Kluwer International Tax Blog

Reconciling MLI Anti-abuse Treaty Rules with Existing Double Tax Agreement (DTA) and Domestic GAAR in Argentina

Guillermo O. Teijeiro (Bomchil) · Monday, April 25th, 2022

Notes on the starting of MLI internalization process

1. **Background**

The Multilateral Convention to Implement Tax treaty Related measures to prevent BEPS (the Multilateral BEPS Convention or MLI) [i] rounded up the implementation of the treaty-based final BEPS outcomes in one single document. MLI is aimed at providing a framework that could allow amending existing bilateral treaties at once, bringing them in line with BEPS treaty-related minimum standards and recommendations without the need to endeavor complex and lengthy bilateral renegotiations.

In a historical signing ceremony hosted by OECD on June 7, 2017, 76 countries and jurisdictions signed or expressed their intention to sign MLI.[ii] Later on, the number of signatories increased to the current 99 countries and jurisdictions, covering over 1,800 bilateral tax treaties worldwide.[iii]

In Latin America, most major Latin American economies have signed MLI, though Argentina, Colombia, Mexico, and Peru have not yet ratified it.[iv] In Argentina, after inexplicable years of inaction, the Executive Power finally sent MLI for Congressional consideration on April 1, last. The text of MLI was sent to Congress in the English and French official languages, accompanied by a translation to the Spanish language.

2. **Interactions Between GAAR and MLI anti-treaty Abuse Rules**

Domestication of MLI through its Congressional ratification in Argentina would create a series of interaction issues in the context of MLI rules for the prevention of treaty abuse and already existing domestic GAAR, heavily applied in the past under a DTA umbrella, both by the tax administration and the courts. These issues and the alternatives to reconcile these two different sets of rules are at the core of this

contribution.

One theoretical alternative might be just doing nothing, so that MLI anti-treaty abuse rules would simply add up to existing domestic GAAR and other tools[v] the Argentine tax administration counts on to prevent avoidance in a treaty setting. This alternative, however, conflicts with express MLI ordering rules of inexcusable application, and, if it is somehow followed in practice, would result in an objectionable tax uncertainty. Then, reconciliation of MLI rules on the prevention of treaty abuse and domestic GAAR would be unavoidable for statutory and prudence reasons.

Avoiding GAAR shopping by competent authorities and tax administrations is a great challenge; These agencies are often inclined to pile up anti-avoidance rules of a treaty or domestic nature without any hierarchy or prevalence of application, and to surf back and forth on them at will to enhance the scope of the taxable event to its maximum possible reach, and, hence, tax collection.

As a refinement of previously existing domestic GAAR and SAAR, bilateral and multilateral (MLI) treaty anti-abuse responses have established a set of standards for transactions under the treaty umbrella that might create an overlapping effect and hence increase uncertainty among taxpayers unless sound ordering principles are followed in their application. As anticipated, some ordering principles are advanced in MLI itself, but others must also be developed to consider the nuances of each jurisdiction's domestic rules and treaty networks, as demonstrated in this discussion focused on Argentina.

3. **Application of GAAR in the Context of the Argentine Treaty Network**

As a general rule, and until quite recently, Argentine DTAs have not contained express anti-treaty shopping rules and have been silent on the possible application, and interpretation of the domestic GAAR of contracting states. Latest DTAs already in force, however, do contain treaty GAAR and/or LoB provisions (notably the treaties with Spain, Chile, Mexico, United Arab Emirates, and the Amending Protocol with Brazil).[vi]

As regards the issue of whether GAAR should apply in a treaty setting, Argentine scholars' opinions have differed; some agreed, some agreed under certain conditions, and some opposed altogether.[vii] Contradicting opinions have also been sustained among eminent foreign scholars.[viii]

In practice, Argentine cases of GAAR application in a treaty setting have been numerous, particularly concerning GAAR re-characterization or disallowance of Argentine residents' round-tripping structures through treaty-partner countries.

Conversely, only a couple of isolated administrative precedents have dealt with inbound transactions. Both deal with the re-characterization of income at source: One of these precedents was issued by the Tax Administration on January 30, 1996, [ix] and addressed the re-characterization of Argentine source income to treaty-partner residents by applying GAAR to the assessment of facts under the DTAs with Italy and

Spain. In the case at hand, insurance premiums paid by a local borrower to foreign insurers, in connection with money lent to it by foreign banking institutions located in Spain and Italy, were deemed subject to income tax withholdings applicable to interest since, in the tax administration's view, the economic reality showed that through those payments the borrower was, in fact, assuming a higher financial cost equivalent to the insurance cost incurred by the lender to cover the potential insolvency risk of the borrower. The other case is from the Argentine Competent authority (Dirección Nacional de Impuestos or DNI) and dealt with the reallocation of interest income from DEG to participants under a participated loan agreement governed by the DTA with Germany. [x]

An analysis of the precedents related to outbound situations, i.e., affecting Argentine residents' round-tripping investments and income through DTAs, fairly exceed this contribution, so I mentioned them in the accompanying footnote, where also remit to previous works of my authorship discussing them at length.[xi]

4. **MLI and the Appearance of Multilateral Treaty Anti-abuse Rules**

The Final Report of Action 6, OECD/G20 BEPS Action Plan, section A, provided for the new treaty anti-abuse rules; and the following approach was recommended: (i) the inclusion of a clear statement in the DTA, in the sense that parties to the tax treaty intend to avoid creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including treaty shopping arrangements); (ii) a specific anti-abuse or LoB rule; and (iii) a more general anti-abuse rule (the principal purpose test or PPT rule) aimed at addressing situations that would not be covered by the LoB rule.

Moreover, recognizing that LoB and PPT may not be appropriate for all countries and that domestic law may include provisions that make it unnecessary to combine both to prevent treaty shopping, the Final Report set forth a minimum standard of commitment, which consists of (i) a combined approach of LoB and PPT rule, (ii) a PPT rule alone, or (iii) an LoB rule supplemented by a mechanism that would address conduit financing arrangements, not already dealt with in DTAs.

The Final Report also included in section A, changes to the OECD MC aimed at ensuring that DTAs do not inadvertently prevent application of domestic GAAR to fight strategies that seek to circumvent provisions of domestic tax laws.

Section B of the Final Report further provided for a reformulation of the Title and Preamble of the OECD MC, clarifying the shared intention of the parties to avoid creating opportunities for tax evasion and avoidance, in particular through treaty shopping arrangements.

In the same line, MLI (Articles 6 and 7) further deals with the minimum standard and optional alternatives to prevent treaty abuse.

The minimum standard requires (i) the inclusion of an express statement in the Preamble stating the common intention to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance,

including treaty shopping arrangements, and (ii) at least a PPT rule, which is the only approach, deemed to satisfy the minimum standard by its own. Options include (i) supplementing the PPT rule by the application of a simplified LoB provision (SLoB), or (ii) a standalone detailed LoB provision, used in conjunction with a mechanism to deal with conduit arrangements not already addressed in tax treaties. MLI does not include the text of such a detailed LoB provision, so that parties that prefer to use it are allowed to opt out of the PPT and agree to reach a bilateral agreement that satisfies the minimum standard, or accept MLI's PPT as an interim rule.

The Preamble text contemplated in paragraph 1 of Article 6 is to be included in place of or in the absence of similar Preamble language in the Covered Tax Agreements, as defined by MLI.[xii] Each party must notify OECD on whether each of its Covered Tax Agreements contains Preamble language and the text of the relevant paragraph. When all contracting parties have made such notification, the Preamble language is to be replaced by the text contained in paragraph 1 of Article 6, MLI.

The PPT rule of the MLI applies in place of or in the absence of similar provisions under the Covered Tax Agreement.[xiii] A party may choose to apply the SLoB to its Covered Tax Agreements, but the provision shall symmetrically apply to a Covered Tax Agreement only where both contracting jurisdictions have chosen to apply it. A SLoB, however, could still be asymmetrically applied by one of the parties to an agreement, if it has decided to do so when the other party agrees to such application notifying OECD accordingly.

Argentina committed itself to amend its Covered Tax Agreements, adopting the text of the Preamble provided for in Article 6, 1, MLI, and to adopt the minimum standard consisting of a combination of PPT and SLoB.[xiv]

MLI principles (reflecting the conclusions of BEPS Action 6) are reflected in the Preamble and in the text of the OECD MC 2017, primarily in Articles 1 (Persons Covered) and 29 (Entitlement to Benefits), and their Commentaries. International tax scholars have extensively explored the very nuances of the new treaty anti-abuse rules, as well as the potential conflicts of said rules with pre-existing domestic GAAR and SAAR. [xv]

5. Reconciling MLI Anti-abuse Rules with Bilateral treaties and Domestic GAAR

It is clear that concrete ordering rules or principles must be developed to furnish the new conventional international law with an elemental predictability and certainty. The following comments address this issue in the context of the Argentine domestic and treaty law.

Once MLI is fully implemented in Argentina through internal congressional ratification and the required subsequent notification to OECD, the ordering rules –at least from a theoretical point of view– will be rather clear:

- in accordance with the principle that the MLI minimum standard applies in the absence of similar provisions under the Covered Tax Agreements, bilateral PPT/LoB

will prevail over the MLI PPT/SLoB minimum standard adopted by Argentina;
- the MLI minimum standard adopted by Argentina (PPT/SLoB) will apply to Covered Tax Agreements lacking similar provisions;
- Specific bilateral provisions and MLI's PPT/SLoB incorporated to Covered Tax Agreements will prevail over domestic GAAR/SAAR as a tool to fight tax avoidance (including treaty shopping) under the Argentine tax treaty network. In effect, where the application of the provisions of domestic law and those of DTAs produce conflicting results, the provisions of DTAs are intended to prevail.[xvi]

Application of the ordering rule referred to in subparagraph (i) of the preceding paragraph may require certain previous definitions in particular cases. For instance, query whether the anti-abuse rules applicable under the Spanish treaty currently in force may be deemed "similar" to the MLI minimum standard adopted by Argentina, and, hence, prevail over the latter. In this sense, it is worth reminding that there may be some contradiction between both sets of provisions since under the Spanish treaty the PPT rule is limited to Articles 10-13, and this DTA also made expressly applicable the parties' GAAR to situations under the treaty umbrella. In my view, in this case, the MLI provisions, once effective, should supersede the Spanish treaty provisions since the former are of a wider scope and postpone domestic GAAR to the conventional treaty anti-abuse provisions.

A similar analysis would be required when comparing the MLI SLoB provision with that of some Covered Tax Agreements, such as the LoB provisions under the Chilean Treaty and the Brazilian Protocol, or the Mexican Treaty which, besides adopting a PPT and an LoB, makes domestic GAAR expressly applicable in the treaty setting; not to mention the current treaty with the United Arab Emirates, where the PPT standard functions not to complement the LoB, but rather as a limit against the objective application of the treaty LoB.[xvii]

In my view, once the MLI becomes effective, the MLI anti-abuse provisions adopted by Argentina (PPT and SLoB), should supersede and prevail over the previously mentioned DTA clauses with their various nuances. In this sense, an express decision will bring certainty to the application of anti-abuse rules to the Argentine treaty network.

An additional complexity hinges on whether such a determination should be unilaterally made by Argentina or in conjunction with the treaty-partner jurisdiction. To the extent that the determination might be viewed to affect international commitments undertaken by Argentina with treaty-partner countries, an agreement as to whether the MLI provisions supersede the application of bilaterally negotiated clauses should be sought.

Instead, domestic GAAR will remain available wherever Argentine domestic rules might have been circumvented within a treaty umbrella. This position not only arises from MLI itself but is also in line with the status of treaties and their prevalence (pursuant to the Vienna Convention and Argentine Constitutional Law) over domestic legislation. In effect, where the application of the provisions of domestic law and those of treaties produce conflicting results, the provisions of treaties are intended to prevail.

In practice, however, it might be troublesome to define with precision whether the treaty and/or domestic rules have been circumvented. Consequently, fine-tuning and prudence would be required to avoid using GAAR as a cure-all subsidiary tool whenever the tax administration finds that the bilateral or multilateral treaty-based anti-abuse rules fall short to apprehend the improper use of a treaty in a given case.

[i] http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf); Explanatory Statement: http://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf

[ii] Signing jurisdictions include, inter alia, the following countries, Argentina, Armenia, Australia, Austria, Belgium, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, the Czech Republic, Denmark, Egypt, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Portugal, Romania, Russia, Serbia, Singapore, the Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, the UK, and Uruguay. Notably absences include the United States of America and, in LatAm, Brazil and Peru.

[iii] https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf

[iv] On the matter of MLI in Latin America see also, Teijeiro, *Multilateral BEPS Convention opens choices to LATAM countries*, Kluwer International Tax blog; and Teijeiro, Kluwer International Tax Blog, July 3, 2017.

[v] DAC 6-type rules, such as Argentine AFIP Resolution 4838/20 through which aggressive tax planning schemes using, inter alia, DTAs, should be reported, also contribute to ease tax administration's advance notice on this type of transactions.

[vi] See Teijeiro, Argentine Anti-Avoidance Rules: Application under Domestic and International Conventional Law, Tax Notes International, October 2003, pp. 89 ff; see also Teijeiro, The Argentine Tax Treaty Network: A Safe Harbor for Foreign Taxpayers, Tax Notes International, January 19, 1999, pp. 287 ff. Teijeiro, LoB Clauses, PPT Standard and the Latin American Treaty Network Choices, Kluwer International Tax Blog, June 5, 2015; Teijeiro, Argentine Treaty Network: Will the Schoppable Treaty Soon Became an Extinct Species, Kluwer International Tax Blog, February 29, 2016. As an exception, limited in scope LoB clauses existed previously under the DTAs with Spain (the old treaty), the U.K. and Sweden.

[vii] In favor of GAAR's application see Vicchi, Argentine Report*, Interpretation of Double Taxation Conventions*, LXXVIIIa Cahiers de Droit Fiscal International (1993), p. 161 ff., at p. 162-164; Tarsitano, Argentine Report, *Tax Treaties and Tax Avoidance: Application of Anti-Avoidance Provisions,* LIXVa Cahiers de Droit Fiscal International, p. 59 ff. Teijeiro, *Abuso o uso impropio de tratados de doble imposición. Medidas unilaterales y bilaterales para prevenirlo. La experiencia en el derecho comparado y en la Argentina,* RDF 5/07, p. 205, ff, at 232/233, Lexis Nexis, November/December

2007; Teijeiro, Argentine Report, *Seeking anti-avoidance measures of general nature and scope – GAAR and other rules, 103a* Cahiers de Droit Fiscal International (2018), p. 5 ff; Teijeiro, *Domestic and Treaty-based GAAR and SAAR: Potential conflicts and Ordering Principles: MLI and Argentine Treaty and Domestic Law*, in Rocha/Christians eds., A Multilateral Convention for Tax, Wolters Kluwer, Series on International Taxation, 80, 2022. Against GAARs application; Diaz Sieiro, Argentine Report, *Form and Substance in Tax Law,* LXXXVIIa Cahiers de Droit Fiscal International, p. 71, at p. 89-90; and Bugallo, *Compatibilidad de las Cláusulas Antiabuso con los Tratados de Doble Imposición,* Bulletin Argentine Association of Fiscal Studies, March/02, p. 39 ff. Díaz Sieiro appears to sustain his opinion on the constitutional prevalence of DTAs over domestic rules according to the 1994 Argentine constitutional amendment.

[viii] See, *inter alia*, Jeffery, The Impact of State Sovereignty on Global Trade and International Taxation, Kluwer, Chapter 4, pp. 102-112; IFA Congress Seminar, *How Domestic Anti-avoidance Rules Affect Double Taxation Conventions*, Seminar Series 19 c, 1994 Congress, p. 6-9 (Dr. Lowe's opinion), p. 9-10 (Prof. Laule's opinion), and p. 10-11 (Mr. Gustasson's opinion) —who express the opinion that a DTA does not affect the application of domestic anti-avoidance rules—, p. 11-15 (Mr. Katz's opinion, who shares that view within certain limitations). Dr. Lowe also opined that application of domestic anti-avoidance provisions does not conflict with the Vienna Convention (id., p. 23). All these opinions preceded the changes introduced to the Commentaries of the OECD MC in 2003.

[ix] Ruling 57/96.

[x] DNI Memorandum 3/06.

[xi] See, *inter alia*, DNI Memorandum 64/09, use of an intermediary (shell) holding company without any economic substance under the old (no longer in force) DTA with Austria. DNI Memorandum 799/10, double non-taxation obtained by using an interposed holding company under the old (no longer in force) Andean Pack-type treaty with Chile. Similarly, Tax Court, in re Molinos Río de la Plata, August 14, 2013, affirmed Federal Court of Claims, Court Room I, May 19, 2016, and Argentine Supreme Court, September 2, 2021. For a discussion of these precedents see, Teijeiro, *Domestic and Treaty-Based GAAR and SAAR: Potential Conflicts and Ordering Principles MLI and Argentine Treaty and Domestic Law,* in Christians/Rocha. Ed. *Multilateral Convention for Tax*, cited in note vii above. On the Molinos decisión by the Argentine Supreme Court of Justice, see also, Teijeiro, *A Pre-BEPS, long-expected Landmark Argentine Supreme Court Decision on DTA interpretation and Domestic GAAR Application in a treaty Setting,* Kluwer International Tax Blog, September 11, 2021,

[xii] Pursuant to Article 6(4) of the Convention, Argentina reserved the right for Article 6(1) not to apply to its Covered Tax Agreements that already contain preamble language describing the intent of the Contracting Jurisdictions to eliminate double taxation without creating opportunities for non-taxation or reduced taxation, whether that language is limited to cases of tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the Covered Tax

Agreement for the indirect benefit of residents of third jurisdictions) or applies more broadly. The following agreements are deemed to contain preamble language that is within the scope of this reservation: Chile and Mexico.

[xiii] Pursuant to Article 7(15) (b) of the Convention, Argentina reserved the right for Article 7(1) not to apply to its Covered Tax Agreements that already contain provisions that deny all of the benefits that would otherwise be provided under the Covered Tax Agreement where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits. The following agreements are deemed to contain provisions that are within the scope of this reservation: Chile and Mexico. Moreover, pursuant to Article 7(15) (c) of the Convention, Argentina reserved the right for the provisions contained in Article 7(8) through (13) (hereinafter the "Simplified Limitation on Benefits Provision") not to apply to its Covered Tax Agreements that already contain the provisions described in Article 7(14). The following agreements are deemed to contain provisions that are within the scope of this reservation: Chile and Mexico

[xiv][xiv] See however, notes ix and x above.

[xv] See, *inter alia*, Baez Moreno, *GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test. What Have We Gained from BEPS Action 6,* 45 Intertax 6/7, p. 432 ff. (2017); Chand, *The Principal Purpose Test in the Multilateral Convention: An In Depth Analysis*, 46 Intertax 1, p. 18 ff. (2018); Chand, *The Interaction of the Principal Purpose Test (and the Guiding Principle) with Treaty and Domestic Anti-avoidance Rules,* 46 Intertax 2, p. 115 ff. (2018); Danon, *Treaty Abuse in the Post-BEPS World: Analysis of the Policy Shift and Impact of the Principal Purpose Test for MNE Groups*, 72 Bulletin International Taxation 1 (2018); Mosquera Valderrama, Burgers, *Review of Anti-Avoidance Measures of a General Nature and Scope—General Anti-Avoidance Rules and Other Measures*, 73 Bulletin for International Taxation, 10 (2019); Kuźniacki, *The Principal Purpose Test (PPT) in BEPS Action 6 Practical Application*, 10 World Tax Journal 2 (2018); Elliffe, The *Meaning of the Principal Purpose Test: One Ring to Bind Them All?,* 11 World Tax Journal 1 (2019); Zahra, *The Principal Purpose Test: A Critical Analysis of Its Substantive and Procedural Aspects—Part 1*, Bulletin for International Taxation November 2019, pp. 609 ff.; Freedman, *The UK General Anti-Avoidance Rule: Transplants and Lessons,* Bulletin for International Taxation June/July 2019. p. 332 ff.; van Weeghel, *A Deconstruction of the Principal* Purposes Test, 11 World Tax Journal 1 (2019), Lang, *The Signalling Function of Article 29(9) of the OECD Model—The "Principal Purpose Test,"* 74 Bulletin for International Taxation 4/5 (2020): Danon, *The PPT in Post-BEPS Tax Treaty Law: It Is a GAAR but Just a GAAR*! Bulletin for International Taxation April/May 2020, pp. 242 ff.: Mithe, *Critical Analysis of the Principal Purpose Test and the Limitation on Benefits Rule: A World Divided but It Takes Two to Tango,* World Tax Journal, (February 2020), 129; Landsiedel, *The Principal Purpose Test's Burden of Proof: Should the OECD Commentary on Article 29(9) Specify Which Party Bears the Onus?* 13 World Tax Journal 1, (2021).

[xvi] Accord. contrario sensu Commentary to Article 1 OECD MC (2017). Paragraphs 77-79

[xvii] Much will depend on whether Argentina maintains as definitive the provisional reservations made to the application of Article 7(8). The Brazilian Protocol is not covered by the provisional reservation to that provision.

To make sure you do not miss out on regular updates from the Kluwer International Tax Blog, please subscribe here.

This entry was posted on Monday, April 25th, 2022 at 10:32 am and is filed under Argentina, GAAR, MLI
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.