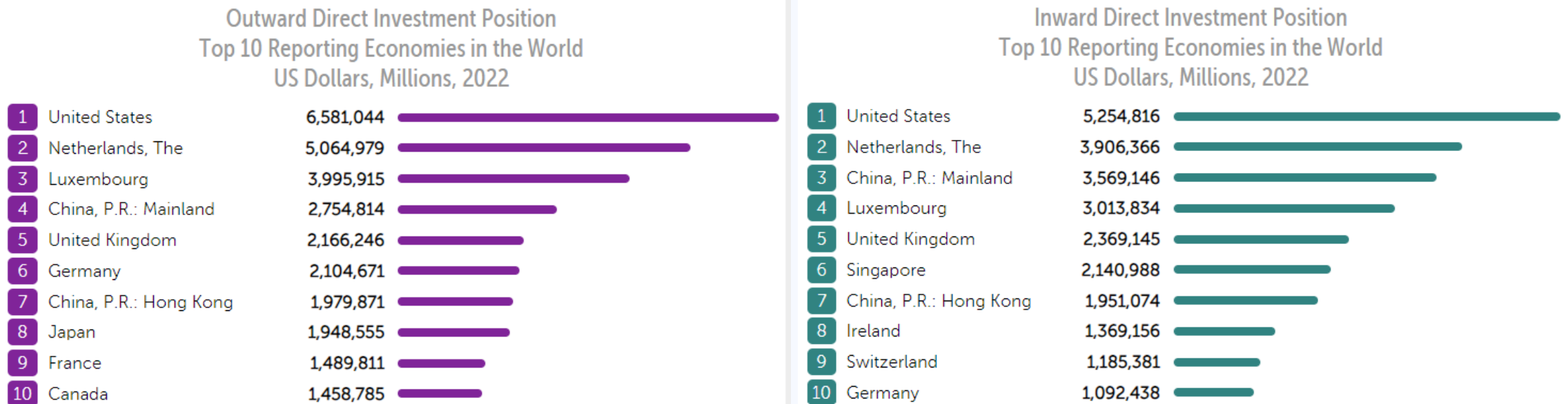
Tax Partner, Osler, Hoskin & Harcourt LLP, Adjunct Professor of Tax Law at the Faculty of Law at McGill University

Why is it still an important topic? Global view.

Beneficial owner (BO): a threshold for entitlement to DTC's benefits (& EU Directives) in respect of dividends, interest and royalties;

=> one of the most contagious and litigious notions under DTCs/EU law globally and in Canada.

The Coordinated Direct Investment Survey by the International Monetary Fund (IMF), 2022



US and Chinese investment money typically flow through special purpose intermediary entities established in the Netherlands, Luxembourg and the UK. *Are those intermediary entities beneficial owners of the received profits?* [\$40 trillion]

OUTLINE

1. Origin in domestic tax law.
2. Origin under tax treaties and the OECD MTC Item.
3. Evolution under tax treaties and the OECD MTC.

BREAK

4. Interpretation.
5. Jurisprudence.
6. Tax policy (PPT/GAAR- relationship and the future of BO).

Origin in domestic tax law: UK (common law) v. civil law

Civil law: a term BO did not exist in most of States = their law typically do not recognize a division of ownership between legal and economic (undivided ownership)

- *The full ownership is either in the intermediary or in the creditor; it cannot be in both of them*
- *Under Quebec Civil Law, beneficial ownership as a trust law concept is foreign, but the distinction between real and personal rights is foundational*

OECD recognized it only in 2014! [para. 12.1 to Art. 10] “(in fact, **when it [BO] was added** to the paragraph, the term **did not have a precise meaning in the law of many countries**)”

Until today, civil law States (non-English States) have issues with translating BO into their domestic tax law

Origin in domestic tax law: UK (common law) v. civil law

UK: the principle of equity => the concept of the divisibility of the right to property developed

- one person holds the legal title to an asset without being able to use and benefit = the legal owner (a trustee in a trust)
- the other person has the right to benefit from and control the asset = beneficial owner (the beneficiary in the trust).

UK issue with income allocation for purposes of DTCs: *a peculiar threat of abuse*

- All beneficiaries of the UK trust were not UK tax residents => no allocation of income received by the trust to the UK trustees, while they retain rights to benefit from UK DTCs
- Dividends paid to the trustees would be subject to *double non-taxation*, i.e., no WHT in the source State and in the UK (maybe also no taxation at the level of beneficiaries)

John Avery Jones on the Origins of “Beneficial Ownership” in the 1977 OECD Model*

- Charge to tax even though not beneficial owner, but exemption for foreign source income

* J. Avery Jones, “The Beneficial Ownership Concept Was Never Necessary in the Model” in *Beneficial Ownership: Recent Trends*, M. Lang et al (2013).

“BENEFICIAL” OWNERSHIP: TRULY A FOUNDATIONAL PRINCIPLE OF CANADIAN INCOME TAXATION

“It is apprehended, however, that the word “person” as used in the charging section of the Act means, prima facie, a person who is beneficially in receipt of income, and that a person who is in receipt of income in a fiduciary capacity is to be regarded as a “person” within the meaning of the charging provision only in so far as the Act expressly provides for the taxation of a fiduciary primarily and not merely secondarily, in respect of income received by him in that capacity.”

“Under the Dominion Act, the obligation to pay income tax is imposed, as a general rule, primarily upon the beneficial recipient of income, and to this general rule there is but one exception, namely, that of a person in whose hands income is accumulating in trust for the benefit of unascertained persons or of persons with contingent interests, the trustee being assessable in respect of such income as if it were the income of an unmarried person.”

- Charles Plaxton, “A Treatise on the Dominion Income Tax Law” (1921)

“BENEFICIAL” OWNERSHIP: TRULY A FOUNDATIONAL PRINCIPLE OF CANADIAN INCOME TAXATION

“In keeping with the paramount object of the Income War Tax Act, i.e., to raise revenue for federal purposes by ‘imposing on all citizens contributions according to their annual means,’ the tax is a personal tax and the liability to pay it is imposed as a general rule primarily upon the beneficial recipients of income. Inflexible adherence to this general rule in a scheme of taxation, general and national in its scope and suited in the interests of revenue to the complexity of modern life, would have been impracticable. Income is a fact, and its sources are of infinite variety; moreover, its receipt or perception by the persons beneficially entitled may be affected by a wide diversity of relationships and contingencies and also by arrangements for evasion or avoidance of the tax.”

- Charles Plaxton and Frederick Varcoe, “A Treatise on the Dominion Income Tax Law”, 2nd Edition (1930)

WARDEAN DRILLING LTD. V. MINISTER OF NATIONAL REVENUE, [1969] 2 EX. C.R.

“In my opinion the proper test as to when property is acquired must relate to the title to the property in question or to the normal incidents of title, either actual or constructive, such as possession, use and risk.”

COVERT ET AL. V. MINISTER OF FINANCE OF NOVA SCOTIA, [1980] 2 SCR 774 (“JODREY ESTATE”)

- Cites with approval the following passage from *MacKeen Estate v Min of Finance (NS)* (1978), 43 A.P.R. 3, [1977] C.T.C. 230:

“It seems to me that the plain ordinary meaning of the expression “beneficial owner” is the real or true owner of the property. The property may be registered in another name or held in trust for the real owner, but the “beneficial owner” is the one who can ultimately exercise the rights of ownership in the property.”

1933: FIRST VERSION OF OUTBOUND WITHHOLDING TAX

- *Income War Tax Act*

TAX ON NON-RESIDENTS. -

9B(2) ..., an income tax of 5 per centum is hereby imposed on all persons who are non-residents of Canada in respect of [dividends, interest, etc...]

COLLECTION AND REMITTANCE... -

9B(4) ..., the taxes is imposed by this section shall be collected by the debtor... who shall remit the same to the Receiver General of Canada.

AGENT FOR NON-RESIDENT PERSON. -

9B(8) Whenever an agent of a non-resident person receives payment of any interest or dividends taxable under this section from which the tax has not been withheld, such agent shall withhold the tax from his principal and remit the same to the Receiver General of Canada.

EXEMPTED DIVIDENDS. -

9B(11) The tax imposed by subsection (2) hereof shall not apply in the case of dividends paid to a non-resident company by a Canadian company all of whose shares (less directors' qualifying shares) are beneficially owned by such non-resident company: Provided that not more than one-quarter of the gross income of the Canadian company is derived from interest and dividends.

- *British Columbia Electric R. Co. v. The King*, [1946] AC 527: Affirms the federal government has the power to tax non-residents

WHAT IS AN AGENT?

- Common law
 - Fridman, *The Law of Agency*, 5th ed. (1986):
 - *“Agency is the relation that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.”*

- Civil law (contract of mandate)
 - **Article 2130 CCQ:** Mandate is a contract by which a person, the mandator, confers upon another person, the mandatary, the power to represent him in the performance of a juridical act with a third person, and the mandatary, by his acceptance, binds himself to exercise the power.
 - **Article 2135 CCQ:** A mandate may be special, for a particular matter, or general, for all the affairs of the mandator.
 - **Article 2136 CCQ:** The powers of a mandatary extend not only to what is expressed in the mandate, but also to anything that may be inferred therefrom. The mandatary may carry out all acts which are incidental to such powers and which are necessary for the performance of the mandate.

THE LEAGUE OF NATIONS – MULTILATERAL EXCHANGE OF INFORMATION INITIATIVE STARTING IN 1936

- Compliance and evasion
- Capital flight
- Canada's perspective as a capital importer

1942 CANADA-US INCOME TAX TREATY

“The term ‘subsidiary corporation’ referred to in Article XI of this Convention means a corporation all of whose shares (less Directors’ qualifying shares) having full voting rights are beneficially owned by another corporation, provided that ordinarily not more than one-quarter of the gross income of such subsidiary corporation is derived from interest and dividends other than interest and dividends received from its subsidiary corporations.”

- Art. XI(2): relationship scrutinized at the discretion of the competent authority of the state of source

1942 CANADA-US INCOME TAX TREATY

Article XX(2)(b)

2. The competent authorities of Canada shall forward to the competent authorities of the United States of America as soon as practicable after the close of each calendar year the following information relating to such calendar year: [...]

(b) The names and addresses of all persons whose addresses are outside of Canada and who derive through a nominee, or agent, or custodian in Canada income from sources within the United States of America, and who are not entitled to the reduced rate of 15 percent with respect to such income provided in Article XI of this Convention, showing the amount of such income in the case of each addressee.

- This undertaking was removed in 1956, as explained in the US Treasury memorandum: “Canada has not been able to supply such information and the deletion of the provision makes the treaty correspond to realities”

1950S-60S: CANADIAN LEGISLATIVE DRAFTING MOVED AWAY FROM 'BENEFICIAL' OWNERSHIP TERMINOLOGY

- Going forward, the “beneficial” ownership language was replaced in Canadian tax legislation by “belongs” and in Canada’s treaties by “owned”
- The “beneficial” modifier was judged to be unnecessary?

1963 AND 1977 OECD MODEL TREATIES

- The 1963 draft of the OECD model treaty does not use the term 'beneficial ownership'
- 'Beneficial ownership' is first used in the 1977 model treaty

CANADIAN TREATIES WERE NOT USING “BENEFICIAL OWNERSHIP” AGAIN UNTIL 1970S

- **The Canada-UK Tax Treaty (1967)**

X(1): The United Kingdom tax on interest [...] derived and **beneficially owned** by a resident of Canada shall not exceed fifteen per cent of the gross amount of the interest.

X(2): The Canadian tax on interest [...] derived and **beneficially owned** by a resident of the United Kingdom shall not exceed fifteen per cent of the gross amount of the interest.

- **The Canada-Belgium Tax Treaty (1975)**

X(2): However, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the law of that State; but if the recipient resident of the other Contracting State is the **beneficial owner** of the dividends, the tax so charged shall not exceed 15 per cent of the gross amount of the dividends. The provisions of this paragraph shall not affect the taxation of the company on the profits out of which the dividends are paid.

Origin under tax treaties and the OECD MTC: Inclusion to the OECD MTC in 1977 [the travaux préparatoires]

Working Party (WP) No. 27 (FR-LU-NL): three reports produced in 1968-1970

1) „it is evident that relief in the country of source applies only if the recipient is actually resident in the other contracting State. This is stated clearly in the text of paragraph 1. Moreover, determining who is the true recipient and his State of residence is a matter of administration and inspection.” [no need for BO]

2) „There is no reason to think that the case of the person acting manifestly as an agent in the name and on behalf of the beneficial owner gives rise to any difficulties. [(...)] The Working Party therefore recommends that there be written into the Model Convention a provision whereby the “beneficial owner text” would be applied.” [no need for BO but *no harm* to add it...]

Origin under tax treaties and the OECD MTC: Inclusion to the OECD MTC in 1977 [the travaux préparatoires]

WP No. 1 (US): four reports produced in 1963-1975 on prevention of abuse of DTCs

1) Focus on a variety of tax avoidance cases (tax deferral via CFCs, round-tripping holding companies PEs in low-tax countries, conduits) => CFC rules, judicial anti-abuse doctrines, LOB, *but not BO* = para. 22 to Art. 10 [LOB] & para. 10 to Art. 1 [LOB/domestic anti-tax avoidance rules] OECD Model (1977)

4) Denial of refund claims if the claimant “is essentially not the beneficial owner of the stock”. However, the use of nominees as well as holding companies, the widespread practice of issuing bearer shares, and the secrecy often accorded banking transactions may make it virtually impossible for effective policing of tax avoidance by individuals.” => no BO of income but UBO (AML) of assets = that is not BO under Arts 10, 11 and 12 of the OECD Model [para. 12.6 OECD Model (2014)]

Origin under tax treaties and the OECD MTC: Inclusion to the OECD MTC in 1977 [the text included to the MTC]

Art. 10(2) (dividends)	Art. 11(2) interest	Art. 12(1) royalties
<p>“However, such dividends may also be taxed in the Contracting State of which the company paying the dividends <i>is a resident and according to the laws of that State</i>, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed:</p> <p>a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;</p> <p>b) 15 per cent of the gross amount of the dividends in all other cases.”</p>	<p>“However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 per cent of the gross amount of the interest.”</p>	<p>“Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.”</p>

So scant wording of BO (just two words: beneficial owner) => Commentary „the limitation of tax in the State of source is not available *when an intermediary, such as an agent or nominee*, is interposed between the beneficiary and the payer, unless the beneficial owner is a resident of the other Contracting State. States which wish to make this more explicit are free to do so during bilateral negotiations.” [para. 12 to Art. 10]

Evolution under tax treaties and the OECD MTC: Inclusion of Conduit Companies Report (1986) [to the OECD Commentary (2003)]

Para. 12.1 to Art. 10 OECD MTC (2003)

“Where an item of income is received by a resident of a Contracting State acting in the capacity of agent or nominee it would be inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption merely on account of the status of the immediate recipient of the income as a resident of the other Contracting State. The immediate recipient of the income in this situation qualifies as a resident but no potential double taxation arises as a consequence of that status since the recipient is not treated as the owner of the income for tax purposes in the State of residence. *It would be equally inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned.* For these reasons, the report from the Committee on Fiscal Affairs entitled “Double Taxation Conventions and the Use of Conduit Companies” concludes that a conduit company cannot normally be regarded as the beneficial owner if, *though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties.*”

- Phrase ‘as a practical matter’ does not appear in the Conduit Report in relation to the conduit’s “very narrow powers which render it a mere fiduciary or an administrator acting on account of the interested parties.” => 2003 update is not a clarification but a new interpretation of BO

Changes in the OECD Commentary (2014-17): “paid to”

12.1 of the Commentary to Art. 10

“Since the term “beneficial owner” was added to address potential difficulties arising from the use of the words “paid to...a resident” in paragraph 1, it was intended to be interpreted in this context and not to refer to any technical meaning that it could have had under the domestic law of a specific country (in fact, when it was added to the paragraph, the term did not have a precise meaning in the law of many countries). The term “beneficial owner” is therefore not used in a narrow technical sense (such as the meaning that it has under the trust law of many common law countries¹), rather, it should be understood in its context, in particular in relation to the words “paid ... to a resident”, and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance.” [footnote no. 1 says that a discretionary trust, which does not distribute received dividends for a given period, can be considered as BO if recognized as a separate taxpayer]

Changes in the OECD Commentary (2014-17): “paid to”

12.1 of the Commentary to Art. 10 (Continued)

- BO **was not** added to the OECD Model in 1977 **to merely clarify** the words “paid...to a resident”, **but to address potential difficulties** arising from the use of these words”
- Emphasize on the exclusivity of the **autonomous understanding of BO**
- Double emphasis that the context in which the concept of BO should be interpreted is **the use of the words “paid...to a resident”** in Art. 10 (1) [co-text of BO] => the general context of DTC, with its object and purposes comes only in the second place [compare to Commentary 2003)

Changes in the OECD Commentary (2014-17): obligation

12.4 of the Commentary to Art. 10

“In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the dividend is not the “beneficial owner” because that *recipient’s right to use and enjoy the dividend is constrained by a contractual or legal obligation to pass on the payment received to another person*. Such an obligation will normally derive from relevant legal documents but may also be found to exist *on the basis of facts and circumstances showing that, in substance*, the recipient *clearly* does not have *the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person*. **This type of obligation would not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment and which the direct recipient has as a debtor or as a party to financial transactions, or typical distribution obligations of pension schemes and of collective investment vehicles entitled to treaty benefits under the principles of paragraphs 22 to 48 of the Commentary on Article 1.**”

Changes in the OECD Commentary (2014-17): obligation

12.4 of the Commentary to Art. 10 (Continued)

- No 3rd category of obligation excluding BO => facts and circumstances are instrumental to determine legal or contractual obligation [legal substance analysis]
- „in substance” means „in essence” and does not have connotations with „economic substance”
- Only legal/contractual obligations that are dependent on the receipt of the payment by the direct recipient limits rights to use and enjoy income received so much that BO vanishes

Agency etc. in the Commercial Space – Some Examples

- Registered title to corporate shares
- Syndicated indebtedness
- Pooled investment structures

Changes in the OECD Commentary (2014-17): relation to PPT

12.5 of the Commentary to Art. 10

“The provisions of Article 29[LOB & PPT] and the principles put forward in the section on “Improper use of the Convention” in the Commentary on Article 1 **will apply to prevent abuses**, including treaty-shopping situations where the recipient is the beneficial owner of the dividends. **Whilst the concept of “beneficial owner” deals with some forms of tax avoidance** (i.e. those involving the interposition of a recipient who is obliged to pass on the dividend to someone else), **it does not deal with other cases of abuses**, such as certain forms of treaty shopping, that are addressed by these provisions and principles and must not, therefore, be considered as restricting in any way the application of other approaches to addressing such cases.”

Changes in the OECD Commentary (2014-17): relation to PPT

12.5 of the Commentary to Art. 10 (Continued)

- GAARs, PPT, anti-abuse judicial doctrines (e.g. economic substance) apply after BO is determined
- OECD examples illustrating how PPT [Art. 29(9)] should apply, renders anti-abuse role of BO obsolete
 - ❖ Example A in para. 182: the facts summarized directly from the *Royal Dutch Shell case* (6 April 1994) – **BO case**
 - ❖ Example B in para. 182: inspired by the *Royal Bank of Scotland case* (29 December 2006) – **BO case**
 - ❖ Example in para. 176 [**promissory notes, cf. Aiken case**] and Example L in § 182 [**securitisation**]: circumstances in which it is difficult to consider that the recipients of the income in question could be considered as their BOs and yet the PPT applies to them, not BO

BREAK



Interpretation of BO: Art. 31 (1) VCLT in general

Vienna Convention on the Law of Treaties (VCLT): the codification of customary international law (formally entered into force in Canada on 27 Jan. 1980), of relevance e.g., to tax treaties

“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 the light of its object and purpose.**”

- A single, general rule of treaty interpretation consisting of **a closely integrated** principle of **bona fide interpretation**, the principle of **linguistic** interpretation and the principles of **contextual** and **purposive** interpretation
- The aim is to achieve the **common intention of the states' parties of treaty** as fully as possible (*effet utile*) without altering the wording of the treaty, nor to filling in any gaps, but...
- Art. 31 (3)c) VCLT: “3. There shall be taken into account, together with the context: (c) any **relevant rules of international law** applicable in the relations between the parties.” => *prohibition of abuse of rights* [now codified into tax treaties through the PPT? domestic GAAR?]

Interpretation of BO: Art. 31 (1) VCLT for BO purposes

An adjudicator (fully impartial tax expert) shall interpret BO under a DTC so that they

- Choose the understanding of BO that most fully reflects the common intention of the parties to the DTC => source State's intention of increasing revenue shall not trump the resident State's intention to eliminate double taxation in respect of income received by its tax resident (allocated to it for tax purposes) [good faith], and
- Determine the status of BO based on premises that exist in the text of the DTC in which the concept of BO is included, esp. Arts 10-12 [linguistic interpretation], and
- While determining the status of BO, the specific context and purpose of the provisions in which that concept is embodied [Arts 10-12] shall be given priority before other operational purposes of the DTC and its general purpose (they shall be reconciled) [contextual and purposive & teleological interpretation], and
- The OECD Commentary on BO shall be given a proper interpretative weight, notably as the context of Arts 10-12 under Art. 31 (1) VCLT and Art. 3(2) OECD Model, unless otherwise follows from relevant facts and circumstances and legal system of a State applying the DTC (e.g., static v. dynamic interpretation and retroactive use of the OECD Commentaries)

Interpretation of domestic tax law vs. tax treaties

Interpretation of statutory domestic tax law is less flexible (more textual) than that of DTCs

- *Alta Energy* (Supreme Court of Canada): “the methodology prescribed [in the VCLT] is not radically different from the modern principle applicable to domestic statutes in Canada. [(...)]. However, unlike statutes, treaties must be interpreted “with a view to implementing the true intentions of the parties” (J. N. Gladden Estate v. The Queen, [1985] 1 C.T.C. 163 (F.C.T.D.), at p. 166, quoted approvingly in *Crown Forest*, at para. 43).” [para. 37]
- *Fothergill* (the UK House of Lords, 10 July 1980): “The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted as Lord Wilberforce put it in *James Buchanan & Co. Ltd v. Babco Forwarding and Shipping (UK) Ltd*. [1978] A.C. 141. at 152, “unconstrained by technical rules of English law, or by English legal “ precedent, but on broad principles of general acceptance“ [page 10]
- *Anson* (the UK Supreme Court, 1 July 2015): “In that context, one would be predisposed to favour an interpretation which reflected the ordinary meaning of the words used and the object of the Convention. This is indeed a point which has been repeatedly made, in other cases concerned with the construction of the UK/US double taxation conventions, in the face of narrow and technical constructions.” [para. 111] => confirmed also by that Court in: *Royal Bank of Canada* (12 February 2025) [para. 28]

Interpretation of BO: static v. dynamic interpretation

An adjudicator must ask the following question: which interpretation – static or dynamic – will give a DTC term a meaning as convergent as possible with the meaning intended by Contracting States of the DTC in order to achieve its purposes in accordance with the common intention of the parties (interpretation in good faith)

- More often than a static interpretation, a dynamic interpretation will effectuate common intention
 - ❖ Domestic tax law of Contracting States changes much more frequently than the wording of DTCs
 - ❖ DTCs need to 'catch up' with the domestic tax laws through the dynamic interpretation of their terms in accordance with the evolutionary meaning of terms under domestic tax laws of Contracting States
 - ❖ DTCs use capacious (flexible) terms in order to allow their dynamic interpretation => achieving the common intention in accordance with the legal, social and economic reality at the time of applying the DTC

- International public law supports dynamic interpretation of treaties more than static
 - ❖ Art. 31(3) VCLT "There shall be taken into account, together with the context: (a) **any subsequent agreement** between the parties regarding the interpretation of the treaty or the application of its provisions; (b) **any subsequent practice** in the application of the treaty which establishes the agreement of the parties regarding its interpretation";
 - ❖ International agreements, including **DTCs, are living instruments** that, as a rule, are subject to interpretation in light of present-day conditions (ECHR, 25 April 1978, judgment in *Tyrer v United Kingdom* (1978) 58 ILR 339, 353)

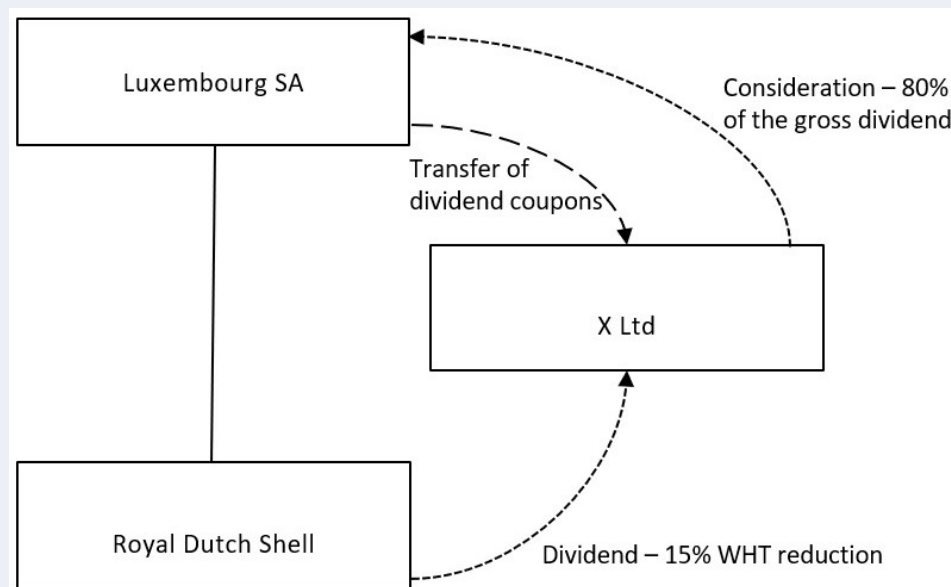
STATUTORY TREATY INTERPRETATION RULES AND EXTRINSIC INTERPRETIVE AIDS

- *R. v. Melford Developments Inc.*, [1982] 2 SCR 504.
“There is no doubt, in my view, that the effect of s. 3 is to make the operation of any other law of Parliament, including the Income Tax Act, subject to the terms of the [Canada-West Germany income tax treaty].”
- *Income Tax Conventions Interpretation Act*: section 3 – Melford superseded
- New interpretive rules expressly referencing the OECD
 - GMTA, transfer pricing, hybrid-mismatch etc...
 - These rules are not the same

Jurisprudence: Royal Dutch Shell, Dutch Supreme Court (1994)

Facts:

- Prior to paying dividend, the shareholder (Lux SA) of RDS sold its dividend coupons to the UK-based brokerage company X Ltd (market maker).
- Aim => obtain the tax benefit of a reduced 15% WHT rate under Art. 10(2)(a) of the UK-NL DTC (1980) (otherwise 25% Dutch WHT)
- Lux SA sold coupons to X Ltd for 80 per cent of the gross dividend value [the price = share the tax benefit of the 10% WHT saved, i.e., 5% of 10 % was split each between LSA and X Ltd.]



Court's conclusion and reasoning: BO is determined in DTC's autonomous way, not Dutch one

- BO has DTC's autonomous meaning, excluding from Art. 10 DTC only agents and nominees or other entities acting as such
- X Ltd was BO of the dividends paid by RDS under Art. 10 the UK-NL DTC because it had become the owner of the dividend coupons => become free to use them and, after cashing them in, was free to use the cash (dividend's income)
- When cashing out the coupons, X Ltd was not acting as a voluntary agent (zaakwaarnemer) or acting for the account of a principal (lasthebber) => X Ltd did not receive dividends only because of a legal obligation to pass them to another person
- The requirement to hold shares any other entitlement to dividends (e.g., dividend coupons) should be determined at the time of paying the dividend and not at the time of adopting the resolution to distribute the company's profits

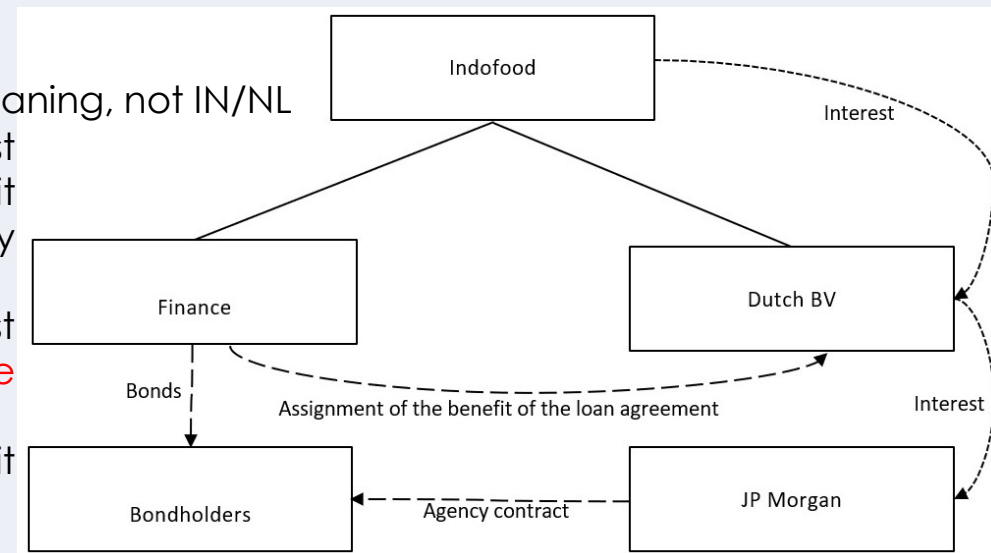
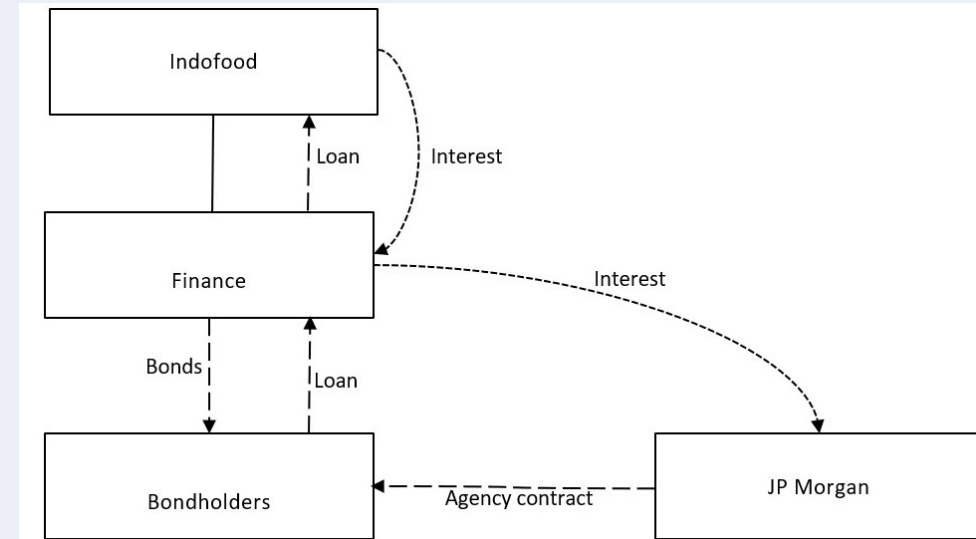
Jurisprudence: Indofood, UK (civil) Court of Appeal (2006)

Facts :

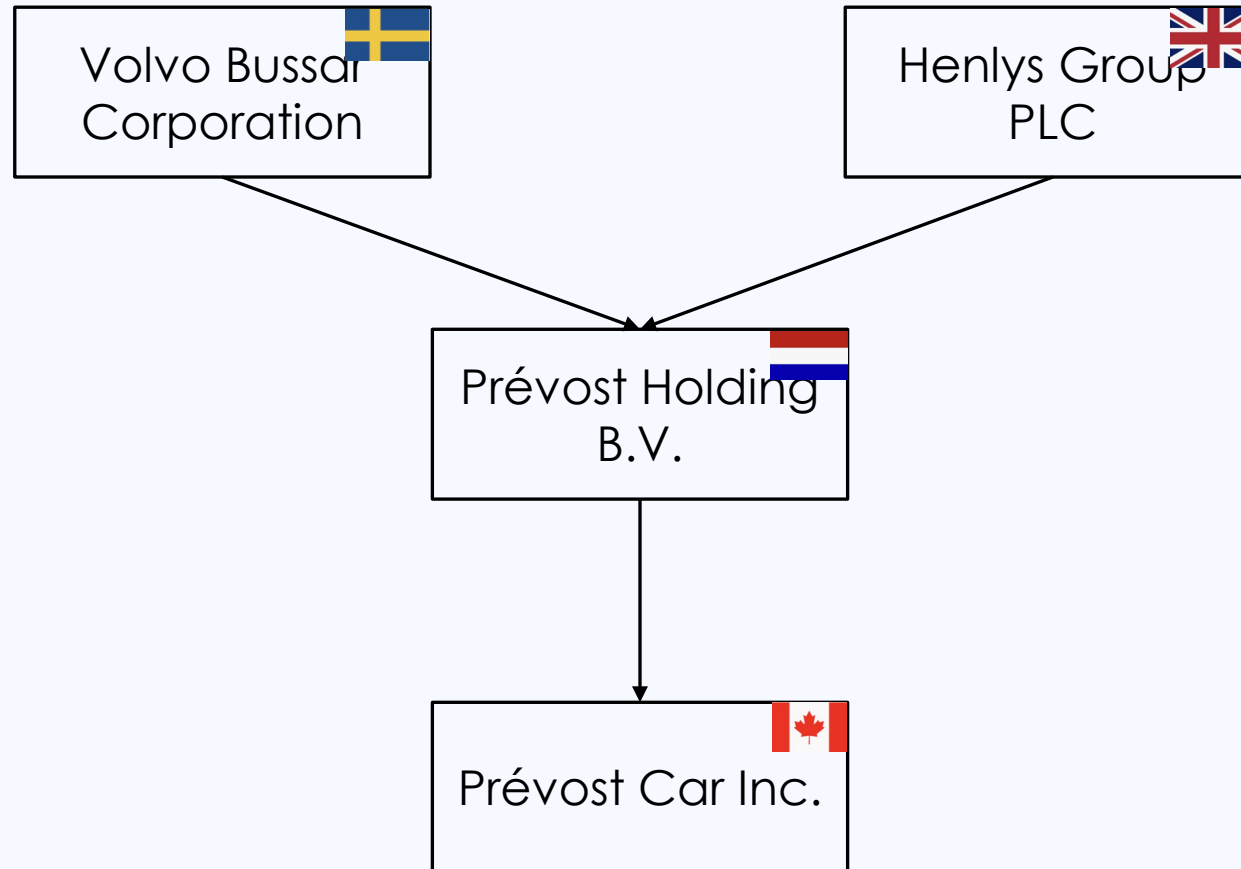
- In 2002, Indofood raised USD 280 million by issuing bonds on the international market (JP Morgan in London was agent and trustee of bondholders)
- To avoid 20% Indonesian WHT on interest, a company was established in Mauritius (Finance) to reduce WHT on interest to 10% under Indonesia-Mauritius DTC (1996)
- The interest payment by Indofood to Finance (10.375% interest) and the loan (USD 280 million) were identical to the loan between Finance and bondholders (0.005% spread).
- In practice, Indofood paid interest directly to JP Morgan of London
- Indofood provided a guarantee to the bondholders re: payments of the interest
- In 2004, Indonesia terminated DTC with Mauritius.
- JP Morgan proposed an alternative structure – via a newly established Dutch BV – to keep WHT at 10% (otherwise Indofood could redeem all the bonds earlier).
- Can the Dutch BV be considered as BO of interest under Art. 11(2) IND-NL DTC?

Court's conclusion and reasoning: BO has an international fiscal meaning, not IN/NL

- Finance (Mauritius co. and then Dutch co.) was not BO of the interest received from Indofood because in commercial and practical aspects, it was not entitled to dispose of the interest received from Indofood in any other way than to use it for payments to JP Morgan (cf. *Hargreaves 2024*)
- Even if these companies were not agents or trustees of the interest received from Indofood on the account of JP Morgan, they could only be considered as administrators of these interest payments
- Formal title to receive a given payment is not sufficient to become BO => it is necessary to have the “full privilege to directly benefit from the income.”



Prévost Car Inc. v. Canada, 2009 FCA 57.

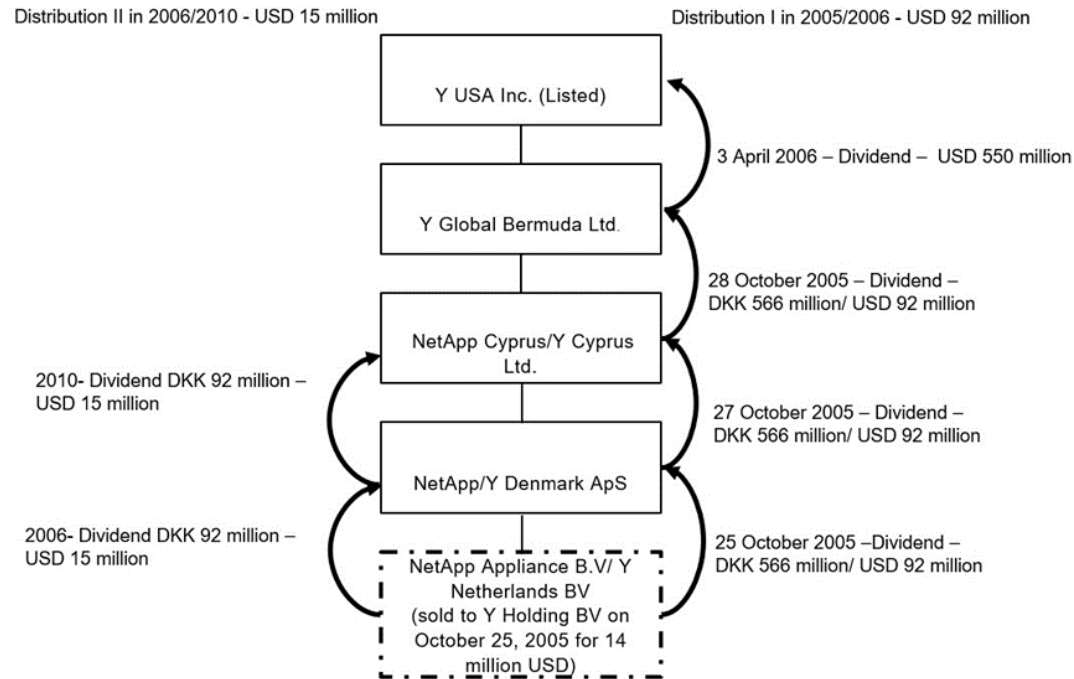


Prévost Car Inc. v. Canada, 2009 FCA 57.

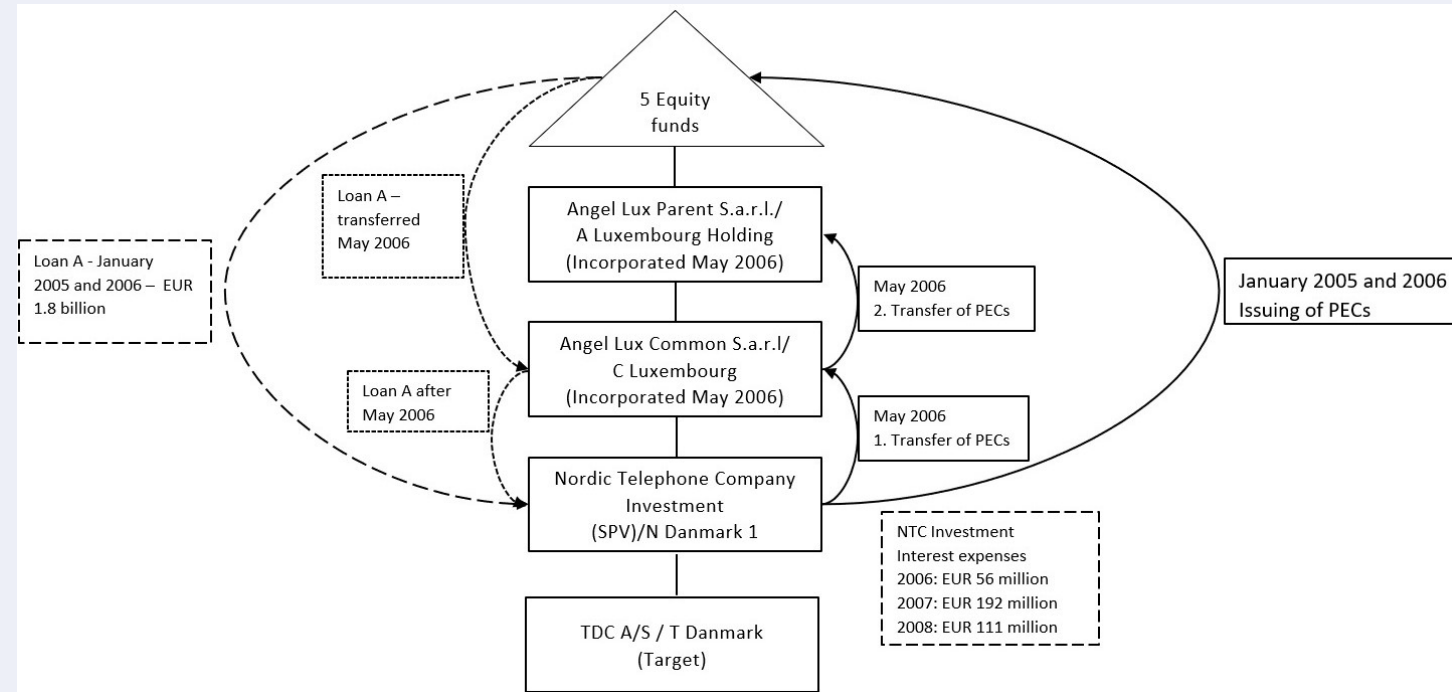
[100] “In my view the “beneficial owner” of dividends is the person who receives the dividends for his or her own **use and enjoyment and assumes the risk and control** of the dividend he or she received. The person who is the beneficial owner of the dividend is **the person who enjoys and assumes all the attributes of ownership**. In short the dividend is for the owner's own benefit and this person is not accountable to anyone for how he or she deals with the dividend income. When the Supreme Court in Jodrey stated that the “beneficial owner” is one who can “ultimately” exercise the rights of ownership in the property, **I am confident that the Court did not mean, in using the word “ultimately”, to strip away the corporate veil so that the shareholders of a corporation are the beneficial owners of its assets, including income earned by the corporation.** The word “ultimately” refers to the recipient of the dividend who is the true owner of the dividend, a person who could do with the dividend what he or she desires. **It is the true owner of property who is the beneficial owner of the property.** Where an **agency or mandate exists or the property is in the name of a nominee, one looks to find on whose behalf the agent or mandatary is acting or for whom the nominee has lent his or her name.** When corporate entities are concerned, one does not pierce the corporate veil unless the corporation is a conduit for another person and has absolutely no discretion as to the use or application of funds put through it as conduit, or has agreed to act on someone else's behalf pursuant to that person's instructions without any right to do other than what that person instructs it, for example, a stockbroker who is the registered owner of the shares it holds for clients.”

Jurisprudence: Danish cases, the CJEU (EU) (2019)

Facts: Y Denmark Aps / NetApp case (PSD)



N Luxembourg 1 / NTC Parent case (IRD)



S. Baerentzen, <https://mnetax.com/danish-beneficial-ownership-cases-on-interest-high-court-rules-in-favor-of-tax-administration-46444>

Contextual observations: BO was not decisive, the concept of abuse was

- “The facts as set out by the referring court and illustrated [(...)] by a number of diagrams of the structure of the company groups concerned are particularly complex and detailed.” [paras 29 & 36 on IRD & PSD, respectively]
- The CJEU cut the Gordian knot (the complexity of the cases) by using **the general principle of the prohibition on the abuse of rights** under EU law as a one-fits-all solution, while **the concept of BO was highly marginalized**
- The only reason why BO appeared in the Danish BO cases was **the lack of an adequate anti-abusive legal basis in Danish law** at the time when the disputes in these cases arose in Denmark (no antiabusive rules from IRD & PSD, no GAAR)

Jurisprudence: Danish cases, the CJEU (EU) (2019): BO & abuse

BO: no BO in PSD (dividends) but only in IRD (interest & royalties) = EU autonomous concept, the OECD Comm. of relevance

- BO under the IRD “must therefore be interpreted as designating an entity which actually benefits from the interest that is paid to it. Article 1 (4) of the directive by stating that a company of a Member State is to be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person.” [para. 88, IRD]
- BO “concerns not a formally identified recipient but rather the entity which benefits economically from the interest received and accordingly has the power freely to determine the use to which it is put.” [para. 89, IRD]
- BO, “which appears in the bilateral conventions based on that model, and the successive amendments of that model and of the commentaries relating thereto are, therefore, relevant when interpreting [IRD].” [para. 90, IRD]
- OECD is clear that the term BO “excludes conduit companies” and must have “a meaning that enables double taxation to be avoided and tax evasion and avoidance to be prevented.” [para. 92, IRD]
- A benefit from the IRD can be granted as long as BO is in EU = BO does not need to be a direct recipient [para. 94, IRD]

Jurisprudence: Danish cases, the CJEU (EU) (2019): BO & abuse

(Continued)

BO & abuse: no reply whether BO is anti-abuse rule, because decisive in those cases were the concept of abuse

- “in light of the general principle of EU law that **abusive practices are prohibited** and of the need to ensure observance of that principle when EU law is implemented, the absence of domestic or agreement-based anti-abuse provisions does not affect the national authorities’ obligation to **refuse to grant entitlement to rights** provided for by [IRD] **where they are invoked for fraudulent or abusive ends.**” [para. 111, IRD, cf. para. 72, PSD]
- “Having regard to the finding made in paragraph 111 above, there is **no need to answer Question 3** asked by the referring courts, relating in essence to **whether [BO under DTCs] can constitute a legal basis for combating** fraudulent and **abusive practices in the context of [IRD]**”, [para. 121, IRD, cf. para. 93, PSD]

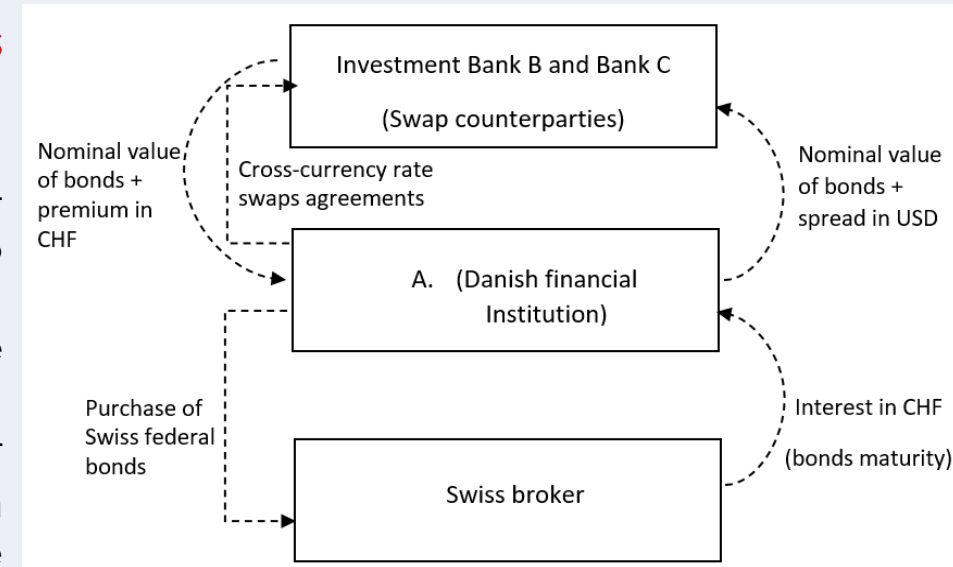
BO v. abuse: confusing use of a term “beneficial owner” while providing indicia of abuse of rights under IRD & PSD, e.g.

- **Where BO** “of interest paid **is resident for tax purposes in a third State**, refusal of the exemption provided for in Article 1(1) of [IRD] **is not in any way subject to** fraud or **an abuse of rights** being found.” [para. 138, IRD, cf. para. 111, PSD]
- “in particular **the fact that the company to which the interest has been paid is not its [BO]**” constitutes one of relevant factors of **existence of abusive practice**. [para. 142, IRD, cf. para. 117, PSD]

Jurisprudence: Swaps case, Swiss Supreme Court (2024)

Facts:

- A. (Danish financial institution) **purchased five tranches of two Swiss federal bonds**
- The bonds **were not part of securities lending or borrowing**
- Together with each bond purchase, A. entered into so-called “Cross-Currency Rate Swaps” (Swaps) with non-Danish investments Bank B and Bank C to hedge FX risk
- The swap term exactly matched the remaining maturity of the federal bond
- Under the swaps, A. received from the investment banks an amount in CHF corresponding to the nominal value of the bond tranche in Swiss francs plus a premium payment corresponding to the difference between the nominal value of the tranche acquired and its market value plus accrued interest.
- In return, A. **was obliged to pay to the investment banks the equivalent of the nominal value of the bond tranche in USD and a variable USD LIBOR interest plus a spread on this amount irrespective of whether interest were paid to A.** on Swiss federal bonds.
- Swiss tax authorities rejected WHT refunds because in their view A. was not BO of bond interest under Art. 11 DK-CH DTC as it did not bear any substantial bond-specific risk and was actually obliged to pay the amount equal to interest further to Banks B & C.



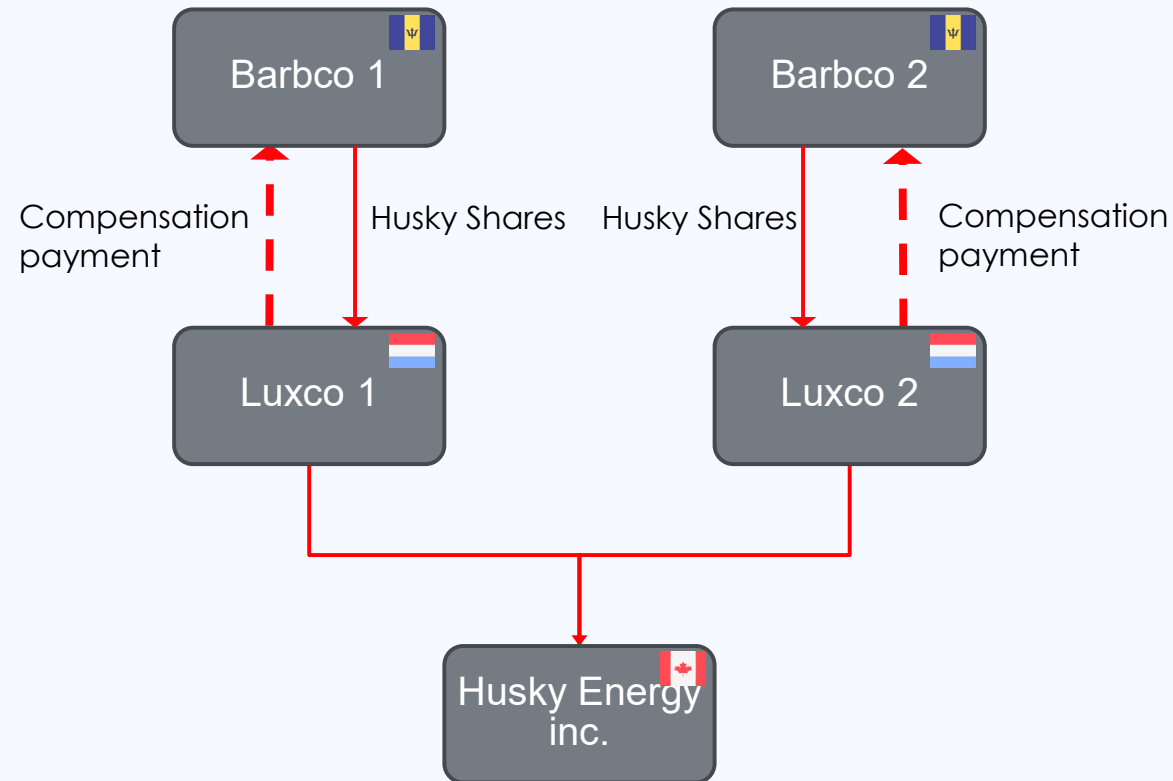
Jurisprudence: Swaps case, Swiss Supreme Court (2024)

(Continued)

Court's conclusion and reasoning: BO has an international fiscal meaning, not CH

- BO was added to DK- CH DTC only in 2009 => OECD Comm. (2014-2017) clarifies its meaning in the best way: BO of interest exists, unless their recipient is **contractually or legally (but not factually) obliged** to pass interest to another person so that they would never receive interest **but for that obligation** = it deprive the recipient of interest a right to use & enjoy them
- A. was BO of interest under Art. 11 DK- CH DTC because it would have been obliged to pay the nominal value of bonds and spread to its swap counterparties **even if the issuer of the Swiss bonds had not fulfilled its interest obligations on the bonds or had not fulfilled them in full** (no interest payment to A.) => A. was not legally/contractually obliged to pay amount of interest on Swiss bonds to its swap counterparties only if it received such interest from Swiss broker
- But 1: **swap payments** to no-DK entities were **obviously closely related** to the interest from the bonds **from a factual point of view** => thus, granting benefit under Art. 11 DK-CH DTC in the present case **is not in accordance with its purpose**
- But 2: a benefit under Art. 11 DK-CH **could be denied in case of abuse**, which must be further determined by the lower court => the arrangements at issue **could have been unusual and motivated by the tax savings**

Canada v. Hutchison Whampoa Luxembourg Holdings S.À R.L., 2025 FCA 176 [Husky].



Crown Forest Industries Ltd. v. Canada, [1995] 2 SCR 802.

“Of high persuasive value in terms of defining the parameters of the Canada-United States Income Tax Convention (1980) is the OECD Model Double Taxation Convention on Income and on Capital (1963) re-enacted in 1977. As noted by the Court of Appeal, it served as the basis for the Canada-United States Income Tax Convention (1980) and also has world-wide recognition as a basic document of reference in the negotiation, application and interpretation of multilateral or bilateral tax conventions.”

Alta Energy (TCC), per Justice Robert Hogan

[77] A tax treaty is a multi-purpose legal instrument. The preamble of the Treaty states that the two governments desired “to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital.” While indicative of the general purpose of the Treaty, this statement remains vague regarding the application of specific articles of the Treaty. Under the GAAR analysis, the Court must identify the rationale underlying Article 1, 4 and 13, not a vague policy supporting a general approach to the interpretation of the Treaty as a whole.

[84] Parties to a tax treaty are presumed to know the other country’s tax system when they negotiate a tax treaty; they are presumed to know the tax consequences of a tax treaty when they negotiate amendments to that treaty. The OECD commentaries highlight that some states – like Luxembourg – generally do not tax capital gains: OECD commentary on Article 13, 28.12. It is then the responsibility of the state that does tax capital gains to prevent a double exemption if it wishes to do so.

[93] When the Treaty was negotiated, adopted and ratified by Canada and Luxembourg, the Model Convention included in Articles 10, 11 and 12 a very narrow anti-abuse or treaty shopping rule. That provision was based on the concept of beneficial ownership and applied only to certain types of income (dividends, rents and royalties) received by residents of the other Contracting State. The rule was ultimately incorporated in the Treaty. It has been found to be of very limited application.

Canada v. Alta Energy Luxembourg S.A.R.L., 2021 SCC 49.

- Justice Coté (6 - 3 Majority): OECD Commentaries as Interpretive Aids
 - The OECD Model Treaty and commentaries are relevant in interpreting tax treaties
 - “However, the relevance of Commentaries released subsequent to the signing of a treaty is disputed.”
 - Adopts the approach from *Prévost Car* that subsequent commentaries are relevant if they expand or clarify existing notions, but not if they extend the scope in a manner not considered by the drafters

Canada v. Hutchison Whampoa Luxembourg Holdings S.À R.L., 2025 FCA 176.

- In 2003, Husky Energy Inc., a Canadian public company, declared a large special dividend.
- Before the dividend was paid, Barbados-resident shareholders (“Barbcos”) loaned their Husky shares to related Luxembourg companies (“Luxcos”) under securities lending agreements, so that the Luxcos were registered as shareholders of record when the dividend was paid.
- Husky paid about C\$328.99 million in dividends to the Luxcos and withheld tax at 5 %, the rate under the Canada–Luxembourg Treaty.
 - A 15% withholding rate would have applied had the dividend been paid to the Barbcos.
- The Tax Court held that the Luxcos were not the beneficial owners of the dividends, and concluded Husky should have withheld tax at a higher rate; but it did not raise the withholding rate above 15 % due to limits on appealing assessments.

Canada v. Hutchison Whampoa Luxembourg Holdings S.À R.L., 2025 FCA 176.

- The FCA dismissed the appeal;
 - The FCA emphasized that the Luxcos had no meaningful economic risk, earned only trivial returns, and relied on intragroup, cost-free “perfect” hedging arrangements.
 - The Tax Court committed no error in applying *Prévost Car*
 - FCA analysis of the “legal substance” of the SLAs:
 - Identifying the legal substance of the SLA’s is necessary to properly apply *Prévost Car*
 - When the SLAs are “interpreted and the surrounding circumstances are considered”, the SLAs are not “true” SLAs: “they do not reflect the parties’ intentions and are devoid of a fundamental characteristic of securities lending agreements.”
 - It was never intended that the Luxcos would sell or on lend the shares
 - No collateral was provided

Canada v. Hutchison Whampoa Luxembourg Holdings S.À R.L., 2025 FCA 176.

- The FCA dismissed the appeal (*con't*)
 - In *Alta*, the Supreme Court found that the “beneficial ownership” requirement for dividends, but not capital gains, reflects that such a measure was intended to prevent conduits from accessing treaty benefits
 - “Husky’s argument is at odds with how the Commentaries and the Conduit Report apply to this matter.”
 - Relying on the 2003 OECD commentaries on Article 10, FCA finds that “beneficial owner” is not used in a “narrow technical sense”, and should instead be interpreted “in light of the object and purposes of the [treaty], including avoiding double taxation and prevention of fiscal evasion and avoidance.”
 - “Since Luxembourg does not consider the Luxcos to be the economic owners of the Dividends and therefore does not tax them, the 2003 Commentaries support a conclusion that it would run counter to the purposes of the *Luxembourg Treaty* for Canada to treat the Luxcos as the beneficial owners of the Dividends.”
 - The commentaries are consistent with the Conduit Report that a conduit company is not the beneficial owner if it has “very narrow powers”

Canada v. Hutchison Whampoa Luxembourg Holdings S.À R.L., 2025 FCA 176.

- Husky is seeking leave to the Supreme Court of Canada
 - **Husky's assertion:** "Husky seeks to resolve the uncertainty created by the decision of the Federal Court of Appeal that applied an intention-based test of beneficial ownership, involving a subjective assessment of the economic results of transactions and the commercial reality of contracts."
 - **Crown's assertion:** "The judgment below applied settled law on beneficial ownership in the context of a tax treaty to a unique set of facts."

Canada v. Hutchison Whampoa Luxembourg Holdings S.À R.L., 2025 FCA 176.

- **Husky FCA decision critiqued:**

- The FCA never addresses or answers this question: can the owner of property at private law also not be the “beneficial owner” of the property for treaty purposes?
- The FCA introduces a novel “legal substance” approach, characterizing the Husky SLAs as “atypical” and not “true” securities loans, based not on sham or intended legal effect, but on surrounding circumstances and the likelihood that borrowers will exercise their ownership rights.
- The FCA’s approach departs from established jurisprudence (notably *Continental Bank* (TCC: 1995, SCC: 1998) and *Prévost Car*) by **focusing on practical constraints and intentions rather than the legal rights** granted under the agreements, and by relying on a selective reading of standard OSLA documentation.
- While the FCA attempts to confine its reasoning to the unusual facts of Husky, the **decision creates uncertainty** for securities lending markets and treaty interpretation, risks conflating domestic “economic ownership” with treaty “beneficial ownership”.

“Very narrow powers”

- *Husky (FCA) para 90: Thus, the Commentaries endorse the Conduit Report's assertion that “a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties”: 2003 Commentaries on Article 10 at para 12.1 (emphasis added) citing para. 14b) of the Conduit Report.*
- Did the Luxcos have “very narrow powers”?
- In a contract of agency, the agent's powers can be “narrow” or “broad”. The scope of the agent's powers is not fundamental to the nature of the relationship.

“Legal Substance” – Where do we stand?

- **Alta Energy dissent para 167:** *“In our view, Alta Luxembourg’s presence in Luxembourg is not genuine — it is mere gossamer. As such allowing it to enjoy tax benefits conferred on the basis of the stronger economic connection between the taxpayer’s income and Luxembourg frustrates the object, spirit or purpose of the provisions of the Treaty.”*
- **Methanex (UKPC, 2025) para 48:** *“Far from being abnormal, the payment of dividends up a corporate chain at the request of the ultimate holding company is a commercial commonplace in national and international groups, not least because it is the only lawful means by which distributable profits can be brought up from subsidiaries.”*
- **David Rosenbloom:** *“The doctrine of substance over form is not a magic wand that could be used to reconstitute transactions or corporate structures to suit tax administrators. The problems posed by treaty shopping, as often as not, transcend mere form. At least this is true for the jurist, accustomed to perceiving a real separation, of substance, between the corporate entity and its shareholders. The economist might contend otherwise, but it is surely late in the day to begin ignoring corporations for the sake of substance.” Intertax 1987*

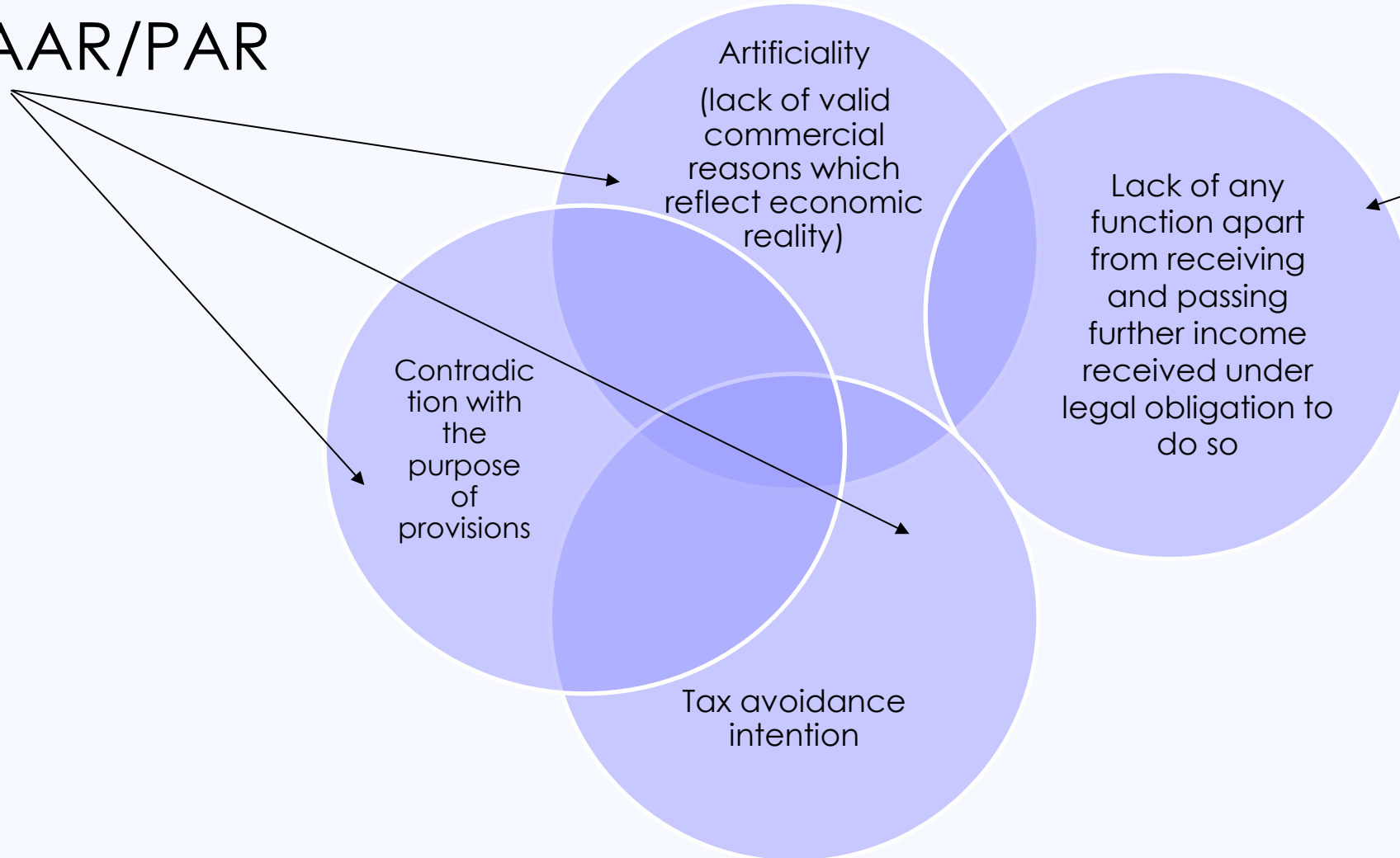
BO vs. EU GAAR and the EU general principle of prohibition of abuse of rights (PAR)

BO	GAAR	PAR
<u>Origin</u> : UK (ca. 150 years ago)	<u>Origin</u> : EU (10 years ago)	<u>Origin</u> : Roman law (ca. 2000 years ago)
<u>Nature</u> : rule (all or nothing)	<u>Nature</u> : hybrid, i.e., a rule-principle (dimension of weight to determine abuse & its consequences)	<u>Nature</u> : principle (dimension of weight)
<u>Function</u> : delineation of the subjective scope of EU directives and tax treaties re: dividends, interest & royalties (actual rather than sham/artificial allocation of income)	<u>Function</u> : prevent abusive tax avoidance mainly under corporate tax provisions (tax avoidance intention, artificiality and contradiction with the purpose of relevant tax provisions, typically which provide benefits)	<u>Function</u> : prevent abusive tax avoidance under all tax provisions (tax avoidance intention, artificiality and contradiction with the purpose of relevant tax provisions, typically which provide benefits)
<u>Order of application</u> : BO applies before GAAR/PAR	<u>Order of application</u> : GAAR applies after BO	<u>Order of application</u> : PAR applies after BO
<u>Legality & certainty to prevent abuse</u> : only indirectly if the qualified obligation exists	<u>Legality & certainty to prevent abuse</u> : directly when abuse exists (all premises of abuse must be met)	<u>Legality & certainty to prevent abuse</u> : directly when abuse exists (all premises of abuse must be met)
<u>Distribution of burden of proof</u> : on taxpayers	<u>Distribution of burden of proof</u> : on tax authorities	<u>Distribution of burden of proof</u> : on tax authorities

Significantly different scope & premises of application

GAAR/PAR

BO



Future of BO

Despite that BO can be as seen as *redundant, paradoxical and harmful* concept, it is highly unlikely that the concept of BO will cease to be a potent antiabusive weapon in hands of tax authorities, **unless tax jurisprudence reverses that trend** or legislators remove it from law

- *Redundant* because of proliferation of domestic GAARs and tax treaty PPT
- *Paradoxical* because it makes sense to apply it predominantly in tax avoidance situations, while BO does not have tax avoidance markers
- *Harmful* because its anti-abuse application is *redundant, paradoxical* and may upset the principle of legal certainty and effectiveness of tax treaties

Areas of particular concern

- Securities lending agreements, dividend or interest coupons and similar agreements splitting ownership between legal and economic
- BO-PPT/GAAR relationship will become the new big conundrum required in-depth tax technical expertise under tax treaties
 - ❖ *What if BO exists but PPT/GAAR denies a tax treaty benefit? The tax treaty with the ultimate investor may never apply because it shall apply only to BO and such investor is not BO*

QUESTIONS?



Guest Lecturers:

Błażej Kuźniacki

Global Tax Policy & International Tax Services at PwC Netherlands | Professor of Law at Lazarski University | Senior Research Affiliate at Singapore Management University

Robert Raizenne

Tax Partner, Osler, Hoskin & Harcourt LLP, Adjunct Professor of Tax Law at the Faculty of Law at McGill University