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MAIN SUBJECT 2 SESSION REPORT

Improper Use of Tax Treaties and Source Taxation: Policy, Practice and Beyond

Tuesday, 7 October 2025 | 08:30-10:00/10:45-11:45

Chair
Prof. Dr. Luís Eduardo Schoueri (Brazil)

Panel members
Prof. Dr. Jinyan Li (Canada)
Prof. Dr. Eivind Furuseth (Norway)
Valeria D'Alessandro (Argentina)
Thomas Ickeringill (Australia)
Prof. Dr. Eric C.C.M. Kemmeren
Padamchand Khincha (India)
Amanda Pedvin Varma (USA)
Elisangela Rita (Angola)
Adriana Rodríguez (Mexico)
Dr. Adam Zalasiński (Poland/EU)
Prof. Dr. Juan Zornoza (Spain)

Prepared by Secretary
Prof. Dr. Luís Flávio Neto (Brazil)

1. Introduction

The first part of the panel examined whether, when, and where the improper use of double taxation agreements occurs, focusing on source countries' perspectives, the need to maintain investment attractiveness, existing anti-abuse rules, and recent court cases involving treaty shopping and rule shopping. The second part of the panel explored the arsenal of beneficial ownership, Limitation of Benefits (LOB), and Principal Purpose Test (PPT) clauses available to countries to calibrate their intolerance toward treaty shopping, while also considering a rich variety of recent court decisions worldwide.

2. Main Topics Discussed

2.1. Topic 1: Introduction to treaty shopping and rule shopping from the source country perspective

The session opened with insightful presentations from the General Reporters, Jinyan Li and Eivind Furuseth . They summarized the General Report on Subject 2, and also laid the groundwork for the discussions that would follow. The General Report is an outstanding piece of work, comparing national reports in detail and offering a pragmatic view of the topic, making its thorough examination highly recommended.

Immediately after this introduction, the first poll of the panel was launched:
"Considering the A–B and B–C DTAs, Company X, a resident of A, sets up a company in B (treaty shopping). If there is abuse, which treaty is abused?
A total of 263 participants responded via the Congress app as follows:

(A) The A-B DTA has been abused – 21%

(B) The B-C DTA has been abused – 20%

(C) None of the DTAs has been abused – 18%

(D) Both treaties have been abused – 39%

As will be seen later, after a series of insights shared during the panel, the same question was posed again, and the results changed substantially.

Following the poll, Thomas Ickeringill addressed the source country perspective, balancing anti-abuse measures with the need to maintain investment attractiveness. In particular, he addressed the question: How can Australia achieve its ambition for a faster energy transition while ensuring it collects its fair share of tax from natural resource exploitation? Building on this insightful analysis of the Australian context, Adriana Rodríguez and Padamchand Khincha shared brief perspectives drawn from their professional experiences in source countries.

The discussion then shifted to a fundamental question: if it exists, where is the "abuse" in a treaty shopping arrangement? In other words, if treaty shopping should be avoided, the first step is to identify where the abuse lies. Since Brazil does not have a tax agreement with the United States, Luís Eduardo Schoueri explored this issue using an example involving the Brazil–Netherlands and Netherlands–US treaties, arguing that the treaty between the residence state and the intermediary state should be considered rather than the one between the intermediary and the source state. This means that the OECD may be adopting an incorrect perspective in its recommendations. It is also important to note that the US investor (the residence state) benefits from the US–Netherlands treaty, which enables the tax planning. In the context of this example, completing the analysis, Amanda Pedvin Varma and Eric Kemmeren offered compelling arguments from their respective countries' perspectives.

But improper use of treaties is not limited to treaty shopping structures. The panel continued with Eric Kemmeren's discussion of the so-called rule shopping, illustrated by the Dutch case of conversion of dividends into capital gains on shares under the OECD Model Tax Convention**.** Valeria D'Alessandro also detailed Argentina's experience with rule shopping in the Carrefour case. Amanda Pedvin Varma , Valeria D'Alessandro , and Juan Zornoza added their views on these structures.

Advancing the discussion on proper versus improper use of treaties, Jinyan Li highlighted that countries remain committed to source taxation, balancing anti-abuse measures with the need to attract investment. The tension between inbound capital and rigorous enforcement was illustrated with case studies such as Australia's energy transition and the Methanex case related to UK and Trinidad and Tobago, which involved combating treaty shopping through domestic General Anti Avoidance Rules(GAAR) and Special Anti Avoidance Rules (SAAR) provisions. Juan Zornoza and Thomas Ickeringill reacted to this analysis, citing other cases decided by courts worldwide. For example, Thomas illustrated the PepsiCo case.

At this point, the same question from Poll #1 was posed again to measure whether the presentations had changed participants' perceptions: **"Considering the A–B and B–C DTAs, Company X, a resident of A, sets up a company in B (treaty shopping). If there is abuse, which treaty is abused?"** This time, 274 participants responded:

(A) The A-B DTA has been abused – 18%

(B) The B-C DTA has been abused – 18%

(C) None of the DTAs has been abused – 31%

(D) Both treaties have been abused – 31%

From Poll #2, we observed a significant rise in participants acknowledging, as the panel discussions progressed, that some treaty shopping scenarios could represent proper application of treaties rather than abusive practices.

Dealing with Latin American treaty shopping case law, Adriana Rodríguez presented the Arrendadora Movil case as an illustration of how source countries resort to domestic law when treaties prove insufficient. Valeria D'Alessandro offered an insightful response to Adriana's excellent presentation, referencing the Molinos, Lutz, and Praxair cases and providing a pragmatic perspective on prevailing trends in Argentine court decisions.

Closing this dynamic panel, Padamchand Khincha discussed how recent developments in India's GAAR are shaping the approach to treaty shopping, signaling potential changes in a jurisdiction that has historically shown tolerance toward such structures.

2.2. Topic 2: The arsenal of measures to tackle the improper use of tax treaties

After a delightful Portuguese coffee break, the second panel welcomed an even fuller auditorium to explore countries' anti-abuse arsenal for addressing the improper use of tax treaties: Beneficial Ownership, the PPT, and LOB clauses.

Adam Zalasiński opened the discussion on treaty shopping and beneficial ownership under the European Union's approach, including the Parent-Subsidiary Directive (PSD), Interest-Royalties Directive (IRD), and the Court of Justice of the European Union's decisions on conduit companies and beneficial ownership (Danish cases).

Continuing the analysis of this comprehensive arsenal, Juan Zornoza addressed the PPT in theory and practice, offering a critical perspective based on the Lowy and Sky cases, which

were later revisited by Padamchand Khincha during his presentation on Indian cases. Juan Zornoza examined how Action 6's minimum standard provides three different approaches to achieve the same goal, but producing different results due to the nature of the rules: a sole PPT, PPT combined with LOB, or LOB combined with Anti-Conduit Rules. The discussion also clarified the subjective and objective tests embedded in the PPT clause.

A new poll was then launched via the Congress app, with 483 participants responding to the question: **If a PPT clause were included in all tax treaties, what would happen?**

(A) The improper use of treaties would be solved – 8%

(B) New structures would be created by taxpayers to circumvent the PPT clause – 39%

(C) More controversies would arise – 51%

Poll #3 indicates that most of the audience remains skeptical about the effectiveness of PPT clauses in reducing tax litigation. Indeed, many believe the opposite could happen, with an increase in disputes if such clauses were broadly implemented.

After this Poll #3, discussing treaty shopping, LOB, and hidden PPT clauses, Amanda Pedvin Varma explained how U.S. tax treaties are equipped with objective LOB tests, which focus on the characteristics and activities of entities and their owners. U.S. treaties contain objective LOB tests to combat treaty shopping, and if an objective test is satisfied, the treaty resident's purpose or intention becomes irrelevant. In some cases, the objective LOB test may not be satisfied even when no treaty shopping occurs. But U.S. treaties also allow discretionary determinations by competent authorities, which consider the principal purpose of arrangements.

Padamchand Khincha then discussed India's experience, one of the most interesting cases regarding treaty shopping and PPT. The burden of proof and the role of SAARs and domestic GAARs were debated, considering very recent Indian cases such as Tiger Global (2024), Ayodhya (2024), Lowy (2025), and Sky (2025).

The African experience with treaty shopping and PPT clauses was presented by Elisangela Rita . Courts have not yet developed substantial PPT jurisprudence, but there is progressive adoption of PPT clauses in treaties:

Country	PPT Adoption Status (2025)
South Africa	Yes (MLI, post-2023)
Mauritius	Yes (MLI, new DTAs)
Angola	Yes (new DTAs)
Cameroon	Yes (MLI)
Nigeria	Yes (MLI)
Egypt	Yes (MLI)
Morocco	Yes (MLI)
Lesotho	Yes (MLI)
Tunisia	Yes (MLI)
Ghana	Some PPT coverage
Namibia	Some PPT coverage
Zambia	Some PPT coverage
Uganda	Yes (MLI/updates)

In a dialogue with Elisangela Rita , Luís Flávio Neto identified similarities between Brazil and several African countries: this Latin American country also lacks court cases applying the PPT, and many of its treaties do not even include a PPT clause. However, this does not mean Brazilian tax authorities would avoid applying similar logic. Interestingly, even without a GAAR, Brazilian tax authorities and the administrative tax court have often questioned whether a structure was set up mainly to obtain tax benefits. This occurs both domestically and internationally, as shown in the well-known Eagle case, where the Administrative Tax Court disregarded a company established in Spain, arguing it lacked substance. In contrast, in another recent case (ADI 2446), the Brazilian Supreme Court ruled that taxpayers are free to organize their business to reduce their tax burden, and that Brazil does not have a GAAR. The only limitation applies to sham or fraud transactions.

Toward the end of the second part of the panel, Eric Kemmeren provoked discussion on the Principle of Origin and how some foundations of international taxation may be the root cause of the improper tax treaty use. Taxing income where value is created was advocated as a means to enhance justice, ability-to-pay, direct benefit, tax neutrality, and inter-nation equity, reduce economic gaps between developing and developed states, and ensure efficient allocation of production factors. On the other hand, it would reduce double taxation, tax evasion, and abusive treaty shopping and rule shopping.

The final remarks of the second topic were delivered by the General Reporters of Subject II, Eivind Furuseth and Jinyan Li. They noted that, while legal frameworks appear to be converging, their practical application remains divergent due to differences in domestic law, interpretation, and enforcement. The need for international coordination, stable legal frameworks, and clear guidelines was emphasized to promote cross-border investment and sustainable long-term growth.

3. Conclusions and Key Takeaways

In his closing words, Chairman Luís Eduardo Schoueri paid tribute to Professor Alberto Xavier at the Lisbon IFA Congress, emphasizing his pivotal role in shaping international tax law in Brazil and worldwide.

This is how these two topics unfolded, exploring the hottest topics of Subject 2 and clearly demonstrating that, even ten years after the BEPS project, there are still many issues yet to be addressed regarding the improper use of tax treaties and source taxation.