THE ELUSIVE FINGERPRINT: AN ANALYSIS OF THE CURRENT CHALLENGES IN IDENTIFYING BENEFICIAL OWNERS IN BILATERAL INCOME TAX TREATIES

Introduction

December 1st, 1999, saw the publication of a report containing the highlights of the 53rd Annual Congress of the International Fiscal Association (IFA), written by Professor Rick E. Krever. In that report, Professor Krever described the debates that took place in each of the seminars of the IFA scientific programme, which was entirely dedicated to palpitating international taxation issues for scholars, practitioners and enthusiasts. One of the seminars, specifically Seminar F, addressed a "mysterious legal construction [called] beneficial ownership",[1] and whether it had any place at all in the field of international taxation – the panel discussing this subject eventually concluded that it did. The panel further agreed that a treaty meaning for "beneficial ownership" should be pursued, and that the Organization for Economic Co-Operation and Development (OECD) ought to expand the Commentary to its Model Convention in order to properly define it.[2]

In the course of over fifteen years since the issuance of that report, "beneficial ownership" became a topic of increasing importance for international tax practitioners. The growing number of cross-border transactions compelled domestic authorities to ask themselves whether treaty benefits should be awarded to a party holding title to either corporate stock, or an interest-bearing note, or even a piece of intellectual property, just

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1 See LODIN, Sven-Olof. Editorial. *Bulletin for International Taxation*. V-53, N-10. International Bureau of Fiscal Documentation (IBFD): 1999, p. 417.

2 See KREVER, Rick E. Editorial. *Bulletin for International Taxation*. V-53, N-12. IBFD: 1999, p. 591. For the section of Seminar F, Professor Rick E. Krever expressly thanks the contribution of David Oliver.

because of apparent legal status. Should the lender of a particular sum of money be subject to a more favorable withholding tax rate simply because it is blessed by a Bilateral Income Tax Treaty (BITT) between two consenting nations, if the interest received from the source State is soon thereafter reverted to an entity located elsewhere? Who should be the beneficial owner of a particular flow of funds in a structure consisting of multiple entities, each one with a specific affiliation to the taxable event that led to the application of a BITT? Is it appropriate from a tax policy perspective to attribute ownership to an "economically dominant" party if that approach sacrifices the legal certainty essential to every multinational business plan?

Though these questions have concerned stakeholders at least since the 1960s,[3] the challenge in answering them is now more burdensome than ever before, and indeed it should be. Private equity investors, venture capitalists, multinational entities, and even your favorite celebrities[4] are constantly devising new and more complex strategies to reduce their overall tax burden, a calculation that will often involve an element of hiding their "beneficial ownership" status from the eyes of tax authorities. Add to that practice the temporary basking of international taxation in the limelight of tabloid[5] and investigative press,[6] and your end result is nothing short of a diplomatic witch-hunt: government agencies are pushed by individual taxpayers to promote "tax fairness",

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[3] The very first incarnation of the "beneficial ownership" standard in tax treaties appeared in the 1942 BITT between Canada and the United States, but it was not until 1966, with the Protocol to the BITT between the United Kingdom and the United States, that "beneficial ownership" was first addressed as the weapon of choice against practices of "treaty abuse" and "treaty shopping". See JONES, John F. Avery. The Beneficial Ownership Concept Was Never Necessary in the Model. In LANG, Michael, *et al. Beneficial Ownership: Recent Trends*. IBFD: 2013, pp. 337-338.

[4] See FORBES. *These celebrities shelter their wealth in tax havens*. By Daniel Bukszpan. April 14, 2015. Available at: <http://fortune.com/2015/04/14/celebrity-tax-havens/>.

[5] See DAILY MAIL. *Starbucks moves to UK in tax climbdown following threatened consumer boycott*. By Peter Campbell. April 16, 2014. Available at: <http://www.dailymail.co.uk/news/article-2606274/Starbucks-pay-tax-Britain-relocates-European-headquarters-London-following-customer-boycott.html>.

[6] See ICIJ. *Day in a Fiscal Paradise: Chasing Letterbox Leads in Luxembourg*. By Bastian Obermayer. December 05, 2015. Available at: <http://www.icij.org/project/luxembourg-leaks/day-fiscal-paradise-chasing-letterbox-leads-luxembourg>.

which then leads to their pursuit of the untaxed revenues of foreign "beneficial owners", which by its turn is a tug-of-war between the economic interests of different sovereign States and the need for a coordinated approach of these States against cross-border tax avoidance.

This paper discusses the main challenges in the identification of "beneficial owners" in cross-border transactions taking place today, and it specifically addresses whether the concept of “beneficial ownership” as it stands in our BITTs is fit for purpose – in other words, whether it efficiently targets the individuals or entities that should be deemed as the true recipients of any particular item of revenue and whether its terms are appropriate in light of the stated purpose of treaties to avoid both double taxation and double non-taxation of income.

1 The concept of “beneficial ownership” today

Asking what “beneficial ownership” is all about is a bit like asking who the greatest driver in the history of Formula 1 is. Some will tell you it is definitely Ayrton Senna, others will claim it is Michael Schumacher, or Juan Manuel Fangio, or even Jim Clark. The different answers are justified either because of sheer statistics, or because of a personal identification with a driver’s particular style, or because of home country bias, among other reasons. In order to reach a conclusion on who the best driver in the history of Formula 1 really is, we would be better off evaluating all the answers provided in light of the perspectives they reveal. This approach is perfectly applicable to our “beneficial ownership” investigation.

1.1 General characteristics of the "beneficial ownership" standard in BITTs

Beneficial ownership is in many ways an evolution of previous entitlement standards in BITTs. "Entitlement standards" are mechanisms that allow authorities to identify taxpayers entitled to treaty benefits in Contracting States, such as the holder of an interest-bearing note, or the direct shareholder of a foreign company. In these two cases, an entitlement standard of "formal receipt", for example, would look for the lender named in the relevant loan agreement, or for the shareholder registered in the company's records.[7] The entitlement standard commonly known as "subject to tax", on the other hand, would deny treaty benefits to these persons or entities if they were, with respect to their items of revenue, not subject to the regular taxes imposed on comparable residents of their respective Contracting States.[8] The "beneficial ownership" standard goes one step further in the quest to avoid the improper application of BITTs and demands that these taxpayers must have the "right to use and enjoy" their items of revenue without being constrained either by a contractual arrangement or a legal obligation to forward the payment to someone else.[9] If they are legally or empirically constrained by any of these duties, chances are they may have been placed in either of

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[7] Several BITTs signed in the first half of the 20th century used the term "beneficiary" as a surrogate for "recipient of (a particular flow of funds)", which in any given transaction would be the formal recipient of revenues in accordance with the domestic laws of Contracting States. See VANN, Richard. Beneficial Ownership: What Does History (and Maybe Policy) Tell Us. In LANG, Michael; PISTONE, Pasquale; SCHUCH, Josef; STARINGER, Claus; and STORCK, Alfred. *Beneficial Ownership: Recent Trends*. IBFD: 2013, pp. 308-311.

[8] "The subject-to-tax approach seems to have certain merits. It may be used in the case of States with a well-developed economic structure and a complex tax law. […] such an approach does not offer adequate protection against advanced tax avoidance schemes such as 'stepping-stone strategies.'" See OECD. *Model Tax Convention on Income and on Capital*. July 15, 2014, p. 65. Available at: <http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2014_mtc_cond-2014-en>.

[9] See OECD. Note 8, pp. 189/214/225. But see the Indian differentiation between "beneficial entitlement", which would be defined as the right to use and enjoy, and "beneficial ownership". KORDE, Ajit. *Beneficial Owner – The Debate Continues*. BNA Bloomberg. Available at: <http://www.bna.com/beneficial-owner-debate-n17179874704/>.

the two relevant Contracting States for the sole or main purpose of obtaining treaty benefits, a tax planning strategy widely known as "treaty abuse" or "treaty shopping".[10]

The definition of beneficial ownership as the full right to use and enjoy an item of revenue is complemented by Du Toit, who says that a beneficial owner "is the person whose ownership attributes outweigh those of any other person."[11] Du Toit touches upon an important point in the "beneficial ownership" debate, which is the fact that cases involving this BITT standard will often present authorities with more than one eligible "owner" for relevant items of revenue. Therefore, the task of finding the "beneficial owner" of a payment of dividends, for example, is not so much an absolute qualification of a taxpayer as the sole recipient of that item of revenue, but a judgment on who is "more of a beneficial owner" than all other parties competing (or not) for applicable treaty benefits. In considering whether an eligible "owner" is a "beneficial owner" for BITT purposes, one should analyze not only if that person or entity has the right to possess, use or manage the relevant item of revenue, but also if it bears the risk of depreciation attached thereto,[12] and if its risk is higher than the risk borne by other parties in each relevant transaction.

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[10] See ROSENBLOOM, H. David. Derivative Benefits: Emerging US Treaty Policy. *Intertax*. V-22. Kluwer Law International: 1994, p. 83.

[11] See DU TOIT, Charl. The Evolution of the Term "Beneficial Ownership" in Relation to International Taxation over the Past 45 Years. *Bulletin for International Taxation*. V-64, N-10. IBFD: 2010, p. 501.

[12] See DE BROE, Luc. *International Tax Planning and Prevention of Abuse*. Doctoral Series. IBFD: 2008, p. 677.

1.2 Contentious issues in the application of the "beneficial ownership" standard in BITTs

Though members of the international community generally agree that a BITT standard should be put in place to prevent persons and entities from abusing tax treaties, they will sometimes disagree on how to implement this standard. This goes back to our Formula 1 analogy, in the sense that disagreements on how to apply "beneficial ownership" treaty clauses are derived from different policy perspectives of countries around the world.

At least since the 2003 Amendment to the terms of the OECD Model Convention, it has been said that if a transaction takes place between parties located in BITT partner jurisdictions, one should primarily look to the BITT (not to domestic law) for a proper identification of the beneficial owner of revenues derived from that specific transaction.[13] This statement is supported by the finding that a number of sovereign States, particularly those with a civil law background, are not familiar with the concept of "beneficial ownership" in their domestic legislations,[14] and it would seem intuitive that an "international fiscal meaning" should be favored over a "domestic meaning" (and therefore an interpretation of "beneficial ownership" not agreed upon by both Contracting States) of this concept. However, given that a clear-cut "international fiscal meaning" to "beneficial ownership" is not readily available to local courts, they sometimes revert to domestic law,[15] and other times they season their interpretation of

13 Note 8, p. 189.

14 See BAKER, Philip. *Report on the Possible Extension of the Beneficial Ownership Concept*. Economic and Social Council – Committee of Experts on International Cooperation in Tax Matters. Geneva, October 20-24, 2008.

15 In the famous 2009 case of *Prévost Car*, decided by the Canadian Federal Court of Appeals (FCA), though the concept of "beneficial ownership" was primarily drawn from common law, it happened to coincide with the general terms of the concept before the OECD. See LI, JINYAN.

what the international standard is by looking at local legislation.[16] This mishmash of different viewpoints ends up confusing tax authorities and practitioners alike, which in turn creates legal uncertainty for multinational taxpayers.

Another issue that commonly arises in debates about "beneficial ownership" is whether it should be the mathematical result of a series of objective tests, or the legal byproduct of "economic substance", "step transaction" and/or "business purpose" doctrines. In the United States alone you can detect both a dominant preference for objective criteria (evidenced by Article 22 of the United States Model Convention, the "Limitation on Benefits" clause)[17] and a supplementary recourse to backstop doctrines.[18] These may sometimes be found only in the precedents issued by domestic courts,[19] but that is not always the case: the 2012 BITT between Russia and Chile, for instance, establishes that the benefits of the treaty shall be granted to taxpayers in structures created for "sound business reasons".[20] Similar provisions can be found in the

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Beneficial Ownership in Tax Treaties: Judicial Interpretation and the Case for Clarity. Osgoode Hall Law School – Research Paper Series. 2012, p. 198.

16 In the 2006 case of *Indofood*, decided by the English Court of Appeal, though a reference was made to an "international fiscal meaning" for "beneficial ownership", a test of "full privilege to directly benefit from the income" was drawn from Indonesian domestic law. See ELLIFFE, Craig. The Interpretation and Meaning of "Beneficial Owner" in New Zealand. *British Tax Review*. Number 03. Sweet and Maxwell, 2009.

17 See U.S. INTERNAL REVENUE SERVICE (IRS). *United States Model Income Tax Convention*. September 20, 1996, pp. 31-34.

18 See also the United States experience with the 1997 and 2001 cases of *Northern Indiana* and *Del Commercial* in CASTRO, Leonardo F. M. *U.S. Policy to Counter Treaty Shopping – From Aiken Industries to the Anti-Conduit Regulations: A Critical View of the Current Double-Step Approach from the Perspective of Treaty Objectives and Purposes*. Bulletin for International Taxation. V-66, N-06. IBFD: 2012, pp. 305-306.

19 Aside from the United States experience with *Northern Indiana* and *Del Commercial*, see also the Italian experience with Ruling 20398/2005, following the European Court of Justice decision in *Halifax*. ROSSI, Marco. *An Italian Perspective on the Concept of Beneficial Ownership*. Tax Notes International. Tax Notes: 2013, pp. 1164-1165.

20 See SERVICIO DE IMPUESTOS INTERNOS (SII). *Convenio entre el Gobierno de la Republica de Chile y el Gobierno de la Federacion de Rusia para evitar la doble imposición y para prevenir la evasión fiscal en relacion al impuesto a la renta y al patrimonio*. August 02, 2012.

1999 BITT between Italy and Estonia[21] and in the 2013 BITT between Brazil and Turkey,[22] and though they may reproduce domestic doctrines against tax avoidance, at least they have been expressly agreed upon by Contracting States. What the usage of these doctrines reveals, whether from a strictly domestic standpoint or in the context of a tax treaty, is a primary focus on battling tax avoidance by all means, including the expansion of administrative powers. These may be used in different degrees, for different purposes, by different tax authorities, resulting in distinct interpretations of the same terms of a particular BITT, and we find it is improper from a tax policy standpoint to rely on mutual agreement procedures (MAP) for the elimination of these potential conflicts – aside from the fact that they may never be fully resolved by BITT partners,[23] their use is based on the premise that taxpayers should seek redress for tax treatment disparities which are chiefly attributed to treaty design.

One last area of contention in the debates about "beneficial ownership" is the application of this standard to situations involving partnerships, collective investment vehicles (CIVs) and non-CIV funds, which are kinds of entities either unknown by some jurisdictions,[24] or considered as invisible parties, or even regarded as fully taxable entities. These different treatments across sovereign States may lead to conflicting

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21 See FISCO OGGI. *Convenzione tra il Governo della Repubblica Italiana e il Governo della Repubblica di Estonia per evitare le doppie imposizioni in materia di Imposte sul Reddito e per prevenire Evasioni Fiscali*. October 19, 1999.

22 "Competent authorities of Contracting States may deny the benefits of this Treaty to any person, or with respect to any transaction, if, in their opinion, the granting of these benefits, considering their circumstances, would constitute an abuse of the Treaty in relation to its goals." [underlined] See RECEITA FEDERAL DO BRASIL (RFB). *Acordo entre o Governo da República Federativa do Brasil e o Governo da República da Turquia para Evitar a Dupla Tributação e Prevenir a Evasão Fiscal em Matéria de Impostos sobre a Renda*.

23 See SIDHU, Poonam Khaira. *Is the Mutual Agreement Procedure Past Its "Best-Before Date" and Does the Future of Tax Dispute Resolution Lie in Mediation and Arbitration?* Bulletin for International Taxation. V-68, N-11. IBFD: 2014, p. 605.

24 See the perspective of Peruvian legislation in ZUZUNAGA, Fernando. *Report on Peru – Conflicts in the Attribution of Income to a Person*. IFA Cahiers de Droit Fiscal International. V-92b. 2007, pp. 528-529. Also, with regard to the Uruguayan perspective, see FRASCHINI, Juan Ignacio. *Report on Uruguay*. Id., pp. 696-697.

identifications of beneficial owners in transactions that make use of a limited partnership, or a private equity fund, or of equivalent vehicles, something that has been aptly pointed out by the Commentary to Article 1 of the OECD Model Convention.[25] This issue has also been addressed by the Discussion Drafts published in the context of Action 6 of the OECD Base Erosion and Profit Shifting (BEPS) Action Plan, which will be explored in the topic below.

2 "Beneficial ownership" and the OECD BEPS Action Plan

On July 19, 2013, the OECD published on its website what will probably be remembered as one of the most important documents in the history of international taxation, namely the Action Plan on the popular subject of BEPS. The idea for this project came from the widespread perception that the successful tax avoidance strategies employed primarily by multinational enterprises in their operations around the world represent frailties of generally accepted international tax rules and standards.[26] This project is therefore fueled by the intention of creating a new framework of domestic and cross-border tax norms fit for the labyrinthine world we live in.

Several parts of the Plan, or "Actions", address "beneficial ownership" either as a general treaty concept or as a noteworthy element in the discussion of specific weaknesses of international tax law. While the second category accommodates Action 1 (particularly dealing with how "beneficial ownership" will allow market jurisdictions to impose domestic withholding tax rates to digital businesses artificially located in a

[25] Note 8, pp. 49-61.

[26] See OECD. *Action Plan on Base Erosion and Profit Shifting*. OECD Publishing, 2013. Available at: <http://dx.doi.org/10.1787/9789264202719-en>.

BITT partner jurisdiction),[27] and Action 2 (stating that a "limitation on benefits" clause will ensure that hybrid instruments and entities are not used to obtain the benefits of treaties unduly),[28] among others, the part of the BEPS Plan most dedicated to finding the true identity of "beneficial owners" in BITTs is Action 6. According to the OECD, the main purpose of this Action is to "develop model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances."[29]

The first Discussion Draft of Action 6, released on March 14, 2014, contains three different sections. In the first section, the OECD takes a page from the playbook of the United States and recommends that an Article about "Entitlement to Benefits" should be added to the Model Convention. The proposed text for this Article contained various criteria for the qualification of a person as a beneficial owner, including a "derivative benefits"[30] set of rules and a catch-all provision establishing that benefits obtained by virtue of the BITT shall be denied if it is "reasonable to conclude" that the transaction that gave rise to them was entered into mainly for tax purposes.[31] Still in the first section, the OECD provides comments on the period of time that a shareholder should spend holding stock before being entitled to receive dividend payments, on the

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27 See OECD. *Public Discussion Draft – BEPS Action 1: Address the Tax Challenges of the Digital Economy*. OECD Publishing, 2014, p. 49. Available at: <http://www.oecd.org/ctp/tax-challenges-digital-economy-discussion-draft-march-2014.pdf>.

28 See OECD. *Public Discussion Draft – BEPS Action 2: Neutralise the Effects of Hybrid Mismatch Arrangements (Treaty Issues)*. OECD Publishing, 2014, p. 05. Available at: <http://www.oecd.org/ctp/treaties/hybrid-mismatch-arrangements-discussion-draft-treaty-issues-march-2014.pdf>.

29 Note 26, p. 19.

30 According to the Discussion Draft, a "derivative benefits" provision would allow Contracting States to grant treaty benefits to persons or entities that would be considered as "equivalent beneficiaries" due to the fact that they are residents of another BITT partner jurisdiction, and only if the withholding tax rate to which they are entitled is at least as low as the one provided in the treaty being applied. However, the OECD did raise the issue of whether, due to domestic differences in the tax treatment of relevant entities, a BEPS effect would be reached by the granting of "derivative benefits". See OECD. *Public Discussion Draft – BEPS Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*. OECD Publishing, 2014, pp. 08-09. Available at: <http://www.oecd.org/ctp/treaties/treaty-abuse-discussion-draft-march-2014.pdf>.

31 Note 30, p. 10.

use of MAP for the definition of the treaty residence of a dual-resident corporation, and on the interplay between domestic law and BITTs, amidst other topics.

The second and the third sections of the first Discussion Draft contain brief comments on the purposes of signing a tax treaty (which ideally should include the avoidance of "double non-taxation") and on the preliminary checklist that States should review before entering into BITT negotiations with foreign tax authorities. This last advice is not necessarily at the heart of the "beneficial ownership" debate, but it might prevent treaties from being agreed upon and signed in the near future. This would in turn either compel governments to comply with the recommendations adhered to by other sovereign States (whatever they might be), or to witness their own domestic corporations starve for foreign investment. Of course, one immediate reply to this statement would be that BITTs are not always signed with experienced capital exporters, but this is beside the point: which would be the countries most interested in adopting strict "beneficial ownership" thresholds in their treaties? The OECD claims its "Entitlement to Benefits" clause came from treaties signed by the United States, Japan and India,[32] all members of the G20, which is arguably the chief political and economic sponsor of the BEPS Action Plan. One would assume that the investigation practices recommended by the OECD would find initial supporters primarily in that group, rather than anywhere else.

After public comments made available on April 11, 2014, the OECD continued to improve the proposals of Action 6, clarifying its position on the reach of the so-called "principle purposes test" (PPT),[33] on the applicability of the "Entitlement to Benefits"

[32] Note 26, p. 05.

[33] The "principle purposes test", or PPT, would be either included as a complement (as described in this topic) or a substitute to the objective qualification criteria present in the "Entitlement to Benefits" clause. It would require that transactions from which BITT benefits are derived must not be driven by the main purpose of obtaining these tax benefits.

clause to countries in the European Union, as well as on the BITT treatment of CIVs and non-CIV funds. This report led to another round of public comments made available on January 12, 2015, which provided a basis for the updated draft released on May 22, 2015, which in turn led to yet another round of public comments updated to the OECD website on June 18, 2015. In reading the proposals and the comments made, we can clearly see that Action 6 (if adopted as it currently stands) is going to modify the existing Model Convention in several important ways, clarifying and/or adjusting the terms and the extension of the "beneficial ownership" standard in BITTs of member countries and associates[34] alike.

3 Potential issues with the application of the "beneficial ownership" standard (even) if OECD proposals make it to Action 15

Whatever the outcome of Action 6, or of Action 15 (the consolidation of all proposals into a neatly packaged multilateral agreement), persistent issues may continue to hinder the application of the "beneficial ownership" standard in tax treaties. We believe that these issues are not essentially conceptual, which is to say that the current pursuit for "beneficial owners" of revenues earned in the context of BITTs is a positive evolution of attribution procedures authorized by previous "entitlement standards" – "beneficial ownership" addresses tax avoidance situations that are evidently outside of the scope of "formal receipt" or "subject to tax" limitations, which in their purest form may be easily exploited by tax strategists across the globe.[35]

[34] Associates are non-member countries that have been invited to participate in the debates of the BEPS Action Plan, such as China and India. These countries are expected to "associate themselves" with the outcome of the project. Note 26, pp. 24-25.

[35] See GALEA, Rachel. *The Meaning of "Liable to Tax" and the OECD Reports*. Bulletin for International Taxation. V-66, N-06. IBFD: 2012.

The first problem facing the application of "beneficial ownership" in BITTs, even if Action 6 proposals find their way into the multilateral agreement of Action 15, is cross-border consistency. Yes, the OECD is coordinating the BEPS project exactly because it wishes to ensure that consistency among members and associates, but even now, months before the expected multilateral agreement is finalized, countries are individually adopting preemptive domestic and treaty measures against BEPS.[36] These potential discrepancies might either entail more opportunities for tax avoidance, which is an improbable outcome, or double taxation, which should be equally avoided by tax authorities applying BITTs.

In addition, we side with Du Toit and Baker in their defense of an "international meaning" to "beneficial ownership". For the sake of legal certainty and protection of foreign investment, the definition of who is entitled to treaty benefits should be fully provided to taxpayers in the text of BITTs, and this is admittedly one of the principles embedded into OECD proposals released thus far. However, when the Discussion Draft recommends the inclusion of a "catch-all rule" in the event the structure of a transaction meets all the listed requirements, but just seems mainly tax driven, it creates a gap in tax treaty application that may be exploited by domestic doctrines such as "economic substance", "step transaction" and "business purpose". These doctrines have populated international case law on "beneficial ownership" for the past century,[37] and though they may be useful for practitioners wishing to advise taxpayers operating in their own countries, their terms may or may not be respected by BITT partners, thus generating more conflict and a less efficient operation of bilateral tax agreements overall.

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[36] See RADOLINSKI, Michael H. *U.S. Treasury Attempts to Influence OECD'S BEPS Initiative via Proposed Changes to U.S. Model Treaty*. OSLER, June 22, 2015. Available at: <https://www.osler.com/en/resources/regulations/2015/u-s-treasury-attempts-to-influence-oecd-s-beps-in>.

[37] Notes 15 and 16 above.

Another issue that has been repeatedly argued by associations making comments to the OECD proposals in the context of Action 6 is the lack of clarity in the definition of investment vehicles (mainly CIVs and non-CIV funds) as prospective treaty beneficiaries under the BITT concepts of "person" or "entity".[38] As we discussed before, partnerships, CIVs and non-CIV funds are usually not recognized as taxable entities or even as "regarded entities" by countries with a civil law background, and we find no evidence of the political willingness of these countries to adjust their domestic approach in light of the terms of the multilateral instrument to be signed after Action 15. What this apparent conflict may cause is the denial of treaty benefits to CIVs and non-CIV funds even when they are regulated entities in the countries of residence, just by virtue of the incompatible treatment they receive with regard to revenues earned in the State of source.

Finally, in spite of the arguments presented by commentators to the Discussion Draft, we believe that any appropriate "Entitlement to Benefits" clause must contain some form of "derivative benefits" provision, allowing persons or entities in BITT partner jurisdictions to enjoy lower withholding tax rates even though they decide (for business and/or tax reasons) to wire their investments using subsidiary treaty connections. We find, however, that countries may oppose to this practice if they are able to identify that a more efficient tax result is reached by parties in the aggregate of treaty and domestic benefits, which is just another way of forcing BITT partners to adjust their internal tax rates to "international standards". Our position is that this political influence over foreign tax policy is not a logical consequence of the "beneficial ownership" investigation, and that it shifts tax revenues from countries in need of

[38] See OECD. *Comments Received on Revised Public Discussion Draft*. OECD Publishing, 2015, pp. 05-28. Available at: <http://www.oecd.org/ctp/treaties/public-comments-revised-beps-action-6-follow-up-prevent-treaty-abuse.pdf>.

foreign investment, instead of increasing them, which is one of the underlying motivations for the support of these countries to the BEPS project as a whole.

Conclusion

The increasing sophistication of tax planning strategies all around the world is a natural catalyst for discussions about the entitlement to treaty benefits, an issue that has up until very recently been debated mostly by government agencies and resident taxpayers before their domestic courts. Nowadays, however, we are witnessing the rapid relocation of that debate to the international arena, predominantly as a result of the OECD BEPS Action Plan, but also because countries have realized that their lack of coordination on how to investigate "beneficial ownership" in BITTs has led to the creation of loopholes used by multinational entities in their cross-border business plans.

The concept of "beneficial ownership" is at the moment derived from relevant BITT experiments and landmark cases of G20 countries, or of known conduit jurisdictions, but we believe this is bound to change in the future. The proper implementation of this standard in treaties must take into account the importance of fostering foreign investment, of reconciling both double taxation and double non-taxation as equally relevant goals of tax treaties, and of providing taxpayers with objective guidelines for compliance with applicable rules. We stress that the very justification of tax treaties as facilitators of international trade depends on these elements being factored into a set of provisions coherently replicated in BITTs after Action 15 is concluded.