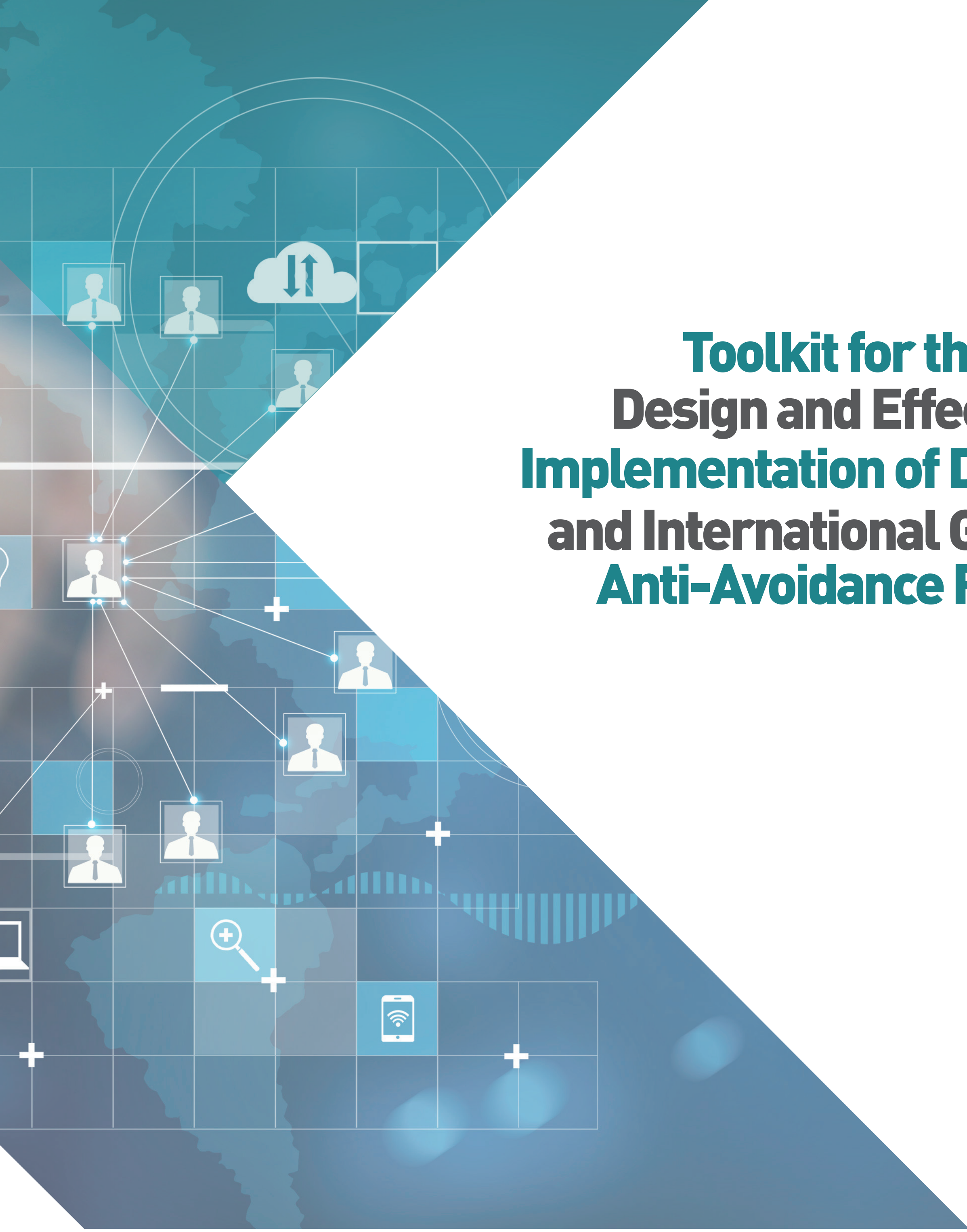
Toolkit for the Design and Effective Implementation of Domestic and International General Anti-Avoidance Rules



Toolkit for the Design and Effective Implementation of Domestic and International General Anti-Avoidance Rules

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A NEW MODEL OF GLOBAL GOVERNANCE IN INTERNATIONAL TAX LAW MAKING

Toolkit for the Design and Effective Implementation of Domestic and International General Anti-Avoidance Rules

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Foreword

In the current context, a critical element to consider is the speed at which changes occur. Proof of this, for example, is the permanent innovation in the field of information and communications technologies and the frequent reorganization of businesses to achieve greater competitiveness, especially in times of crisis. In addition, the financial markets develop numerous new products every year, and crypto assets are gaining ground. Another critical element is the international community's ability to reach consensus, which has led to the elimination of numerous potentially harmful tax regimes, the large-scale implementation of transparency standards, cooperation mechanisms and specific anti-avoidance rules, making it more difficult to evade or avoid taxes.

In this scenario, there is a fertile field for tax promoters to use their creativity and offer a wide range of sophisticated options for taxpayers who are willing to assume different levels of risk to save tax costs. The limitations encountered by tax promoters consist of improvements to domestic and international tax systems, and efficient and effective administrative practice (e.g., risk management and treatment actions that generate certainty or effectively address known risks).

The big question I ask myself is: what can governments do to protect their tax bases when the diversity of aggressive tax planning schemes exceeds the specific cases raised in their rules and, due to their complexity, compromises their control capacity?

While there is no single answer to this question, I would argue that general anti-avoidance rules play a key role in achieving this objective. However, their effective application requires an adequate regulatory design, a tax administration that has reached a certain degree of maturity in its actions and especially in the way it relates to taxpayers, a certain specialization of the justice system, among other aspects.

Many developing countries have encountered difficulties in applying this type of rules. Therefore, the purpose of this toolkit is to address the critical issues that make the effective application of general anti-avoidance rules, from the various dimensions (regulatory, administrative, and contentious); in order to provide countries with a guide to address them or optimize their application.

On behalf of the CIAT Executive Secretariat and personally, I am deeply grateful to all those who contributed to this initiative. In particular, to the German Cooperation (GIZ) and the EUROSocial+ Program for their trust and cooperation leading to the completion of this work, to the University of Leiden, especially to Irma Mosquera, Juliana Cubillos and Frederik Heitmuller for their outstanding technical work, and to the tax administrations of Costa Rica, Chile, Uruguay, Mexico, Kenya and Panama for their feedback to reach this final version of the document.

Isaác Gonzalo Arias Esteban
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Abbreviations

BEPS	Base Erosion and Profit Shifting
CbCR	Country by Country Reporting
CIAT	Inter-American Center of Tax Administrations *(Centro Interamericano de Administraciones Tributarias)*
EU	European Union
FDI	Foreign Direct Investment
GAAR	General Anti-Avoidance Rule
IBFD	International Bureau for Fiscal Documentation
ICRICT	Independent Commission for the Reform of International Corporate Taxation
ICTD	International Centre for Tax and Development
IMF	International Monetary Fund
IRS	Internal Revenue Service (United States of America)
LOB	Limitation on Benefits
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD	Organisation for Economic Co-Operation and Development
PPT	Principal Purpose Test
SAAR	Specific Anti-Avoidance Rule
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development

1. Introduction

This toolkit provides guidelines for implementing and applying a general anti-avoidance rule (GAAR). The focus is on developing countries (with specific references to CIAT members countries) who are considering introducing a GAAR or are in the process of redrafting their GAAR.

A GAAR is either a legislative provision or a case law-based rule with the ultimate purpose "to stamp out unacceptable tax avoidance practices. A GAAR is a provision of last resort that is capable of being invoked by a tax authority to strike down unacceptable tax avoidance practices that would otherwise comply with the terms and statutory interpretation of the ordinary tax law"[1].

"In general, a GAAR is typically designed to strike down those otherwise lawful practices that are found to be carried out in a manner which undermines the intention of the tax law such as where a taxpayer has misused or abused that law"[2]. However, the approach to the use of GAARs by countries has changed in the last 10 years mainly due to the discussion of the boundaries between acceptable vs. unacceptable tax avoidance[3], and the introduction of the Base Erosion and Profit Shifting (BEPS) Project which aims to tackle aggressive tax planning by multinationals.

1 Christophe Waerzeggers and Cory Hillier, "Introducing a General Anti-Avoidance Rule (GAAR)," IMF Technical Note (IMF, 2016), 1, https://www.imf.org/-/media/Websites/IMF/imported-full-text-pdf/external/pubs/ft/tltn/2016/_tltn1601.ashx.

2 Waerzeggers and Hillier, 1.

3 For Thuronyi, tax minimization (acceptable tax avoidance) is a 'behaviour that is legally effective in reducing tax liability'. Tax avoidance for Thuronyi (being unacceptable tax avoidance) has the same aim (i.e. reduction of tax liability) but 'that is found to be legally ineffective (perhaps because of an anti-avoidance doctrine or by construction of the tax law) although it does not constitute a criminal offense'. Victor Thuronyi and Kim Brooks, *Comparative Tax Law*, 2nd ed. (New York: Kluwer Law International BV, 2016).

Before the introduction of the BEPS Project, the boundaries between tax avoidance vs. aggressive tax planning were more blurred[4], and therefore, it was possible to argue by a taxpayer that it did not constitute aggressive tax planning but accepted tax avoidance, and therefore, the GAAR would not be applicable[5]. Since the BEPS Project, countries[6], international initiatives on taxation such as ICRICT[7] and the International Tax Compact[8] and organizations such as the OECD[9] and the EU[10] are addressing all types of tax avoidance (acceptable or unacceptable) as aggressive tax planning[11]. The discussion on tax avoidance will be addressed in section 2 below.

In general, the analysis of the GAAR should consider the following elements:

- whether the GAAR is introduced in statutory law or has been developed in judicial doctrine (case law);
- whether there are any additional administrative regulations, specialized committees, or specific substantive requirements / exceptions that influence the application of the GAAR, and
- whether there are administrative and/or judicial procedures to solve dispute between taxpayer and tax administrations regarding the GAAR.

4 Another distinction that should be also made is between tax abuse and aggressive tax planning. For Piantavigna, "tax abuse are transactions where the tax benefit is within the boundaries of the rules, but not in accordance with the object and purpose of the rules. He adds that, unlike tax abuse, 'Aggressive tax planners do not go beyond the limits fixed by rules, they go between rules (i.e. '*interleges*'). This gives rise to 'aggressive' tax planning, which consists of exploiting gaps in the architecture of the existing tax legislations, mismatches and disparities (i.e. differences resulting from the concurrent exercise of two or more taxing jurisdictions) of the international tax system. ATP reveals its essential nature of 'arranging', 'organizing', 'placing' ('planning', precisely) for tax purposes. It consists of active purposive behaviour (as opposed to passive unintentional behaviour). Paolo Piantavigna, "Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, Despite Linguistic Discrepancies," *World Tax Journal: WTJ 9*, no. 1 (2017): 47–98.

5 Brian J Arnold and James Wilson, "Aggressive International Tax Planning by Multinational Corporations: The Canadian Context and Possible Responses," *SPP Research Paper*, no. 07.29 (2014).

6 For an overview see Lydia G. Ogazón Juárez and Ridha Hamzaoui, "Common Strategies against Tax Avoidance: A Global Overview," in *International Tax Structures in the BEPS Era: An Analysis of Anti-avoidance Measures*, ed. Madalina Cotrut (Amsterdam: IBFD, 2015), 3–40.

7 See for instance: Independent Commission for the Reform of International Corporate Taxation (ICRICT), "The Fight Against Tax Avoidance," 2019, https://www.icrict.com/s/thefightagainsttaxavoidance_finalversion.pdf.

8 International Tax Compact (ITC), "Addressing Tax Evasion and Tax Avoidance in Developing Countries" (GIZ, 2010), 19–25, https://www.taxcompact.net/sites/default/files/resources/2010-12-ITC-Addressing-Tax-Evasion-and-Avoidance.pdf.

9 OECD referring to BEPS addressing tax avoidance strategies without making a distinction between acceptable vs. unacceptable tax avoidance. The OECD states that "But these tax avoidance strategies were in most cases legal, and largely overlooked until the OECD/G20 BEPS Project". https://www.oecd.org/about/impact/combatinginternationaltaxavoidance.htm, accessed 19/07/2021

10 European Commission, "Commission Recommendation of 6 December 2012 on Aggressive Tax Planning," 2012/772/EU § (2012), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012H0772.

11 See for an overview of EU and OECD approaches José Manuel Calderón Carrero and Alberto Quintas Seara, "The Concept of 'Aggressive Tax Planning' Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border between Legitimate and Illegitimate Tax Planning," *Intertax* 44, no. 3 (2016): 206–26.

More specifically for developing countries, the description of the elements above shows the need for transparency and clear rules when designing GAARs in a developing country context. In addition to the legal design, it is important, to give attention to:

- the available administrative capacity and infrastructure to apply the GAAR in a measured, even handed predictable way and

- the country's infrastructure to settle tax disputes since the broad powers that GAARs confer to a tax authority requires adequate taxpayer safeguards[12].

Generally, GAARs are norms that operate as "catch all clauses"; that is, legal provisions allowing a tax authority to deny the tax benefit of transactions it deems as being specifically tailored to achieve said benefit without serving any (or hardly any) real-world purpose. Yet, wordings of GAAR vary considerably across countries. While all GAARs serve a similar goal, the ways through which they seek to achieve it differ from one another.

GAARs in CIAT member countries are concerned with uncovering the 'real nature' of a transaction to determine whether the GAAR is applicable to it, yet they vary in their wording. In a little less than half of the cases, the GAAR is applicable when a transaction is deemed to be either 'improper' or 'inadequate' to render it eligible for a tax benefit. The other half of the considered countries instead rely on a transaction being 'artificial' and/or 'fictitious' -mostly in combination- to render their respective GAAR applicable. Additionally, a small number of countries apply a 'substance over form' approach to determine the true nature of an action.

One must also differentiate between domestic and treaty GAARs. A treaty GAAR is usually one article of a bilateral double tax convention, called "Entitlement to Benefits". A treaty GAAR is somewhat more limited than a GAAR, because it only applies to that single tax convention. However, since there are many potential ways in which a tax treaty can be used in tax avoidance schemes (and not all may be foreseeable in advance), it makes sense to think of the "Entitlement to Benefits" article as "treaty GAAR". In 2017, the OECD and UN incorporated a specific version of this article (the "Principal Purpose Test" (PPT)) in their model double taxation treaties and many participants of the BEPS Inclusive Framework have amended their bilateral treaties to include it.

About this toolkit

Many good resources on GAARs already exist in the public domain, most notably the UN's Practical Portfolio on "Protecting the Tax Base of Developing Countries through the use of General Anti-avoidance Rules"[13] and the IMF's Technical

12 Waerzeggers and Hillier, "Introducing a General Anti-Avoidance Rule (GAAR)," 1.

13 Brian J. Arnold, "Protecting the Tax Base of Developing Countries through the Use of General Anti-Avoidance Rules," United Nations Practical Portfolio, 2019, https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-09/GAAR_Portfolio_EN.pdf.

Note on "Introducing a General Anti-Avoidance Rule (GAAR)"[14].

The present toolkit puts a specific emphasis on helping the reader navigate the already existing resources and elaborates on specific topics, such as risk assessment and practical administration of GAARs, in more detail than the previously mentioned documents.

The remainder of the toolkit is structured as follows chronological way: section 2 discusses whether countries should introduce statutory GAARs in domestic law and tax treaties at all. Sections 3-6 cover four big thematic areas: risk assessment, managing GAAR introduction, effective GAAR design, and GAAR application.

The situations of countries are diverse: Many countries have already introduced GAARs but have not yet successfully applied them in practice. For instance, it can be difficult for an administration to establish what exactly constitutes "tax avoidance", but successfully doing so is critical for applying a GAAR. In other countries, the application of GAARs has negatively affected the climate between taxpayers and tax administrations. In sum, some countries may be concerned to a greater or lesser extent by the different issues discussed in this toolkit and may consider focusing more on the sections relevant to them.

Moreover, the considerations laid out below are sometimes interrelated with each other. For example, undertaking risk assessments regarding tax avoidance practices is relevant before introducing a GAAR. At the same time, risk assessments are also relevant in the process of applying the GAAR.

14 Waerzeggers and Hillier, "Introducing a General Anti-Avoidance Rule (GAAR)."

2. Should countries introduce a (new) GAAR?

Although more and more countries have introduced a GAAR in their domestic tax codes, this is not true for all of them. Moreover, many countries have introduced GAARs only relatively recently. For countries, which have not yet introduced a GAAR, the question naturally arises whether it is advisable to do so.

A review practices by CIAT member countries showed that, by 2021, 27 of these countries have introduced a GAAR within their domestic legislation, whereas the remaining countries rely on alternative means to combat tax avoidance at the domestic level. The establishment of most GAARs falls into one of two relatively small timeframes; namely, either in the early 2000's between years 2000-2005, or from 2015 until 2021[15].

Table 1 **Statutory GAARs in CIAT Member countries as of 2021**

GAAR	Country
Yes	Angola, Argentina, Barbados, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, France, Guyana, India, Italy, Jamaica, Kenya, Mexico, Nigeria, Panama, Paraguay, Peru, Portugal, Spain, Trinidad & Tobago, Uruguay, Venezuela.
No	Aruba, Belize, Bermuda, Cuba, Curaçao, Guatemala, Honduras, Morocco, the Netherlands*, Nicaragua, Sint Maarten, Suriname, United States of America.*
Information not available	Haiti.

* The Netherlands and the United States have extensively developed "judicial" GAARs

Source: *The authors*

15 Since 2015, seven countries have codified a GAAR into their national legislation. These countries follow the approach given by the principal purpose test as included in the Multilateral Instrument.

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Similarly, the practice of introducing a GAAR in double tax treaties is recent. The most widely used models, the OECD, and the UN model treaty, only contain a GAAR in their most recent versions, which were published in 2017.

The aim of this toolkit is not to pronounce a general advice in favour or against introducing a domestic GAAR or GAARs in all tax treaties of a country. The general recommendation is rather that each country decides on the introduction of a GAAR after a thorough evaluation of its circumstances. This section elaborates on what factors could be considered in such an evaluation.

The considerations for treaty GAARs are somewhat different from those applicable to domestic GAARs and are therefore discussed separately.

2.1 Domestic GAARs

In the past, the introduction of a domestic GAAR in a country's tax code has often generated debates among tax academics and professionals of that country. In India, for example, around 8 years passed from the first proposal of a GAAR in 2009 to its final introduction in 2017. In the United Kingdom, about 16 years passed from the proposal of a GAAR in 1997 to its introduction in 2013[16]. In Chile and Peru, the recent introductions of GAARs have been preceded by debates, as well.

This section references some of the principal arguments raised in these debates and discusses some of the questions that countries may consider when deciding on the introduction of domestic and treaty GAARs. The validity of most of the arguments considered here depends on the design of a GAAR. Through good design, concerns may be mitigated. Through bad designs, the desired advantages may not materialize.

Table 2 **Pros and Cons of introducing a domestic GAAR**

Pros	Cons
Applies to new forms of tax avoidance.	Administrative costs.
Works where SAARs do not work anymore.	Discretion to tax administration.
Deterrent effect.	Potentially reducing certainty (compared to SAARs).
Potentially increasing certainty (compared to not-legislated general anti-avoidance principles).	

16 Judith Freedman, "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle," *British Tax Review*, 2004, 332–57; John Prebble, "Varieties of General Anti-Avoidance Legislation," in *Behavioural Public Finance: Individuals, Society, and the State*, ed. Mustafa Erdogdu, Larissa-Margareta Batrancea, and Savaş Çevik (New York: Routledge, 2020), 115.

2.1.1 Is there a lot of tax avoidance?

Ideally, when evaluating whether a GAAR is needed an assessment of the extent of tax avoidance can be undertaken[17]. Is tax avoidance a serious problem that requires further legislative action and cannot adequately be tackled with existing legislation? Or are there indications that it may become a problem in the future justifying preventive action? Due to the inherent fuzziness of the tax avoidance concept, there is no straightforward way to measure how many taxpayers employ tax avoidance schemes or how much revenue is lost due to tax avoidance. Arnold, the author of the UN Practical Portfolio on GAARs even argues that it is impossible to prove the size of the tax avoidance problem or – on the contrary – its non-existence[18]. However, the methods and indicators described in section 3 may help decide whether tax avoidance is a serious problem or might become so in the future.

Ideally, all three areas of risk assessment described in that section (knowledge about schemes, aggregate indicators, as well as legal analysis of incentives) should be weighed in the analysis. Conducting a tax avoidance risk assessment is not only useful for deciding whether a GAAR should be introduced or not but should be a continuous exercise that can inform audit activities and can help detect cases that could be subject to GAAR application.

2.1.2 Administrative costs

Introducing a domestic GAAR has different types of administrative costs. First, the application of a GAAR requires human resources qualified to uncover tax avoidance schemes within taxpayer's tax returns and to analyse the legal consequences of certain schemes. A country should accompany the introduction of a GAAR with a specific capacity development program. Capacity building processes should not only include the tax administration but also tax courts which may need to interpret the GAAR. Since the application of a GAAR is likely to result in legal disputes, the costs of engaging in such disputes need to be considered. Finally, the process of introducing a GAAR itself (e.g., holding a consultation process) has a cost, which should be taken into account.

An investment in building up analytical and legal capacity is likely to yield net benefits if tax avoidance is reduced consequently. Benefits can even go beyond those resulting of applying a GAAR to tax avoidance cases, since higher analytical and legal capacity can improve tax administration in general, potentially leading to higher tax revenue collection and increased certainty for taxpayers. Yet, it may take several years until such benefits materialize.

However, the introduction of a GAAR is probably only worthwhile if a country is willing to incur such an up-front investment in building up capacity.

17 Paulo Rosenblatt, "Tax Avoidance in Emerging Countries: Is a GAAR a Suitable Measure?," *Revista Direito Tributário Internacional Atual*, no. 1 (2016): 83.

18 Arnold, "Protecting the Tax Base of Developing Countries through the Use of General Anti-Avoidance Rules," 14–15.

2.1.3 Is tax avoidance not already prohibited? Is a rule necessary for that?

Courts of some countries have relied on general anti-avoidance principles or on general principles that a country's tax system must conform to according to the constitution (such as horizontal equity and the ability to pay principle) to tackle tax avoidance. Prebble, for example, discusses a case, in which a tax avoidance scheme which allowed a rich person to reduce tax was rejected by a court because accepting it would have meant that the person did not pay tax according to his/her ability to pay[19]. If the jurisprudence of a country has developed in such a way, introducing a statutory GAAR may not be necessary.

However, not all countries' constitutions contain such principles[20]. Sometimes, jurisprudence may have developed in a way that makes it difficult to tackle tax avoidance. In the United Kingdom, the *Duke of Westminster* doctrine established that "taxpayers may organise their affairs so as to pay the least tax"[21]. If such is the case, legislating a GAAR may be necessary to overturn the precedent[22]. Introducing a statutory GAAR may also increase legal certainty for both taxpayers and tax administration through a greater standardization of the rule's application process[23].

2.1.4 Aren't specific anti-avoidance rules sufficient?

Any tax avoidance scheme detected by a tax authority can theoretically also be addressed by specific legislation tailored for that scheme. For example, many countries have introduced rules against indirect transfers of shares, a scheme whereby a taxpayer avoids capital gains tax by selling a foreign company that holds the underlying asset in the country, instead of the asset itself[24]. In practice, the tax codes of most countries contain many clauses that aim at preventing certain tax avoidance practices. Introducing specific anti-avoidance rules (SAARs) makes sense, because they provide certainty and are more straightforward to apply for both tax administration and taxpayers than a GAAR.

However, two arguments are generally put forward why a GAAR may nevertheless be a good supplement to SAARs. The first argument is that because of the time it takes to detect an avoidance scheme and to develop and enact new legislation, a tax avoidance scheme only becomes

19 Prebble, "Varieties of General Anti-Avoidance Legislation," 103.

20 Freedman, "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle," 339.

21 This doctrine stemmed from the dictum proffered by Lord Tomlin in the British case *IRC vs. Duke of Westminster* (1936), who observed that "Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be".

22 Freedman, "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle," 333.

23 Arnold, "Protecting the Tax Base of Developing Countries through the Use of General Anti-Avoidance Rules," 26.

24 Platform for Collaboration on Tax, "The Taxation of Offshore Indirect Transfers— A Toolkit," 2020, https://www.tax-platform.org/sites/pct/files/publications/PCT_Toolkit_The_Taxation_of_Offshore_Indirect_Transfers.pdf.

forbidden after it has been used for several years by taxpayers and potentially significant amounts of revenue have been lost by then[25]. A GAAR, in contrast, may act pre-emptively and deter taxpayers from developing avoidance schemes. The second argument is that SAARs themselves may be circumvented[26], for example when the SAAR's criteria are only formally, but not substantively, complied with. A GAAR, in contrast, may be capable of addressing such situations.

2.1.5 Increasing or decreasing tax certainty?

Whether having a GAAR or not provides more certainty to a taxpayer cannot be said generally for all circumstances. Per design, GAARs are less certain instruments than SAARs, as a GAAR grants powers to the tax administration and the courts to interpret the purpose of the taxpayer (based on objective criteria) and the legislator. Especially in the first years after the introduction of a GAAR, the uncertainty felt by taxpayers may be high. On the contrary, tax administrations may feel greater certainty with regards to the application of tax rules.

However, it should be noted that GAARs are introduced to act as a deterrent and to prevent taxpayers to venture into new and creative ways of tax avoidance. Moreover, depending on its design, a statutory GAAR may create more certainty than anti-avoidance doctrines developed by courts[27], since interpretations by the judiciary may change more frequently. For example, the interpretation of the principle of abuse of law developed by the European Court of Justice has been subject to changes over time[28].

Freedman argues that certainty is not the appropriate criteria to judge a GAAR. Instead she advances the argument that a GAAR may open a conversation between taxpayers, tax administration and judiciary about what behaviour is appropriate considering the intention of the law[29]. Whether a GAAR increases or decreases certainty is then more matter of the design of the GAAR, its process of application and the quality

25 Brian J. Arnold, "Chapter XII: The Role of a General Anti-Avoidance Rule in Protecting the Tax Base of Developing Countries," in *United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries*, ed. Alexander Trepelkov, Harry Tonino, and Dominika Halka, 2017, 716; Frederik Zimmer, "In Defence of General Anti-Avoidance Rules," *Bulletin for International Taxation 73*, no. 4 (2019): 220.

26 Arnold, "Chapter XII: The Role of a General Anti-Avoidance Rule in Protecting the Tax Base of Developing Countries," 716.

27 Zimmer, "In Defence of General Anti-Avoidance Rules," 220.

28 Susi Hjorth Bærentzen, "European Union/International-Danish Cases on the Use of Holding Companies for Cross-Border Dividends and Interest–A New Test to Disentangle Abuse from Real Economic Activity?," *World Tax Journal: WTJ* 12, no. 1 (2020): 39–101; Susi Hjorth Bærentzen, "European Union-Cross-Border Dividend and Interest Payments and Holding Companies–An Analysis of Advocate General Kokott's Opinions in the Danish Beneficial Ownership Cases," *European Taxation* 58, no. 8 (2018): 343–53; Rita De La Feria, "Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law through Tax," *Common Market L. Rev.* 45 (2008): 395; Koen Lenaerts, "The Concept of 'Abuse of Law'in the Case Law of the European Court of Justice on Direct Taxation," *Maastricht Journal of European and Comparative Law* 22, no. 3 (2015): 329–51.

29 Freedman, "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle," 354–56.

of accompanying guidance produced by the tax administration[30]. The remainder of this toolkit (especially sections 4, 5 and 6), develop more in detail how to balance the goals of deterrence and certainty in GAAR design and administration.

2.1.6 Practices in the tax administration

An argument sometimes raised in debates is that the introduction of a GAAR may be detrimental when corrupt practices are prevalent in a tax administration and a culture of trust and good faith is lacking[31]. If the country's system of governance incentivizes corruption (e.g., low salaries and large discretion for public officials), a GAAR clause may be used as additional argument by a public agent to blackmail or ask for a bribe in exchange for not applying the clause.

Next to corruption, certain types of productivity indicators for tax auditors (e.g., related to the number of disputes started or the amount of additional revenue raised), as well as prosecution of taxpayers for political reasons pose similar risks[32].

It should be noted, however, that the gravity of these issues depends to a large extent on the effectiveness and degree of independence of the country's dispute resolution system. If a taxpayer can effectively dispute the decision of an official through a court procedure, it is not clear why he/she should fear a GAAR more than any other rule. If the dispute resolution system is ineffective (due to lack of capacity, or an equal pervasiveness of corruption) or costly, it is likely that a public official would be able to ask for bribes or be able to threaten political opponents, even in the absence of a GAAR. Nevertheless, if corruption is a major concern, a GAAR can be accompanied by procedural rules that limit the discretion of individual tax officials (see discussion in section 5.5).

Ideally, the introduction of a GAAR should be accompanied by greater efforts for creating a culture of trust among tax administration and taxpayers. This can be fostered through clear drafting of the rule, publication of guidance and procedures, involvement of relevant stakeholders in the introduction process, as well as transparency about taxpayers' rights.

2.1.7 When should an existing GAAR be amended?

As a general principle, amendments should be used sparingly. Since the purpose of a GAAR is to "catch" future tax avoidance schemes that are not already known, the clause's design should make it possible to apply to future developments.

Nevertheless, changes could sometimes be necessary. This could be when courts interpret the clause in an excessively narrow or excessively broad way, thereby setting a precedent that is undesired

30 Arnold, "Chapter XII: The Role of a General Anti-Avoidance Rule in Protecting the Tax Base of Developing Countries," 720–21.

31 Rosenblatt, "Tax Avoidance in Emerging Countries: Is a GAAR a Suitable Measure?," 84.

32 Rosenblatt, 84.

from the legislator's perspective. In Australia, for example, the original GAAR introduced in 1936 was interpreted in an excessively narrow way in court judgments (see also section 5.2.1), leading to a perceived increase in tax avoidance scheme[33]. Consequently, a new GAAR clause was introduced in 1981.

The GAAR might also be amended to prevent domestic courts from appealing to principles that dismiss the application of anti-avoidance principles. Following the close connection of the South African legal system with the one of the United Kingdom[34], the South African Supreme Court of Appeal decided to introduce the *Duke of Westminster* (see also section 2.1.3) doctrine in its deliberations for applying the GAAR to tax abuse cases. Considering this situation, the South African Tax Administration drafted an amended GAAR, which was promulgated by parliament in 2006[35]. The amendment focused on delineating more precisely the type of agreements to which the GAAR is applicable and extended the rule's scope to any tax, duty, or levy instructed under the Income Tax Act or any other law administered by the Commissioner[36].

All other considerations that apply to the first introduction of a GAAR into the tax system also apply to the amendment, such as organizing a consultation process, clarifying the timing of application, and building capacity within the relevant institutions for applying the clause.

2.2 Treaty GAARs

As explained in the introduction, treaty GAARs are clauses that a tax administration can use to deny benefits of different types of treaties.

Member countries of the Inclusive Framework on BEPS have committed themselves to accept the introduction of a GAAR, the "principal purpose test" (PPT) clause, in a treaty with another member country, in order to comply with the BEPS Action 6 Minimum Standard on Treaty Shopping[37], if that other country wishes so and if the tax treaty does not already contain a GAAR or a detailed Limitation on Benefits (LOB) clause, such as in many treaties concluded by the United States.

33 Lidia Xynas, "Tax Planning, Avoidance and Evasion in Australia 1970-2010: The Regulatory Responses and Taxpayer Compliance," *Revenue Law Journal* 20, no. 1 (2011): 6714.

34 The South African legal system mixes both the common law and civil law traditions as an inheritance to both of its colonizers the United Kingdom and the Netherlands: "The two European countries who occupied the land were the Netherlands (1652-1795 and 1803-1806) and Great Britain (1795-1803 and 1806-1961). Although South Africa became a Union with its own white people government in 1910, the country was still regarded as a colony of Britain till 1961." Erna Oliver and Willem H Oliver, "The Colonisation of South Africa: A Unique Case," *HTS: Theological Studies* 73, no. 3 (2017): 1.

35 Revenue Amendments Act 2006 - https://www.gov.za/documents/revenue-laws-amendment-act-1

36 Articles 80A, 80C and 80L of the South African Income Tax Act 1962.

37 OECD, "BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances – Peer Review Documents," OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD, 2017), http://www.oecd.org/tax/beps/beps-action-6-preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstance-peer-review-documents.pdf

A GAAR (or a combination of a GAAR with a simplified LOB article) is since 2017 spelled out in article 29(9) of the OECD and UN Model Tax Conventions[38]. To introduce the clause in their treaties, many countries have signed the "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (MLI) in 2017 or following years. The MLI amends a bilateral tax treaty once both parties to the respective bilateral treaty have ratified it.

As of 2020, a few CIAT countries (for which data was available in the considered databases) have already introduced GAARs in their tax treaties[39]. In addition, some have treaties with other types of rules aimed at preventing treaty shopping.

The fact that treaty GAARs are not widespread as of 2020 can in part be explained by the fact that the MLI is still in the process of ratification in many countries. In a near future many treaties of the countries will have a treaty anti-avoidance clause, the PPT. However, this is by no means the case for all of them, as not all CIAT Member countries have signed the MLI, their treaty partner countries have not signed the MLI, or signatories have not selected a treaty to be covered by the MLI. The question of whether to include a GAAR in any of the not-covered treaties and if so, what kind of clause, is therefore still relevant for many countries.

There is no evident reason why a country, which has committed itself to the BEPS Minimum Standards should actively deviate from this standard when implementing the BEPS project's requirement or when signing new treaties. Therefore, the discussion in this section rather focusses on whether countries should seek to re-negotiate tax treaties which do not yet contain an anti-avoidance rule and are not covered by the MLI process. Since treaty re-negotiation processes take time and resources, it also makes sense to seek re-negotiations according to an order of priorities. The considerations below can help establishing such an order.

Three factors should be weighed:

- the avoidance risk posed by the treaty;
- whether a country can rely on the UN / OECD Commentary or a domestic GAAR to deny benefits in avoidance situations relating to a particular treaty;
- whether re-negotiating the treaty to reduce the avoidance risk is a feasible option.

38 OECD, "Model Tax Convention on Income and on Capital: Condensed Version 2017." (2017), http://dx.doi.org/10.1787/mtc_cond-2017-en; United Nations, "Model Double Taxation Convention between Developed and Developing Countries 2017" (2017), https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf.

39 For data on the implementation of GAARs and other anti-avoidance rules in tax treaties consider the CIAT BEPS Monitoring database on Action 6 (https://www.ciat.org/beps-monitoring-database/?lang=en) and the ICTD's Tax Treaties database (https://www.treaties.tax/)

2.2.1 Do a country's tax treaties create opportunities for tax avoidance?

Essentially, there are two types of tax avoidance situations which a treaty GAAR may tackle: treaty shopping and rule shopping. In the first case, an investor tries to take advantage of a tax treaty which under normal circumstances should not apply to him, for example because his actual residence is not in the treaty partner country but in a third country or in the country of source[40]. In the latter case, one would also speak of "round-tripping".

In the case of rule shopping, an investor rightly benefits from a treaty, but tries to change the character of the transaction to benefit from a more favourable rule within the treaty, for example recharacterizing a royalty payment as service payment, if a lower withholding rate applies to service payments[41].

Determining the risk of tax avoidance of a particular treaty can be done based on three factors, described in detail in section 3: knowledge about tax avoidance schemes, indicators in macro and micro data, and risk analysis of the legal provisions in the treaty.

2.2.2 Can a country rely on the UN / OECD Model Commentary or a domestic GAAR to tackle tax avoidance?

One important question is if a country can rely on the UN and / or OECD Model Convention Commentaries or on a domestic GAARs to deny treaty benefits even in case a treaty does not yet contain a GAAR. If that is possible, then re-negotiating a treaty may not be a priority.

The Commentary to the 2017 version of the OECD Model Tax Convention states that "[…] A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions. That principle applies independently from the provisions of paragraph 9 of Article 29, which merely confirm it"[42]. This paragraph is commonly referred to as the "guiding principle". This principle was first introduced in 2003. The UN Model Commentary contains a similar paragraph. However, it has been introduced for the first time several years later than in the OECD Convention, namely in 2011.

40 Arnold, "Protecting the Tax Base of Developing Countries through the Use of General Anti-Avoidance Rules," 48.

41 Arnold, 48.

42 2017 OECD Model Tax Convention Commentary on Article 1, paragraph 61

The content of the guiding principle is not fundamentally different from the GAAR that the MLI now introduced in the mentioned paragraph 9 of Article 29 and could therefore be applied to similar situations.

The questions, however, that a tax administration would need to consider before arguing a case based on this guiding principle are:

- would the Commentary to the OECD or the UN Model be accepted as relevant instrument for interpreting the tax treaty by the courts of the country?
    - if yes, was the treaty concluded after 2003 (if based on the OECD model) or after 2011 (if based on the UN Model)?
    - if not, can the Commentary be interpreted in a dynamic way (i.e., applying a Commentary that was published after the treaty was concluded)?

A related question is whether a country can apply a domestic GAAR to cases of treaty abuse or not. The most recent Commentaries of both OECD Model Tax Convention and UN Model Tax Convention note that, generally, domestic general anti-avoidance rules can apply to treaty abuses cases (2017 OECD Model Convention, Commentary on Article 1, paragraph 77).

A potentially important caveat is that the domestic GAAR must be consistent with the Commentary's "Guiding Principle" introduced in the section above. The UN Commentary states in that regard that "Clearly, countries should not be able to escape their treaty obligations simply by arguing that legitimate transactions are abusive and domestic tax rules that affect these transactions in ways that are contrary to treaty provisions constitute anti-avoidance rules." This suggests that if a country's domestic GAAR is significantly broader than this "Guiding Principle" or grants more discretion to the tax authority, applying it to cases that would not also be covered by the "guiding principle" may not be possible.

Prior to 2003 (in the OECD case) and 2011 (in the UN case), the commentaries suggested that it may be possible to use domestic GAARs to deny treaty benefits but that this would need to be clarified in the treaty. The Commentary to the 1992 of the OECD Model Convention states that in respect of anti-avoidance rules that "It may be appropriate for Contracting States to agree in bilateral negotiations […] that the application of the provisions of domestic laws against tax avoidance should not be affected by the Convention"[43]. In case of a convention concluded prior to 2003 / 2011, a tax administration would therefore need to verify whether the treaty contains such an express provision or whether the countries have signed a protocol that clarifies that domestic GAARs can be applied.

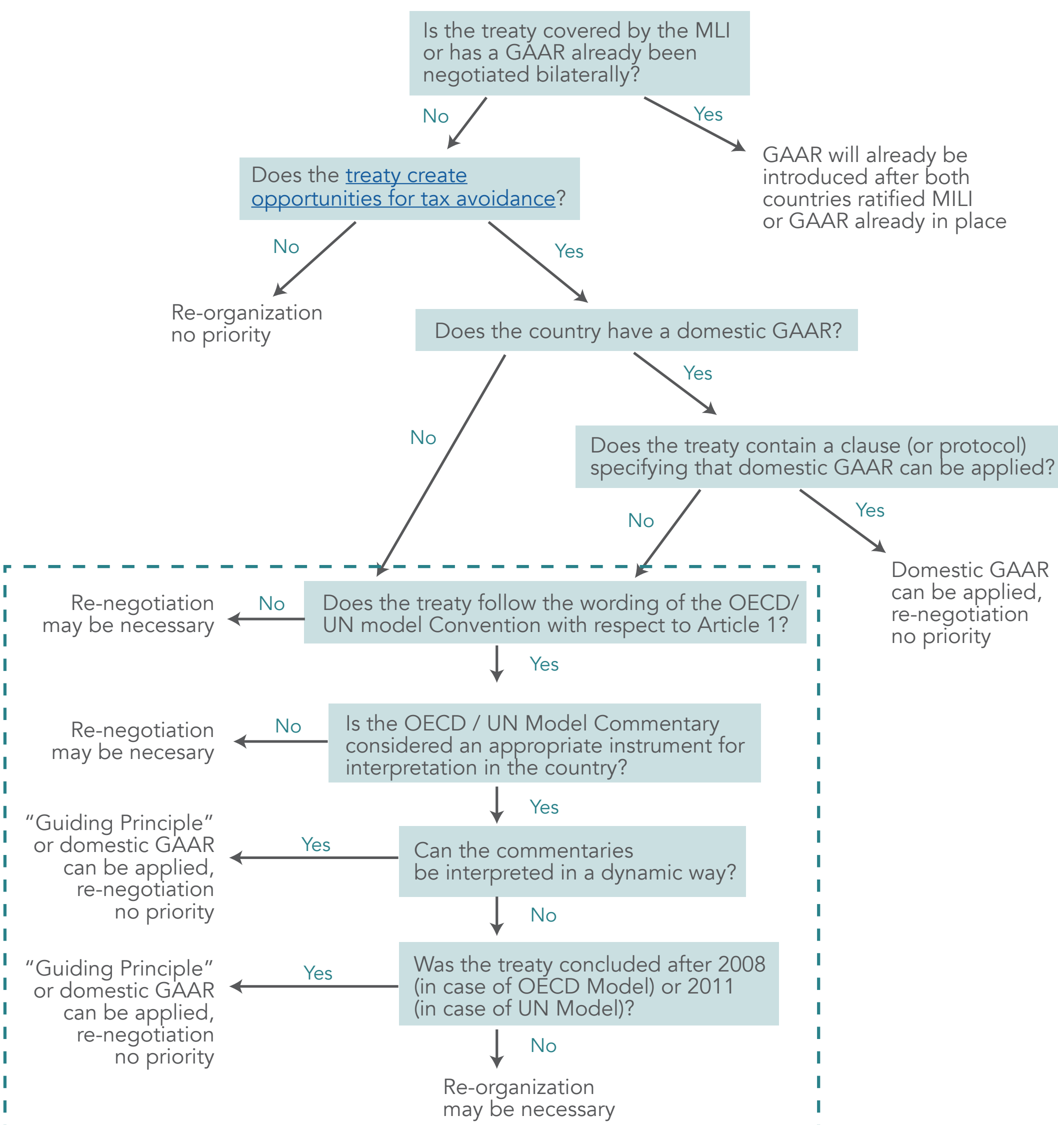
In sum, while in certain cases, countries can rely on alternative to a specific GAAR clause, this may be difficult in many situations. Even if a country

43 1992 OECD Model Tax Convention Commentary on Article 1, paragraph 10

finds that it can deny treaty benefits based on one of the methods described in this section, it may be advisable as a matter of diplomatic courtesy, to notify or consult with the partner country before the application of domestic GAAR or guiding principle.

Some of the arguments laid out in this section are subject to scholarly debate and criticism. Therefore, it is not always certain whether courts would agree with the path followed. A longer exposition of these issues can be found in the UN Practical Portfolio on Protecting the Tax Base of Developing Countries through the use of General Anti-Avoidance Rules[44].

Figure 1 **Assessing which tax treaties should be re-negotiated bilaterally to protect against tax avoidance**



44 Arnold, "Protecting the Tax Base of Developing Countries through the Use of General Anti-Avoidance Rules," 51–67.

2.2.3 Introducing a treaty GAAR vs. re-negotiating other clauses

If based on the considerations explained above a country determines that one of its treaties should be re-negotiated, introducing a GAAR may not be the only option to mitigate that risk. Other options are to re-negotiate a treaty to make it less favourable compared to its treaties with other countries or compared to its domestic law, thereby reducing the treaty shopping risk, or to terminate the treaty. India, for example, re-negotiated its treaties that were vulnerable to treaty shopping (mainly those concluded with Mauritius and Singapore) already before introducing a GAAR, by amending the clause related to capital gains taxation so that it would be like clauses in India's other treaties.

If a country assumes that in a re-negotiation process it is likely that only one of both concessions can be obtained from another country (either GAAR or amendment of another clause to mitigate risk), a country should assess whether the second option may be more beneficial[45].

However, it should be considered that while such a measure (for example an increase in withholding taxes) reduces the incentive for companies to engage in treaty shopping, it may also increase the burden on businesses which are genuine residents of the partner country.

Terminating a treaty should only be considered if all economic relationships with the partner country can be in essence attributed to treaty shopping.

45 Arnold, 156.

3. Risk assessment

Tax avoidance risk assessment is relevant both for the decision regarding the need of a GAAR and for the identification of cases, to which a GAAR could potentially be applied. Where a country disposes of insufficient information in one of the areas, the framework may point to areas where monitoring capacity can be improved.

Risk assessment consists in three broad areas, which are, however, interrelated with each other.

1) Knowledge about behaviour / schemes

2) Aggregate indicators about taxpayer behaviour

3) Monitoring the extent to which the tax system incentivizes taxpayers to engage in tax avoidance

Figure 2 **Three areas of risk assessment**

Source: *The authors*

Conducting and combining the three methods of risk assessment can help with an efficient allocation of audit capacity:

Consider that through one of the methods described in section 3.1 below, the tax administration of country X acquires knowledge about a tax avoidance scheme in form of a generic description. For example, it learns from the tax administration in country Y, that companies had used the treaty between country Y and country Z to avoid capital gains tax. Then the tax administration of country X needs to assess whether this type of scheme may also be present in country X. To do so, it can consider aggregate indicators such as described in section 3.2 (is the pattern reflected in foreign investment data?) and legal analysis (to what extent does the treaty between country X and country Z pose similar treaty shopping risks as the treaty between Y and Z?).

Consider another example in which the starting point is different: If a tax administration detects certain patterns in investment flows or has knowledge about the incentives for tax avoidance posed by its own tax laws and tax treaties, it may direct its search for potential tax avoidance schemes in this direction.

3.1 Acquiring knowledge about tax avoidance schemes

GAARs are most useful for novel types of avoidance behaviour, for which no specific anti-avoidance rules have been developed yet. However, the issue is then how to identify such behaviour when it occurs? Essentially, five sources of information can be considered:

- tax avoidance cases in other countries, including public information produced by those countries with regards to tax avoidance and its impact;
- generic descriptions of tax avoidance schemes by international and academic organizations;
- confidential exchanges with other tax authorities;
- mandatory /voluntary disclosure;
- the tax administration's general technological, juridical and control infrastructure, and risk assessment based on certain risk hallmarks.

3.1.1 Tax avoidance cases in other countries

A first way to learn about tax avoidance practices by which a country is affected could be to look at other countries' experiences. Tax administrations and policymakers can study judgments of other countries' courts where a GAAR was invoked or descriptions of tax avoidance schemes that other countries' tax administrations post on their website. Subsequently, it can be assessed whether taxpayers engage in similar behaviour in their own jurisdiction (using methods described in section 3.2 and 3.3)[46].

46 A database on international tax cases is currently developed by CIAT and GLOBTAXGOV.

Of course, the fact that a country identifies a certain behaviour as tax avoidance does not mean that another country should necessarily interpret the case in the same way or that such a case would even be likely to arise in another country. Avoidance schemes can depend on the particularities of the tax laws and the economic structures of the relevant country. For example, the use of a certain type of legal entity may be motivated by a tax avoidance purpose in one country but can be legitimate (or simply irrelevant) in another. Nevertheless, a comparative exercise might provide useful indications on the extent of tax avoidance prevalent in the country.

Table 3 **Countries which provide information about aggressive tax planning schemes publicly**

Country	Name	Reference / Link
Australia	Tax avoidance schemes to watch out for	https://www.ato.gov.au/general/tax-planning/tax-avoidance-schemes-to-watch-out-for/
Chile	*Catálogo de Esquemas Tributarios* (Catalogue of Tax Schemes)	https://www.sii.cl/destacados/catalogo_esquemas/index.html
United Kingdom	Tax avoidance schemes that HMRC believes are being used to avoid paying tax due	https://www.gov.uk/government/collections/tax-avoidance-schemes-currently-in-the-spotlight

Table 4 **Databases of judgments where a GAAR was invoked**

Country	Name	Reference / Link
Australia	Australian Taxation Office Legal Database, search for "Part IVA"	https://www.ato.gov.au/Law/#Law

3.1.2 Public reports on tax avoidance schemes

International organizations, such as CIAT, OECD, UN, and the Platform for Collaboration on Tax frequently publish reports that describe tax planning schemes that could potentially fall under the scope of anti-avoidance rules.

Table 5 **Public sources with descriptions of tax avoidance schemes**

Organization	Reference / Link	Year	Countries referenced	Languages available
CIAT	Manual on International Tax Planning Control	2007	2007: Argentina, Brazil, Canada, Chile, Mexico	English, Spanish
CIAT	Manual for the Control of International Tax Planning (Update of the 2007 Manual)	Chapters will be issued from 2022	CIAT member countries	English, Spanish
OECD	Model Convention Commentary and Reports related to the Model Tax Convention	2017		English
UN	Model Convention Commentary	2017		English
UN	United Nations handbook on selected issues in protecting the tax base of developing countries	2017		English
OECD	Tax and Development Case Studies	2020	Zambia	
OECD	BEPS Action Reports	2015		English, Spanish, French
Platform for Collaboration on Tax	The Taxation of Offshore Indirect Transfers - A Toolkit	2020	China, India, Peru, Uganda, United States	English, Spanish, French
South African Revenue Service (SARS)	Discussion Paper on Tax Avoidance and section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962).		South Africa and references to Australia, New Zealand, Spain, The United Kingdom and United States.	English

3.1.3 Confidential exchanges with countries

Confidential exchanges with other countries can be used to gain more detailed descriptions of tax avoidance cases or information that is relevant to a certain taxpayer that operates in both jurisdictions.

The confidential CIAT Database on Transnational Cases is set-up to share experiences with tax avoidance cases among tax administrators[47]. In addition, CIAT organizes meetings and workshops to facilitate exchange among tax administrators[48].

Member countries of the OECD's Forum on Tax Administration, can exchange such information through the Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC)[49].

A useful resource to consider for implementing confidential exchanges related to information on specific taxpayers is the CIAT Manual on Exchange of Information[50].

3.1.4 Disclosure rules

Some countries rely on rules that require intermediaries (such as tax advisors, accountants) or taxpayers to report to the tax authority when certain schemes are set up, that may not necessarily amount to tax avoidance, but which have certain hallmarks common to avoidance schemes. The United Kingdom, South Africa, Portugal[51], among others, have had these "mandatory disclosure rules" for many years. More recently, the EU's "DAC6" Directive has instructed all EU members to introduce mandatory disclosure rules[52].

These rules are extensively described in the OECD's BEPS Action 12 report[53]. An assessment of the conditions under which introducing mandatory disclosure rules is beneficial is beyond the scope of this toolkit. Generally, the increased administrative burden for companies, advisors and administration needs to be weighed with the benefits stemming from increased information.

47 https://www.ciat.org/transnational-cases/?lang=en

48 https://www.ciat.org/redes/

49 https://www.oecd.org/tax/forum-on-tax-administration/about/jitsic/, https://www.oecd.org/tax/forum-on-tax-administration/about/

50 CIAT, "CIAT Manual for Implementing and Carrying Out Information Exchange" (Panamá: CIAT, 2006), https://www.ciat.org/Biblioteca/DocumentosTecnicos/Ingles/2006_CIAT_manual_information_exchange.pdf.

51 OECD, *Mandatory Disclosure Rules, Action 12 - 2015 Final Report* (Paris: OECD Publishing, 2015), 25, https://doi.org/10.1787/9789264241442-en.

52 European Council, "Council Directive (EU) 2018/822 of 25 May 2018 Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation in Relation to Reportable Cross-Border Arrangements," ST/7160/2018/INIT § (2018), para. 1(2), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L0822.

53 OECD, *Mandatory Disclosure Rules, Action 12 - 2015 Final Report*.

In addition to (or instead of) mandatory disclosure rules, countries can offer the possibility for taxpayers to voluntarily disclose tax avoidance schemes. Australia, for example, offers various procedures for taxpayers and tax professionals to voluntarily report information:

- a "tip-off-form" and a phone number, where taxpayers can report if they have been offered a tax avoidance scheme by a tax advisor[54];
- a possibility for taxpayers to report that they are involved in an avoidance scheme before an investigation has been report in exchange for a reduction of penalties[55];
- a possibility for tax professionals to report on tax avoidance schemes that they encounter in their practice[56].

3.1.5 Hallmarks of tax avoidance schemes

Even in the absence of mandatory disclosure rules, it may be possible to use hallmarks of avoidance structures that would normally trigger a reporting obligation to identify potential tax avoidance schemes in the information that the tax authority already disposes of.

These hallmarks are described in the BEPS Action 12 report[57]:

- a taxpayer incurs an important amount of losses (compared to similar taxpayers or compared to other years);
- high value gifts;
- high value leases;
- transactions with low-tax or non-transparent jurisdictions;
- important differences between profits reported in financial accounts and profits reported for tax purposes (book-tax differences).

Transactions in which the benefits of a treaty that may cause a risk for treaty shopping or rule shopping (see section 3.3.2) are invoked, as well as transactions with entities situated in special economic zones, could be additional elements to consider.

If a significant part of the transactions that give rise to losses or profits are undertaken with related parties, i.e., companies that are connected with the taxpayer in question through direct or indirect ownership links, the risk of tax avoidance could be higher.

54 https://www.ato.gov.au/General/Tax-planning/Report-schemes-and-promoters/

55 https://www.ato.gov.au/General/Tax-planning/Report-schemes-and-promoters/

56 https://www.ato.gov.au/General/Tax-planning/Tax-professionals--Protecting-your-clients-and-practice/

57 OECD, *Mandatory Disclosure Rules, Action 12 - 2015 Final Report*, 45–47.

It is important to note that none of these hallmarks alone can sufficiently prove a tax avoidance scheme and a tax authority should never decide to apply a GAAR solely because one of these hallmarks was present. Nevertheless, they can serve to select cases for further assessment and for a detailed investigation that would make a GAAR applicable.

3.2 Indicators of tax avoidance in macro and micro data

In recent years, international organizations and researchers have developed relatively sophisticated methods to approximate to what extent countries are affected by international tax avoidance, i.e., by schemes that involve cross-border transactions[58]. These methods generally rely either on multinational enterprises' (MNE) financial accounts, or on publicly available statistics such as foreign affiliate statistics and foreign direct investment data. Financial accounts are often available in national registers or on the website of the United States Securities and Exchange Commission (SEC) for those companies that are listed on United States stock exchanges and are compiled in commercial databases such as Bureau van Dijk's Orbis database (see Table 6).

FDI statistics may for example show whether there is a high share of low-tax jurisdictions in a country's total inward and/or outward investment stocks, which may be an indicator of tax avoidance schemes[59]. Some FDI databases differentiate between FDI financed by debt and equity. A high share of debt compared to equity financing in inward foreign direct investment flows may indicate a higher risk of tax avoidance since in most countries, debt financing is treated more favourable from a tax perspective than equity financing. The Non-Governmental Organization "The Tax Justice Network" has developed a tool, in which countries can assess tax evasion and tax avoidance risks based on aggregate indicators[60].

In the context of tax treaties, FDI data can also help decide whether a treaty is vulnerable to treaty shopping and whether it is advisable to include an anti-avoidance rule. If there is only little investment originating from the country in question, then the treaty is likely not at a high risk of treaty shopping. If large investment flows are coming from the partner country, then the probability of treaty shopping is higher, although this is not a sufficient indicator for treaty shopping, since all flows could be genuine. Some countries publish so-called special purpose entity (SPE) statistics, broken down on a per country-pair basis[61]. A high amount of SPE investment

58 Richard Bolwijn, Bruno Casella, and Davide Rigo, "An FDI-Driven Approach to Measuring the Scale and Economic Impact of BEPS", *Transnational Corporations* 25, no. 2 (2018): 107–43; FISCALIS Tax Gap Project Group, "THE CONCEPT OF TAX GAPS Report II: Corporate Income Tax Gap Estimation Methodologies" (Brussels: European Commission, 2018), https://ec.europa.eu/taxation_customs/system/files/2018-11/taxation_papers_73_en.pdf; OECD, *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report* (Paris : OECD Publishing, 2015); Thomas R Tørsløv, Ludvig S Wier, and Gabriel Zucman, "The Missing Profits of Nations" (National Bureau of Economic Research, 2020).

59 Bolwijn, Casella, and Rigo, "An FDI-Driven Approach to Measuring the Scale and Economic Impact of BEPS."

60 https://iff.taxjustice.net/#/

61 The OECD FDI Statistics separate FDI flows into an SPE and a non-SPE component: https://stats.oecd.org/Index.aspx?QueryId=64194. In addition, the Spanish Ministry of Commerce distinguishes

received from a treaty partner country is (although by itself not sufficient either) a more precise indicator of treaty shopping than a generally high amount of investment received.

Since recently, country-by-country reports (CbCR) constitute another useful data source. These reports contain, among others, data on tax payments, profits, assets, employees by multinational enterprise groups broken down per country. The tax administrations of countries which participate in the BEPS project collect these reports from MNE's headquarters and exchange them with other tax administrations, in which the MNEs operate. The OECD Handbook on Effective Tax Risk Assessment references methods to calculate tax avoidance risks based on data contained in country-by-country reports[62]. In addition, the OECD publishes aggregate statistics from country-by-country reports[63]. These can potentially be used by countries which do not receive CbCRs from other countries. Researchers have developed methods to approximate the amount of tax revenues lost by a country based on aggregate CbCR statistics[64]. Currently, however, the OECD reports several issues in the data, among them inconsistencies in definitions applied by different reporting MNEs[65]. These should be studied in conjunction with the data analysed.

For a more comprehensive description of all data sources considered in this section and their usefulness for assessing tax avoidance risks, see the BEPS Action 11 report published by the OECD[66].

It is important to point out that none of the methods and data used can directly show whether a company or individual avoids taxation. But they are indicators of risk and hence may help inform decisions, such as whether the introduction of a GAAR is useful, or which type of taxpayers to monitor more closely.

In contrast to the increasing sophistication of methods to approximate quantities of international tax avoidance, there are currently (to the authors' knowledge) no tools available to estimate the overall extent of domestic tax avoidance schemes by which a country is affected. Efforts by CIAT and the IMF, for example, have rather focussed on estimating illegal corporate tax evasion in a domestic context rather than estimating corporate tax avoidance[67].

62 OECD, "Country-by-Country Reporting: Handbook on Effective Tax Risk Assessment" (Paris: OECD, 2017).

63 https://stats.oecd.org/Index.aspx?DataSetCode=CBCR_TABLEI

64 Kimberly A Clausing, "How Big Is Profit Shifting?," *Available at SSRN 3503091*, 2020.

65 OECD, "Important Disclaimer Regarding the Limitations of the Country-by-Country Report Statistics" (OECD, 2020), https://www.oecd.org/tax/tax-policy/anonymised-and-aggregated-cbcr-statistics-disclaimer.pdf.

66 OECD, *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report*.

67 Miguel Pecho Trigueros, Fernando Pelaez Longinotti, and Jorge Sánchez Vecorena, "Estimating Tax Noncompliance in Latin America: 2000 – 2010" (Panamá: CIAT, 2012), https://www.ciat.org/Biblioteca/DocumentosdeTrabajo/2012/2012_WP_3_non-compliance_pecho_pelaez_vecorena.pdf; Junji Ueda, Estimating the Corporate Income Tax Gap: The RA-GAP Methodology (International Monetary Fund, 2018), https://www.imf.org/-/media/Files/Publications/TNM/2018/tnm1802.ashx.

Table 6 **Datasets used for international tax avoidance risk assessments**

Data type	Level	References	Years (available as of 2021)
Company accounts	Firm-Level	Orbis	1999-2021
		Accounts filed in national registries or United States of America Securities and Exchange Commission (for companies listed on United States of America stock exchanges)	Various
Bilateral FDI statistics	Aggregate	IMF CDIS	2009-2019
		UNCTAD[68]	2001-2012
		OECD	2013-2019 (BMD4)[69]
			2003-2012 (BMD3)
		National statistical agencies (e.g., Colombia)	Various (e.g., Colombia 1994-2020)
Bilateral FDI-SPE statistics	Aggregate	OECD	2013-2019
		National statistical agencies (e.g., Spain)	Various (e.g., 1995-2019 for Spain)
Foreign Affiliate Statistics	Aggregate	OECD AMNE	2008-2019
		United States of America Bureau of Economic Analysis (US B.E.A.)	1982-2019
Country-by-country reports	Firm-level	Available to tax administrations participating in BEPS Action 13	2016-2021
	Aggregate	OECD	2016-2017
		United States of America Internal Revenue Service	2016-2018

68 Only accessible via the Internet Archive (web.archive.org)

69 BMD refers to "Benchmark Definition". Since 2013, the OECD collected FDI data according to a newer definition, which means that data before and after 2013 may not be directly comparable.

3.3 Legal analysis of incentives to engage in tax avoidance

3.3.1 Risks in domestic tax law

One can generally suppose that opportunities for tax avoidance are higher in more complex tax systems[70]. The more tax laws try to accommodate the different situations that taxpayers may find themselves in, the higher is the incentive for taxpayers to simulate situations that would procure a more favourable tax treatment.

It is important to mention that such complexities are not inherently bad. Rather, they may be necessary to tax citizens according to their ability to pay, or to use the tax system to favour certain economic and social goals. Consider, for example, a very simple tax system which only requires each citizen, no matter how wealthy or poor, to pay a fixed sum of $1000 per year. Such a system does not need a GAAR, since the rule is very clear and difficult to avoid. However, such a system is arguably not very fair, since poorer citizens would be obliged to pay a much higher share of their income compared to richer citizens.

Complexity of a tax code is not straightforward to measure and very context specific. Yet, familiarity with the history and evolution of a country's tax code may permit an analysis of whether the tax system's complexity is increasing or decreasing. Moreover, when a country plans any reforms which are likely to increase a tax code's complexity (e.g., moving from a flat to a progressive rate structure or introducing more special incentives for certain business sectors or types of activities), it may be worthwhile to consider accompanying the reform with the introduction of a GAAR.

Risks arise especially where situations, which can be considered as similar from an economic perspective, are treated different for tax purposes. A common example is the differentiation between debt and equity. In many countries, interest paid on debt incurred is a deductible expense whereas dividends paid out as consideration for equity are not. From a tax perspective, it is therefore advantageous for a company to finance itself through equity rather than debt. While there are significant differences between debt and equity, they have similarities from an economic perspective (both are ways to provide capital to a business). Whenever economically similar transactions have different tax treatments, tax avoidance risks may arise.

70 Kate Krause, "Tax Complexity: Problem or Opportunity?," *Public Finance Review* 28, no. 5 (September 1, 2000): 395–414, https://doi.org/10.1177/109114210002800501.

3.3.2 Risk in tax treaty networks

As explained in section 2.2.1, a country's treaties may be at risk of treaty shopping or rule shopping. How can a country assess which of its treaties are most vulnerable to treaty shopping and rule shopping?

Vulnerability to treaty shopping

When an investor invests in a foreign country, a tax treaty generally creates a favourable treatment compared to the domestic tax rules of the foreign country which would apply to them in the absence of a tax treaty. A typical situation may be that, while the rules of the domestic tax system would impose taxes at 30% on dividend, interest or royalty payments to the foreign investor, a tax treaty may reduce these rates to 10%.

Whether a tax treaty is vulnerable for abuse depends essentially on how big of a temptation it creates for investors from third countries to try to benefit from it. This is a function of:

- how much the treaty limits a host country's source taxation rights: For example, if it reduces withholding rates to 0% or only to 15% or to what extent the treaty permits the levying of capital gains tax at source or only at residence. Martin Hearson at the International Centre of Tax and Development (ICTD) has developed an indicator for the "source taxing right restrictiveness" of a tax treaty[71];
- in case the country has only concluded few tax treaties and not with all major economic partners: to what extent the tax treaties are more beneficial than the domestic law that the country applies to international transactions, e.g., whether it levies high withholding rates on outbound payments or whether it taxes transfers of shares at source;
- in case the country has concluded many tax treaties, including all major economic partners: if the treaty restricts source taxation rights more than treaties concluded with other countries, e.g., if withholding rates are significantly lower than those included in other treaties, there may be an incentive for taxpayers to use this treaty for treaty shopping purposes;
- whether the treaty partner country exempts foreign income or only provides a credit. In the latter case, the risk for treaty shopping is lower. Sometimes, countries which normally provide a credit have a special holding company

71 Results for most treaties concluded by non-OECD countries can be accessed at: https://www.treaties.tax/.

regime, which allows beneficiaries to benefit from a tax exemption or foreign income. If the treaty partner country has such a regime, the risk of treaty shopping should be considered as higher.

Vulnerability to rule shopping

Whether a treaty is vulnerable to rule shopping depends essentially on whether there is a large discrepancy in benefits for different types of transactions (i.e., if technical services are taxed at 0% and royalties at 20%). If this is the case, a taxpayer may attempt declare a payment in a way that minimizes the withholding tax applicable (for example claiming that a royalty payment was in fact a payment for technical services). If the different withholding rates are more uniform, then the risk for rule shopping is smaller.

4. Managing GAAR introduction

4.1 Introducing a domestic GAAR

4.1.1 Consultation process

It is advisable to organize a public consultation process before the formal introduction of a GAAR or before major amendments to the rule are undertaken. Such a process can increase the perceived legitimacy of the GAAR. It can also generate important information about different GAAR designs' impact on tax revenues and business practices in the country. Potentially, the discussion that such a process creates among the tax community of a country may already fulfil some of the GAAR's purposes by raising awareness that certain types of tax avoidance may no longer be accepted. This could lead to the dismantling of some avoidant tax structures before the formal introduction of a GAAR.

A public consultation can thus take place at three different moments:

1) regarding the decision whether a GAAR should be introduced;

2) regarding the decision how the GAAR should be drafted;

3) regarding the decision of how to amend an already existing GAAR.

The first case is less important than the others, since, as pointed out in section 2, whether introducing a GAAR is advisable or not depends to a large extent on how the rule is drafted and applied in practice.

The draft of the rule or the proposed amendment prepared by the ministry of finance (or an alternative body responsible for legislative drafting), including drafts of additional guidance, should be circulated and stakeholders should be invited to provide comments. For example, before amending its GAAR law 2006, the South African Revenue Service circulated a report detailing reasons for addressing tax avoidance, descriptions of some schemes of concern and a draft of the new rule, together with the invitation for stakeholders to provide comments[72].

72 South African Revenue Service (SARS), "Discussion Paper on Tax Avoidance and Section 103 of the Income Tax Act, 1962 (Act No. 58 of 1962)," 2005, https://www.sars.gov.za/wp-content/uploads/Legal/DiscPapers/LAPD-LPrep-DP-2005-01-Discussion-Paper-Tax-Avoidance-Section-103-of-Income-Tax-Act-1962.pdf.

It is important to sufficiently advertise the opportunity to provide comments among the tax community and provide stakeholders with enough time to respond (approx. 3 to 6 months).

Another good practice is to make all comments received available public (e.g., on the tax administration's website), which can stimulate further discussion among the different commentators[73]. Publication may also deter commentators from making exaggerated or openly self-serving claims (such as for example an industry calling for a specific exemption from the rule). Stakeholders should be made aware beforehand that their comments are published at the end of the process.

In addition to formal written submissions, seminars can be held, at which officials of the tax administration or the ministry of finance discuss GAAR drafts with stakeholders in more informal ways. Such seminars should in general be open to the public. Specific invitations can be sent to ensure that members of the following groups are aware of the opportunity:

- business representatives;
- judges;
- academics;
- tax lawyers;
- accountants;
- civil society groups working on taxation.

It is advisable for government officials to be well prepared regarding the arguments commonly raised in such consultation processes. Some of the arguments that often occur are referenced in section 2 above. The academic literature quoted in that section can support more extensive preparation.

In the past, some countries have "outsourced" the consultation process by mandating a committee headed by persons outside the government with organizing the process: In the United Kingdom, a GAAR committee headed by a tax lawyer and composed of members from academia, judiciary, and business, held consultations with different stakeholders over the course of about one year[74]. The committee produced a report which recommended the introduction of a GAAR and suggested a text, as well as additional guidance that the Ministry could publish alongside. A similar process took place in India, where a report was prepared by a committee with mixed membership from government and academia[75].

73 See for example the proceedings of the public consultation processes held at OECD BEPS Inclusive Framework: https://www.oecd.org/tax/beps/public-comments-received-on-the-reports-on-pillar-one-and-pillar-two-blueprints.htm

74 Graham Aaronson QC et al., "GAAR Study: A Study to Consider Whether a General Anti-Avoidance Rule Should Be Introduced into the UK Tax System.," 2011.

75 Parthasarathi Shome et al., "Final Report on General Anti Avoidance Rules (GAAR) in Income-Tax Act, 1961," 2012, 13, https://www.finmin.nic.in/sites/default/files/report_gaar_itact1961.pdf.

A risk of strong private sector involvement and "outsourcing" of the process to an external party could be the creation of a stronger expectation that the outcomes of such a process will be adopted by the tax administration. The result may be the suggestion / adoption of a too "business-friendly" GAAR. However, the general advantage of gaining valuable information along the process may be amplified and potential issues of distrust among government and the private sector could be overcome.

4.1.2 Drafting a memorandum

When a GAAR is proposed to the legislative body, it would be advisable to accompany the draft language with a memorandum that explains important features of the GAARs and reasons for adopting certain language. Such a memorandum may smooth the legislative process and support subsequent interpretation by courts. Such a memorandum could include:

- reasons why a GAAR is introduced;
- outcomes of tax avoidance assessment process (if applicable);
- summary of outcome of consultation process (to signal that all relevant stakeholders have been involved);
- international practices / doctrines, from which the formulation was inspired.

4.2 Introducing a GAAR in a treaty

Since the publication of the 2017 UN and OECD Model Conventions, a GAAR has become a standard clause for bilateral tax treaties. Moreover, since the applicability of a treaty GAAR is always limited to a specific treaty, a wide public consultation process such as in the case of a domestic GAAR should not be necessary. However, a consultation process could make sense for a country's general treaty model or its tax treaty negotiation strategy. General advice on tax treaty negotiation can be found in the "Tax Treaty Negotiation Toolkit" published by the Platform for Collaboration on Tax[76].

Since the OECD or UN Model Convention form the basis of most tax treaty negotiations, the introduction of a treaty GAAR should not be a controversial issue when a new treaty is concluded.

Many treaties, which are already in place, however, do not include anti-avoidance clauses or less comprehensive anti-avoidance clauses (see CIAT information on anti-avoidance clauses in bilateral treaties regarding actions 6 and 15 of the Action Plan on BEPS[77]).

For treaties already in place, there are two options:

- a country can accede to the Multilateral Instrument (MLI) developed by the OECD BEPS Inclusive Framework. An advantage is that this is a standard procedure. A partner

76 https://www.tax-platform.org/publications/PCT_Toolkit_Tax_Treaty_Negotiations_Online_Version

77 BEPS Monitoring Database, CIATData, 2022, https://www.ciat.org/base-de-datos-monitoreo-beps/

country may have already listed the treaty as a covered treaty. As of 2021, the process of joining the MLI is still open. Another advantage is that there is only one domestic ratification procedure, and not several as in the case of re-negotiating individual treaties. A disadvantage of using the MLI to include anti-avoidance clauses is that a country would need to evaluate and form a position on other clauses included in the MLI, as well;

- alternatively, a country can re-negotiate treaties individually to introduce an anti-avoidance rule. For example, Mexico and Spain agreed to include of an anti-avoidance clause in their tax treaty before the publication of the MLI (namely in 2015)[78]. Since negotiations require administrative resources, individual re-negotiations should not be requested from all treaty partners at the same time but following a risk-based priority list.

4.3 Considerations of timing

When a GAAR is introduced in a country's tax system, several moments in time need to be coordinated. This is usually the case for any tax rule. However, there may be some issues that are specific to GAARs, as discussed in this section. The relevant moments in time are the moment:

- of announcement;
- of promulgation;
- of entry into force;
- from which on tax returns can be scrutinized;
- from which on tax benefits received become relevant for GAAR purposes;
- from which on arrangements/schemes entered into can become relevant for GAAR purposes.

A GAAR can be introduced in a country's tax system in ways that are more or less disruptive for existing practices of taxpayers. One or another option may be favoured depending on the trade-off between raising revenue vs. investment climate. The following section shows various options to manage the different timing questions and some considerations in favour or against. Much of it is based on the discussions surrounding the introduction of a GAAR in India[79], where because of specific conditions, a minimally disruptive way (including grandfathering provisions) was chosen. Whether such conditions exist in the country in question should be carefully assessed before opting for such a minimally disruptive way.

78 Ministerio de Asuntors Exteriores y de Coopéración (Spain), "Protocolo Que Modifica El Convenio Entre El Reino de España y Los Estados Unidos Mexicanos Para Evitar La Doble Imposición En Materia de Impuestos Sobre La Renta y El Patrimonio y Prevenir El Fraude y La Evasión Fiscal y Su Protocolo, Hecho En Madrid El 24 de Julio de 1992, Hecho En Madrid El 17 de Diciembre de 2015." (2015), https://www.boe.es/boe/dias/2017/07/07/pdfs/BOE-A-2017-7905.pdf.

79 Shome et al., "Final Report on General Anti Avoidance Rules (GAAR) in Income-Tax Act, 1961".

4.3.1 Applying the GAAR for the first time: Moment of set-up of scheme and tax benefits received

In most countries, there is a delay between the year in which a tax return is assessed and the year in which the facts that this tax return related to happened (e.g., the income earned, the costs incurred). When a substantive rule enters into force, it can usually be applied for the first time to tax returns that relate to the fiscal year of the rule's entry into force, which are usually due towards the end of the year following the fiscal year to which they relate. When a GAAR is introduced, it is probably best to follow the common practice of the country.

In any case, to avoid confusion, this should ideally be clarified by inserting a sentence in the explanatory memorandum accompanying the law like the following: "The GAAR enters into force with respect to fiscal year XXXX, and tax returns due on … are the first potentially subject to scrutiny under the rule".

The moment at which a tax avoidance scheme was set-up should generally not matter for the application of a GAAR. This can be illustrated in the following example:

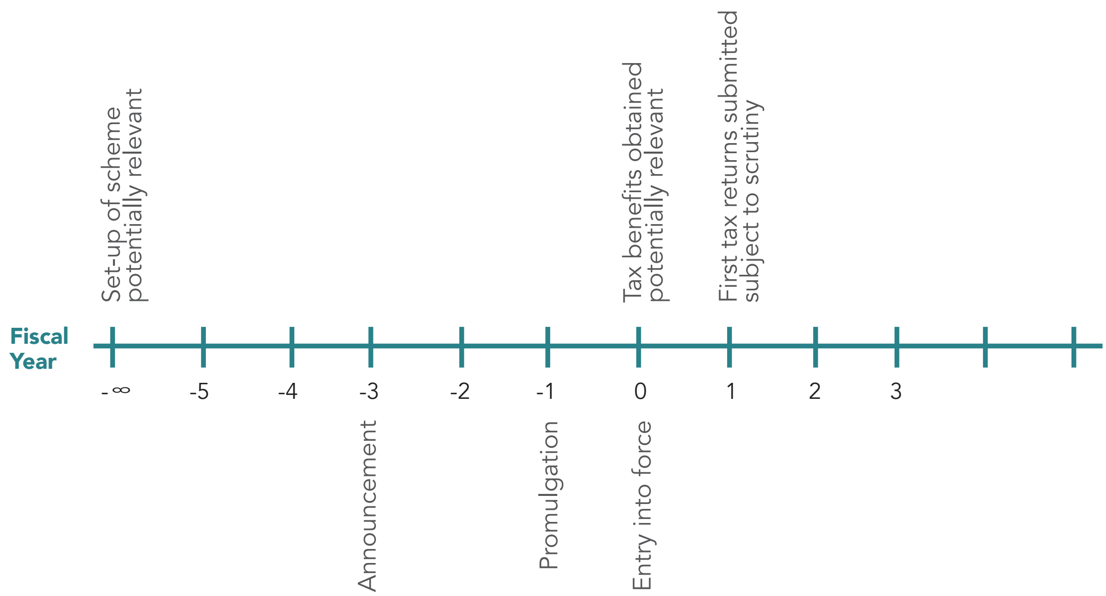
Imagine that it is 2010 and a company is setting up a tax avoidance scheme. The core of this scheme involves a parent company providing a loan to one of its subsidiaries. Each year the participants in the scheme obtain a tax benefit (for example through recurring deductible interest payments) that they should not be entitled to if a GAAR was applied.

A GAAR enters into force in 2022. In that case the tax authority should be able to challenge the tax benefit obtained in fiscal year 2022 (and, for example, re-characterize interest payments made in 2022), even though the arrangement (the loan in this example) was set up earlier. However, the benefits obtained through payments that occurred before 2022 should not be challenged under the GAAR. Potential reasons to deviate from this general case are discussed further below.

For more details on the distinction between the moment in which a scheme is set up and the moment in which tax benefits are obtained, see for example India's Expert Committee Report on GAAR introduction[80].

80 Shome et al., 39–41.

Figure 3 **Example of timing of GAAR introduction**



Source: *The authors, based on discussions from the Indian Expert Committee Report on GAAR*[81]

4.3.2 Entry into force

The second timing issue to consider is the period between the announcement of a GAAR's introduction and its entry into force. This period should not be too short so that stakeholders can be informed and assess consequences for their business decisions.

Some countries have further delayed the introduction of the GAAR, for example by setting the date of entry into force at one (or more) year(s) after the date on which the law is adopted. India, for example, adopted a GAAR in 2013 but delayed the entry into force until 2017, with the goal of granting taxpayers additional time to adapt and bring their affairs in order. The obvious disadvantage of such a delay is that additional tax revenue may be lost. Therefore, managing this delay constitutes a balancing act between the interests of business and the public resources.

4.3.3 Grandfathering / preservation of benefits

An option to minimize the disruptive effect of a GAAR for tax practice is to include a clause that prevents the tax administration from applying the GAAR for a certain period for certain types of transactions or taxpayers.

81 Shome et al., 39–41.

When India introduced a GAAR, it precluded it from applying to transfers of capital acquired before the GAAR entered into effect in 2017[82]. The GAAR would have enabled the tax administration to question foreign investors' claim to be exempt from capital gains tax, if they had made use of a treaty shopping structure involving conduit companies in Mauritius or Singapore. The reason for that decision was that earlier, the Ministry of Finance used to provide assurances to investors that structures to avoid capital gains tax in India would not be questioned by the tax administration and that a foreign investor could exit the country at any moment without incurring capital gains tax[83]. Therefore, in that specific situation, the grandfathering clause served the purpose of keeping up that promise.

Similar considerations could be made in cases where taxpayers have been provided with an advance ruling before the introduction of a GAAR and the advance ruling still applies for one or several years after the GAAR was introduced. It may be a good practice not to apply the GAAR until the advance ruling expires unless it becomes known to the tax administration that the ruling was granted based on partial information and additional information obtained later would justify the application of the GAAR.

In general, however, grandfathering clauses should be used with caution, considering that they introduce an unequal treatment for different taxpayers (disadvantaging newer investors over older ones). Moreover, the negative impact of such a rule on tax revenue may be high and difficult to quantify beforehand. In any case, the adoption of such a rule would need to be well justified and explained in a memorandum.

4.3.4 Retroactive / retrospective application

Ordinarily, statutory provisions become applicable from the time in which the law is enacted onwards (or later if this is specified). This honours the principle that without a proper law, no obligation can be imposed. Generally, a GAAR should therefore not be applied to tax benefits obtained in years prior to its entry into force.

In some situations, the motives that supported the GAAR's introduction are rooted in an increase in certain types of avoidance that have been perceived in recent years. It might be the case that these situations can still be investigated under the GAAR due to the statute of limitations.

If the application is retroactive then the legislator must identify the limits regarding retroactivity of the fiscal law according to the country's constitution or prior case law. It is advisable to directly address the possible controversies by offering a solid argumentation about the reasons to apply a GAAR retroactively when drafting the motives of the GAAR's explanatory memorandum.

82 Income Tax Rules, 1962, rule 10U (d)

83 See, for example, Income Tax Department, "Clarification Regarding Taxation of Income from Dividends and Capital Gains under the Indo-Mauritius Double Tax Avoidance Convention (DTAC)," 789 Circular § (2000), https://www.incometaxindia.gov.in/Communications/Circular/910110000000000483.htm.

4.3.5 Application of judicial anti-avoidance principle for previous years after GAAR has been introduced

An issue specific to the GAAR is that, even in the absence of a legislated GAAR, a country's judiciary may have already developed an anti-avoidance principle and that the statutory GAAR may be a mere codification of such a judicial principle.

If prior to the introduction of a GAAR, a tax administration already used to rely on such a principle to assess certain transactions, then a tax administration should not be prevented from assessing years prior to the GAAR's entry into force based on that principle. The situation could be different if the existence of such a principle has been confirmed by a court, but never been applied by the tax administration.

In any case, it is advisable to clarify this issue in documents that accompany the introduction of the legislated GAAR.

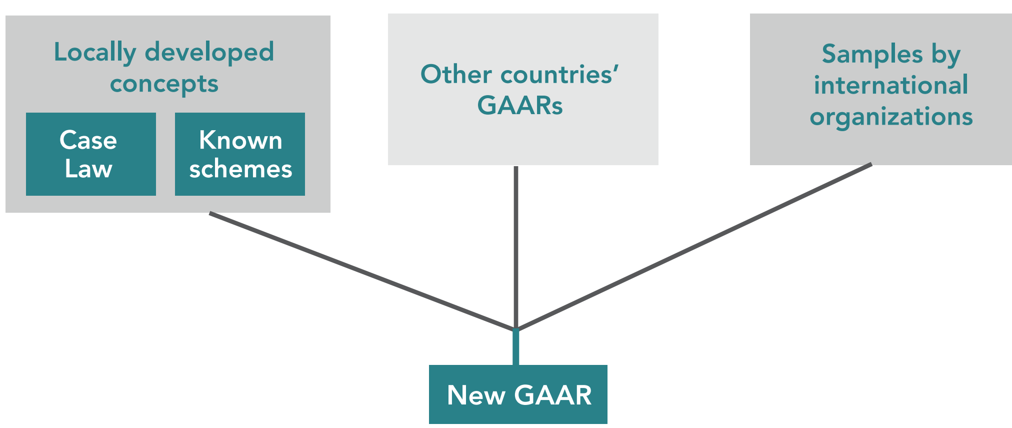
5. How to design a GAAR?

5.1 Effective GAAR design

This section considers how to design a GAAR. The concrete wording differs among countries that have legislated a GAAR in their domestic tax law and there is no consensus – or empirical evidence – regarding which design is best. This toolkit recommends considering all three main "sources of inspiration" for drafting a GAAR: Sample clauses written by international organizations, GAAR clauses included in other countries' tax laws, as well as locally developed concepts that relate to tax avoidance.

The section discusses the advantages and disadvantages of giving either source greater weight. It also references relevant material (such as where to find "sample GAARs" and clauses of other countries) and provides examples of countries that have developed GAAR articles in different ways. Due to the many concepts and clauses already available, this toolkit does not propose a new "sample GAAR". However, some of the main concepts, which constitute the common core of GAAR clauses, are explained and discussed in more detail. And suggestions on how to write a GAAR are given.

Figure 4 **Sources of inspiration for GAAR design**



Source: *The authors*

The situation is significantly different for tax treaties, where due to the BEPS Project's minimum standard on treaty shopping, many treaties now contain the same GAAR clause. This makes sense in so far as the general content of tax treaties is very similar across countries, which also means that tax avoidance schemes involving tax treaties are similar across countries.

The toolkit therefore refers to the material developed by the OECD and UN regarding the drafting of treaty GAARs and recommends inclusion of the standard wording if a country decides to introduce a GAAR in a bilateral tax treaty. Since the concepts used in the standard treaty GAAR of the model treaties overlap with the concepts used in many countries' GAARs, the detailed explanations of concepts provided in this section are also relevant for treaty GAARs[84].

5.2 Connection to local practice

5.2.1 Connection with case law

Aim of the section: Explain the role to be played by legislative interpretation and legal doctrines in the creation of a GAAR. Provide examples of how countries have connected GAARs to previous case law.

The drafting of a GAAR can be inspired by the country's experience with:

- the type of commercial schemes already identified as abusive, which cannot be curbed by existing anti-avoidance legislation;
- judicial anti-avoidance doctrines arising from the interpretation of statutory provisions made by courts;
- the need to protect the correct application of laws providing for special tax benefits in certain sectors. To illustrate this motivation, it is possible to envision a country that has a key interest or depends heavily on certain industry (e.g., oil & gas, mining, etc.) for which several tax breaks have been granted. In such a situation the country might want to make clear that the GAAR can be applied to protect the tax benefits granted for such industry;
- provide better administrative tools for the tax authority to identify the situations in which a taxpayer claims a tax benefit without being affected by the economic consequences suffered by taxpayers in its same position, no matter if the abusive scheme has been identified in the past by the tax authority.

When the country identifies any of these needs, it can draft a GAAR taking into account the specific necessities, terminology or doctrines that have already been developed in the jurisdiction. This

84 The "Principal Purpose Test" clause in the 2017 OECD and UN Model Conventions is inspired from the United Kingdom's domestic GAAR Judith Freedman, "The UK General Anti-Avoidance Rule: Transplants and Lessons," *Bulletin for International Taxation* 73, no. 6/7 (2019): 332–38.

premise should be observed if the country wants to abide, counteract, or reinforce the doctrines/ principles for combating anti-tax avoidance practices.

In doing so a good starting point will be to identify which are the terms associated with tax abusive practices, for instance, the doctrines most used by courts in tax cases. Sometimes, courts refer to principles or doctrines developed through cases of other legal branches (e.g., civil law, commercial law, civil procedural terminologies) or simply borrow ideas from the claims raised by the parties.

Some of the most common anti abuse doctrines are "substance over form", "fraus legis", "sham", "simulation", "economic substance", "business purpose", "abuse of rights", "step transaction", "real business nature", "fiscal nullity", among others.

Bear in mind that these terminologies come from the interpretation of the legal provisions applied to concrete facts of past cases. This is to say that it is most likely for courts to analyse new cases by using the same framework or referring to both the factual circumstances found in the past and the doctrine applied to those situations. Therefore, the case law's evolution is sustained on hindsight, as courts will contrast the new cases with the consideration stated in the past in regard to the factual circumstances and the doctrines stressed in them. Additionally, courts in common law jurisdictions are expected to respect precedents. For courts in civil law countries, this is not a requirement but often practiced.

Examples on terminology included in GAARs inspired by doctrines or case law

(a) Principal purpose test

Rather often the concept of "principal purpose" is being used within the content of a GAAR. This notion relates to the common law tradition of inquiring about the intent of a given action. In the context of a GAAR, this means questioning the reasons for undertaking a transaction or series thereof[85]. In doing so this test aims at finding objectively verifiable criteria rather than requesting a taxpayer to identify his motives for acting in certain way (further information about objectivity within subjective tests is to be found in section 5.4.2).

Before being used as part of a GAARs wording, principal purpose tests were used to reconstruct the course of actions taken by companies or individuals entering into certain agreements or providing their services. The purpose test helped common law courts to identify whether the factual circumstances of a case allowed the individual or the corporation to claim a right based on the situation they were facing.

85 Paulo Rosenblatt, "General Anti-Avoidance Rules for Major Developing Countries: A Comparative Taxation Approach," 2013, 61.

For instance, in Kellog Brown & Root, Inc. et al[86] (KBR) the United States D.C. District Court (District for Columbia) used the "primary purpose" test to identify whether the client-attorney privilege could be claimed by delving into the actions taken by an attorney involved in an internal investigation run by KBR. The D.C Court used the primary purpose test as it had already been used in *Upjohn Co. v. United States*[87], where consideration was given to the behavior deployed by the company's employees as to conclude whether an attorney was providing legal advice to a company, and therefore, his memorandums should be cover by the attorney-client privilege. In a review on KBR made by Jones Day Law Firm it was explained that:

"Many courts—including the D.C. Circuit— have used the "primary purpose" test to resolve disputes when attorney–client communications may have both legal and business purposes. The D. C. Circuit emphasized that the question is simply whether obtaining or providing legal advice was "a" **primary purpose** of the communication—one of the significant purposes—so the privilege can apply even if the communication also had a "business purpose"[88].

In this manner the purpose test was used to identify the existence of external manifestations of will in order to assess the conduct of the individual. Likewise, by identifying observable criteria to assess the conduct of an individual it is equally possible to recognize if there are several purposes supporting the taxpayer's behavior. Since all purposes could be abstracted from the conduct of the individual then it could as well be possible to weigh the purposes based on conclusive acts performed by the person.

The purpose test was later integrated into tax law provisions to provide more certainty to the taxpayers and limit the conduct of the tax administration by requesting an analysis based on external manifestations of will developed by the taxpayer. In Canada, the principal purpose test was adopted as part of the GAAR wording as a secondary test supporting the reasonableness test. A thorough revision of this provision will be made in section 5.4.3.

(b) Reasonableness test

Another commonly used test for common law jurisdictions is the reasonableness test. As mentioned in the previous section the Canadian GAAR uses this test to assess if granting a benefit is coherent with a transaction. Another country that resorts to this terminology is Australia. The notion of having a reasonable expectation about a certain situation stems from closely connected concepts

86 Kellogg Brown & Root, Inc., et al., 2014 U.S. App. LEXIS 12115 (D.C. Cir. June 27, 2014).

87 449 U.S. 383 (1981)

88 Jones Day Commentary on "In re: Kellogg Brown & Root, Inc., et al.: D.C. Circuit Grants Petition for Mandamus and Protects Attorney–Client Privilege of Internal Investigation in False Claims Act Case" July, 2014. Available at: https://www.jonesday.com/files/Publication/68cfc853-cbe4-41d4-945a-db01f9d0feb6/Presentation/PublicationAttachment/f5fc4fe2-2aa5-456f-bb38-e734efeb8481/In%20re%20Kellogg%20Brown%20Root.pdf

such as having a "reasonable doubt" to be found in US criminal prosecution law, English criminal law and in the Canadian law system. Moreover, the notion of "reasonable person" is used by common law systems in both contract and criminal law[89].

Furthermore, the introduction of GAARs in Canada and Australia arose as a response to adverse results from court cases. Courts of both countries made literal interpretations of tax statutes to reject the application of general anti-avoidance rules arguing that taxpayers were legitimated in their action as they complied with formal requirements.

For Canada the introduction of the GAAR happened in 1987 in direct connection with the ruling on *Stubart Investments Ltd. v. The Queen*[90], where the Supreme Court of Canada disregarded the considerations stated by the tax administration on the existence of abusive tax avoidance[91]. The case involved Stubart as the seller of a food flavoring business to Groover in exchange for assuming liabilities and issuing secured notes. After the sale, Grover appointed Stubart as its agent to continue carrying the business and reporting realized net income. Grover reported the income in its tax return and made use of its tax losses.

The tax administration argued that the whole transaction was not supported by an independent or *bona fide* business purpose. To which the Supreme Court argued that as long as the tax legislation was not preventing the taxpayer from undertaking a transaction[92] and considering that the sale and transfer had actually taken place, the behavior of the taxpayer could not be declared as a sham and, therefore, was permitted[93].

In the Australian case the original GAAR introduced in 1936 served the tax administration for several years until 1970 when the GAAR cases were presented to a newly appointed court of appeal. The new court stressed a doctrine named "the choice principle", under which the apparent form

89 Rosenblatt, "General Anti-Avoidance Rules for Major Developing Countries: A Comparative Taxation Approach," 58.

90 [1984] CTC 294, 84 DTC 6305 (SCC).

91 Aaronson QC et al., "GAAR Study: A Study to Consider Whether a General Anti-Avoidance Rule Should Be Introduced into the UK Tax System.," 19.

92 In fact, this approach finds its correspondence on the argumentation taken by Judge Lord Tomlin in *Inland Revenue Commissioners v. Duke of Westminster* [1933 -1935] A.C. 1 (HL) where the Duke's way of acting was accepted on the grounds of being entitled to set his businesses in a way that contribute to his interests. Expressly the judged defended this way of acting by saying: "Every man is entitled if he can to arrange his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure that result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax".

93 When reflecting on the guidance provided by the Court it was expressly mentioned that: "The question comes back to a determination of the proper role of the court in construing the Income Tax Act in circumstances such as these where the Crown relies on the general pattern of the Act and not upon any specific taxing provision. (…) Otherwise, where the substance of the Act, when the clause in question is contextual¬ly construed, is clear and unambiguous and there is no prohibition in the Act which embraces the taxpayer, the taxpayer shall be free to avail himself of the beneficial provision in question. In this appeal, the appellant taxpayer has done nothing to contrive the accumulated and recog¬nized loss carry-forward of Grover. Neither has the parent nor the affiliated company Grover done so. The immediate payment in issue, the transfer of yearly profits from the business, was made by the appellant under a clear, binding legal obliga¬tion so to do. Grover's right to apply the tax loss to the income so received from the business is technically not here an issue".

of a transaction had to be respected, regardless of its economic substance. The reason supporting this approach was equivalent to the one found by the Canadian Supreme Court, in as much tax law provisions were read in a narrow and strict manner. It seems that the motivation was to apply the regulations without articulating the aim of the legislator in combating the abuse of said provisions.

Additionally, the Australian GAAR of 1936 had flaws, which were highlighted by the court of appeal in its judgements. One of these failures was the fact that the provision did not contain a "reconstruction" guidance for the tax authority to be applied once the arrangement was found abusive. This fact inhibited the Commissioner of Taxation from hypothesizing an alternative situation upon which the taxpayer could be assessed. In fact, the court of appeal expressly pointed to this issue in *Slutzkin v. Federal Commissioner of Taxation*[94] noting that: "Further, it is fundamental that the section is, as it has been said, no more than an annihilating section. It does not itself impose tax, nor does it construct or reconstruct any transaction. It does no more than avoid a transaction. The avoidance is of no consequence unless, if the transaction were swept aside, a factual situation involving the payment of tax is exposed"[95].

It can be concluded that a GAAR is often impacted by the doctrines already embedded in the law system and as well might be challenged at a later event when being interpreted by courts. Therefore, conducting a background study on anti-avoidance doctrines and their use by courts in tax law cases would be the first step to take when introducing a GAAR in any jurisdiction. Likewise, it is advisable to review if the country follows the legal traditions of another country (e.g., based on a former colonial relationship, language proximity, or a consistent borrowing of legal concepts of the other country's legislation – legal transplants), in order to identify if there are other cases or notions to be considered when drafting the GAAR. For instance, South Africa maintains a close legal proximity with the United Kingdom and the South African Supreme Court of Appeals has taken into account the Duke of Westminster doctrine as a relevant hallmark in favor of the taxpayers rights, when deciding upon tax avoidance cases to which the GAAR is being applied (See full example in section 5.4.3).

94 Slutzkin v. Federal Commissioner of Taxation (1977) 140 CRL 314.

95 Ibid; Slutzkin v. Federal Commissionaire of Taxation.

Table 7 **Advantages and disadvantages of integrating doctrines/principles into domestic GAARs**

Advantages	Disadvantages
Integrating doctrines and principles previously used in jurisprudence into the GAAR provides clarity for the taxpayer and the tax authority.	If the principle or doctrine being integrated into the regulation has never been dealt with in cases concerning tax law, the outcome on its interpretation might differ from the one expected.
A GAAR comprehensive of the principles or doctrines used in case law can be interpreted by Courts in accordance with the former practice (e.g., enforcement of judicial precedents).	If the doctrine or principle integrated into the GAAR is too ambiguous or has not been sufficiently dealt with in court cases the outcome of its interpretation can enlarge or reduce the faculties conferred by the GAAR to the tax authority (i.e., Courts can take a literal interpretation of the GAARs wording or either solve certain drafting issues)[96].

Takeaway of this section: Regardless of the circumstances that enabled the GAAR's enactment, the rule's content must be understandable by taxpayers, tax officials and courts.

Therefore, the expressions, ideas and consequences described in the provision need to clearly convey the message that the legislator wanted to manifest.

This is to say that the wording of the GAAR identifies the circumstances being covered by the provision (i.e., identify the transactions covered, or describing objectively verifiable criteria to apply the GAAR). And in this sense, issues concerning the scope of the norm are preferably described in simple but comprehensive terms.

There should be a mutual resonance between the guidelines present in the wording of the provision and the pragmatic application of its mandate by tax officials and courts.

A feature that will enhance this correspondence is the incorporation of terminology employed in doctrines and laws of the country that combat non-compliant tax behaviour and of available

96 Between 1936 to 1969 the Courts in Australia disregarded the fact that the GAAR had no written reconstruction mandate and assumed it was implicit in the provision. This changed, however, with the introduction a newly conformed Court in 1970. Richard Krever and Peter Mellor, "Australia," in *GAARs–A Key Element of Tax Systems in the Post-BEPS World*, ed. Michael Lang et al. (Amsterdam: IBFD, 2016), 45–64.

terminology addressing anti-tax avoidance practices directly.

Make sure that the provisions being integrated to the GAAR address tax avoidance cases and differentiate them from those attacking other types of tax law abuse (i.e., tax evasion).

It is advisable to include clarifications within the GAAR or in its guidelines about the existence of terminologies connected with tax abuse circumstances and the way in which they can assist in the GAAR's application.

If the legislator intents to draw a distinction between behaviour addressed by past doctrines and behaviour to be addressed by the GAAR, this could be clarified in guidelines, as well.

The countries in the examples took the experiences of past case law to draft future GAARs. The situations faced by Australia and Canada occurred later in other jurisdictions, therefore learning from the experience of other countries and contrasting it with the domestic particularities of the country allows to include hallmarks touching on sensitive points (e.g., detailing the ability of the tax authority to re-characterize the transaction found abusive, the working groups that are enabled to do so and the application procedure)

The former guidelines are also applicable to those cases and doctrines incorporated in other countries that maintain a close legal proximity with the country drafting the new GAAR, as it is highly possible that the courts consider such cases and doctrines to decide on anti-avoidance matters (e.g., a foreign doctrine can be used to complement the GAAR application, to dismiss it or corroborate its enactment).

Considering the doctrines and cases of other country's closely related to the country where the GAAR is being drafted may allow the tax administration to respond to counter arguments when drafting the arguments to apply the GAAR.

5.2.2 Envisioning the area or type of tax avoidance schemes to counteract

Aim of the section: To reflect on the importance of identifying the tax schemes already known by the tax authority, which will be counteracted by the GAAR. Alternatively suggesting to identify areas to be protected by the GAAR and creating hypothetical examples.

Testing the GAAR towards already known tax abusive situations that cannot be countered by existing norms is a good way to put into perspective the role to be accomplished by the GAAR. Bear in mind that the legislation does not have to include explanations on those examples, but rather provide guidance on the type of avoidance issues that would be considered as impermissible under the GAAR. When examples are provided, those can be placed in connection with the GAAR to illustrate the situations that would most likely trigger its application.

Another alternative is to include additional wording within the GAAR or its procedural regulations pointing out that the general rule will be applied in all cases where an "impermissible arrangement" is found. To this extent, the notion has to be defined within the legislation to clarify the scope of the GAAR. This alternative was adopted by India when including section 96 (1) of the Income-Tax Act, which described:

"(1) An impermissible avoidance arrangement means an arrangement, the main purpose or one of the main purposes of which is to obtain a tax benefit and it:

(a) Creates rights, or obligations, which are not ordinarily created between persons dealing at arm's length;

(b) Results, directly or indirectly, in the misuse, or abuse, of the provisions of this Act;

(c) Lacks commercial substance or is deemed to lack commercial substance under section 97, in whole or in part; or

(d) Is entered into, or carried out, by means, or in a manner, which are not ordinarily employed for *bona fide* purposes".

The definition of an impermissible arrangement is connected directly with the principal purpose doctrine and departs from it by complementing the acting of the taxpayer, which can be assessed by identifying its departure from usual practices or expected behaviour. In this example three particular terms can be spotted as ancillary criteria for identifying impermissible conducts, these are:

a. a departure from the 'arm's length principle';

b. lack of commercial substance in the transaction;

c. use of the doctrine of 'bona fide purposes' to signal behaviour that departs from accepted conducts.

Another example is shown in the GAAR enacted by France under the Tax Procedure Code *"Livre de Procédure Fiscale"* in article L64, which clearly establish that the tax administration is enabled to determine the real character of an operation when the acts conforming the transaction constitute an abuse of law. This last term is clarified under three hallmarks, as follows:

- the acts have a fictitious character;
- the acts are aimed at obtaining a tax benefit based on the literal application of certain laws or decisions, which goes against the objectives with which those laws or decisions were created by its authors (legislative power, the tax administration, or the judiciary);
- the acts are inspired on the will to avoid or mitigate fiscal burdens otherwise faced by the taxpayer according to its circumstances and real activities.

In this case the clause provides guidance on three characteristics to be looked at when determining the type of operation that is being assessed by the tax authority. It is also noticeable that there is a balance between clearly stating the hallmarks for abuse of law within the provision's content without limiting the tax authority in its capacity to review the operation.

Table 8 **Advantages and disadvantages of referring to specific tax schemes**

Advantage	Disadvantage
Provides an option to connect the GAAR with other branches of law by referring to terminology already defined in tax law itself (e.g., commercial substance) or closely related practices as customs, foreign exchange, or transfer pricing to determine usual or accepted behaviour (i.e., refer to the arm's length principle). Creating these connections will ultimately provide a robust legislation.	Providing a too narrow scope definition is not advisable as the taxpayers will simply avoid falling within those situations and the GAAR application would be compromised.
Defining what is identified as impermissible behaviour helps the taxpayer to identify to certain extent the difference between tax planning and tax avoidance.	Too narrow definitions might make the GAAR become a SAAR.

Takeaway of this section: A revision of the existent tax avoidance practices in a jurisdiction is recommended in order to foresee the cases to which the GAAR can be applied to. This review will prove to be useful for motivating the GAAR's wording and the examples used to best describe its elements.

Another point to bear in mind concerns the practice of taxpayers regarding aggressive tax planning. For instance, the tax administration may consider whether it is usual to find taxpayers engaging on aggressive tax planning in the said jurisdiction. Also, in which way does this aggressive planning takes place? Are there any special purpose vehicles implicated, which structures are most commonly used? By identifying these practices, the tax administration can already identify which types of aggressive tax planning structures can be addressed in the GAAR.

Creating connections with terminology present in other tax legislation provides certainty and connects the GAAR to closely related practices such as transfer pricing, investment and trade law, customs, and foreign exchange, etc.

5.2.3 Using example lists to define terminology included in the GAARs text or referring to it

Aim of the section: To bring into awareness the fact that general definitions can serve from having lists of non-exhaustive examples that might guide the tax authority and courts when interpreting the GAAR.

Guidance can be provided to taxpayers and tax administrations on the way in which the GAAR can be applied by including non-exhaustive lists of situations that can be regarded as indications of tax avoidance.

The former can be envisioned in different manners, for example, India's Final Report on General Anti-Avoidance Rules in Income-Tax Act (1961) provided by the Expert Committee in 2012 indicated that definitions already included in the GAAR could be reinforced by introducing positive lists of examples for the sake of clarity[97] . One of the suggested lists indicated the following:

97 In particular the Committee recalled that both 2009 and 2010 Tax Bills defined this term by providing a general definition: "an arrangement shall be deemed to be lacking commercial substance if it does not have a significant effect upon the business risks, or net cash flows, of any party to the arrangement apart from any effect attributable to the tax benefit that would be obtained but for the provisions of section…" This broad approach would make difficult the task of the tax administration, as economic position variations would only be accounted for situations under three scenarios: 1) change in the economic composition, 2) alteration of business risks, or 3) alteration in the net cash flow. Therefore, it was suggested to include a non-exhaustive list of arrangements that would be deemed to lack economic substance.

"Under section 97, certain arrangements have been deemed to lack commercial substance as under –

(a) the substance or effect of the arrangement as a whole, is inconsistent with, or differs significantly from, the form of its individual steps or a part; or

(b) it involves or includes—

(i) round trip financing;

(ii) an accommodating party;

(iii) elements that have effect of offsetting or cancelling each other; or

(iv) a transaction which is conducted through one or more persons and disguises the value, location, source, ownership or control of funds which is the subject matter of such transaction; or

(c) it involves the location of an asset or of a transaction or of the place of residence of any party which is without any substantial commercial purpose other than obtaining a tax benefit (but for the provisions of this Chapter) for a party"[98].

In the same vein, Australia included a non-exhaustive list of "indications of tax avoidance". The list included references to changes in the financial position of a taxpayer, changes in the financial position of the members of the taxpayer's family, the nature of the connections held with those family members, and consequences relevant for the taxpayer other than financial. Subsections e, f, g and h explain the following:

"(e) any change in the financial position of the relevant taxpayer that has resulted, will result, or may reasonably be expected to result, from the scheme;

(f) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant taxpayer, being a change that has resulted, will result or may reasonably be expected to result, from the scheme;

(g) any other consequence for the relevant taxpayer, or for any person referred to in paragraph (f), of the scheme having been entered into or carried out;

(h) the nature of any connection (whether of a business, family or other nature) between the relevant taxpayer and any person referred to in paragraph (f)".

98 Additional guidance was provided to identify the meaning to be given to terminology within the list. Among these terms the Committee included "round trip financing", "accommodating party".

Table 9 **Advantages and disadvantages of using a list of examples**

Advantage	Disadvantage
Having lists of non-exhaustive examples can help the tax administration and courts when applying and interpreting the GAAR. This list can also increase the deterrent effect of the GAAR. In this regard, the use of examples can prevent taxpayers from using certain investment vehicles or engage in given transactions anticipating that they could fall under the scope of the GAAR.	Drafting a list of examples is a difficult task for the tax administration since it requires knowledge of the type of transactions carried out by taxpayers that can fall under the GAAR.

Takeaway of this section: Thinking ahead on the list of indications of tax avoidance for applying the GAAR and including references to them in the procedural regulations, would assist the tax administration when creating its argumentation for having selected a determinate case to be reviewed under the GAAR.

Non-exhaustive lists of examples can increase the certainty of the taxpayers without reducing the scope of the general anti-avoidance rule.

The examples provided can focus on given behaviours that can be considered as possible cases of tax avoidance. The examples can also take into account business or commercial considerations in the taxpayer' behaviour.

5.3 Learning from other countries

5.3.1 Analysis of other countries' GAARs

Aim of the section: To provide a summary on comparative studies regarding GAARs which can be used as sources of inspiration for drafting domestic and treaty GAARs.

The studies recorded on the table have different objectives with GAAR being the main object of study, or one of the secondary topics of study.

Table 10 Overview of comparative studies on GAARs

Authors	Title	Year	Specific topics dealt with
IFA Reports[99]	Anti-avoidance measures of general nature and scope: GAAR and other rules. Specially the general report.	2018[100]	Tax Avoidance/Tax Evasion[101].
	Tax Treaties and Tax Avoidance: Application of anti-avoidance provisions.	2010	Form and substance in tax law.
	Form & Substance in Tax Law.	2002	Treaty anti-avoidance provisions.
	Tax Avoidance /Tax Evasion.	1983	GAARs and other anti-avoidance rules.

99 These comparative studies have addressed mainly developed (OECD/G20) countries (from CIAT member countries Canada, France, Spain, Italy, Mexico, Colombia, Brazil, the United States, India, the Netherlands, Portugal, Argentina) and very few non-OECD, non-G20 countries including developing countries (from CIAT member countries Peru (Twice IFA 2018 and 2010), Venezuela (Once IFA 2010), Morocco (Once IFA 2010)).

100 P. Rosenblatt & M.E. Tron, General Report at sec. 1. In anti-avoidance measures of a general nature and scope – GAAR and other rules, IFA, Cahiers de droit fiscal international vol. 103a (SDU 2018), Books IBFD.

101 In the 2018 IFA report, the GAARs was analyzed as a concept that has been transplanted from one country to another, and therefore, in order to analyze the GAAR, the reporters chose to provide a comparative taxation approach with the aim of facilitating the exchange among countries of common problems and best practices in the drafting and application of GAARs. By providing an overview of the main elements in the design of GAARs, the reporters intended to permit countries to learn from each other "on how to draft GAARs, identify comparable features, solve similar issues and analyse significant judicial responses".

Authors	Title	Year	Specific topics dealt with
European Association of Tax Law Professors (EATLP)	Munich revisiting tax avoidance. General Reporter Ana Paula Dourado.	2016	Tax Avoidance.
University of Vienna (WU Wien)	GAARs: A Key Element of Tax Systems in the post-BEPS world.	2014	GAARs and BEPS.
International Bureau of Fiscal Documentation (IBFD)[102]	Comparative study – Tax Policy Trend in Africa. Commentary on the Major Tax Developments of 2013. Africa, Middle East and Latin America Knowledge Group on the IBFD.	2014	Identifies the major tax related developments in Africa and specifically addresses changes in anti-avoidance rules in African countries.
CIAT (as commissioner)[103]	*Los retos en la aplicación de las cláusulas antiabuso por las administraciones tributarias latinoamericanas y las lecciones de la experiencia española y europea*. Inter-American Center of Tax Administrations. Christian Anguita Oyarzún.	2017	Comparative study on the application of the GAAR in developing countries.
OECD[104]	Anti-Avoidance rules against international tax planning: A classification. Economics Departments Working Papers No. 1356. Asa Johansson et all. BEPS Action Plan 6 addressing the implementation of the Principal Purpose test (BEPS documents including peer review documents).	2016	Describes which were the main anti-avoidance rules used by OECD and G20 countries to combat international tax planning by multinational enterprises in 2016. Includes GAARs within the 5 most used types of anti-avoidance rules.

102 Section 4 White paper Tax Policy Trend in Africa September 2014 https://www.ibfd.org/sites/ibfd.org/files/content/pdf/14_135_var_whitepaper_tax_policy_trend_in_africa.pdf

103 Anguita Oyarzún, C. (2017). *Los retos en la aplicación de las cláusulas antiabuso por las administraciones tributarias latinoamericanas y las lecciones de la experiencia española y europea*. Inter-American Center of Tax Administrations. https://biblioteca.ciat.org/opac/book/5542 See also CIAT blogpost https://www.ciat.org/avoidance-in-contemporary-tax-law/?lang=en

104 https://www.oecd.org/economy/public-finance/Anti-avoidance-rules-against-international-tax-planning-A-classification.pdf

Authors	Title	Year	Specific topics dealt with
Carlo Gabarino	Comparative Taxation and Legal Theory: The Tax Design Case of the Transplant of General Anti-Avoidance Rules Theoretical Inquiries in Law 11.2.	2010	In this comparative study Gabarino addressed the differences in the use of the GAAR by China and Canada[105].
Judith Freedman[106]	The United Kingdom General Anti-Avoidance Rule: Transplants and Lessons. Bulletin for international taxation June/July 2019.	2019	Studying the use of the concepts and phrases transplanted from the United Kingdom's GAAR and used in the European Union's Anti-Tax Avoidance Directive and BEPS Action 6.
Mosquera Valderrama, I.J., Mazz, A., Schoueri L.E., Quiñonez N., West C., Pistone P. & Zimmer F.	Tools Used by Countries to Counteract Aggressive Tax Planning in Light of Transparency, Intertax.	2018	Provide a comparison of the tools to counteract tax avoidance by Colombia, Brazil, Uruguay and South. Africa. This study also referred to the usefulness of GAARs to tackle aggressive tax planning (ATP)[107].

105 According to the author, the GAAR in Canada aims to "draw the line between legitimate tax minimization and abusive tax avoidance, while in China it is an instrument to be used at the discretion of the State Administration of Taxation".

106 Bulletin June/July 2019 IBFD https://www.ibfd.org/shop/united-kingdomeuropean-unionoecd-uk-general-anti-avoidance-rule-transplants-and-lessons

107 The research led to the conclusion that "while anti-avoidance rules and related instruments developed by the tax administration to interpret such rules exist, significant uncertainty remains for the taxpayer regarding the implementation and interpretation of GAARs by the tax administration. The lack of consistency in the application of anti-avoidance rules, reference to the case law pertaining to an old anti-avoidance rule for the application of a new anti-avoidance rule, the broad scope of interpretation left to the tax administration (Colombia), the use of an anti-avoidance rule without legislative basis require clarification.

Table 11 **Advantages and disadvantages of using comparative studies**

Advantage	Disadvantage
Taking inspiration from the way in which other countries have dealt with GAAR drafting and the problems faced by those countries can provide perspective.	Using other countries' examples without assessing first the legal traditions and doctrines of the country implementing the GAAR might result in adverse results in court cases.
Good practices in the fight against tax avoidance can be copied.	Too literal adoption of norms can divert into tax rules whose outcome cannot be foreseen and might constitute the root for future amendments of the provision as well as social disbelieve in the effectiveness of the GAAR.

Takeaway of this section: If other countries have had positive experiences by using certain wording in their GAARs then there is no reason not to reflect on those provisions for constructing the country's own GAAR.

However, the use of another country's GAAR wording may need to be carefully approached.

The fact that a given GAAR wording is effective in one country (donor) does not indicate that it will work in the other country that is borrowing such wording (recipient). Sometimes the borrowing of rules results in outcomes completely different from those seen in the country that introduced the legal provision in the first place (i.e., donor).

Tax administrations should use the sample GAAR for inspiration and identify the facts of the cases that it wants to be tackled with the GAAR. Too broad provisions tend to be rendered ineffective, therefore finding a balance is an important task for the tax administration.

Tax administrations can consider the comparative reports listed in this section to gain further insight about the experience of other countries of your region or law tradition.

5.3.2 Sample GAARs by international organizations

Aim of the section: Provide a list of the sources where sample GAARs can be found.

Table 12 **Sample GAARs offered by international organizations**

Authors	Title	Year	Scope of action
CIAT	Tax Procedure Code Model	2015	Domestic

Sample GAAR:

Article 11. Anti-avoidance general clause.

1. When artificial or improper acts are conducted, either on a stand-alone basis or conjointly, for obtaining a given result, the tax consequences applicable to the parties involved in the acts would be the ones corresponding to the acts usually performed in order to achieve the obtained result.
2. The former would only be applicable in those cases where the artificial or improper acts conducted do not entail relevant legal or economic effects, excluding tax savings.

Authors	Title	Year	Scope of action
IMF[108]	Introducing a General Anti-Avoidance Rule (GAAR): Ensuring that a GAAR Achieves Its Purpose	2016	Domestic

Sample GAAR:

(1) This section applies when the Tax Authority is satisfied that:
(a) a scheme has been entered into or carried out;
(b) a person has obtained a tax benefit in connection with the scheme; and
(c) having regard to the substance of the scheme, it would be concluded that a person, or one of the persons, who entered into or carried out the scheme did so for the sole or dominant purpose of enabling the person referred to in paragraph (b) to obtain a tax benefit.

(2) Despite anything in this Act, when this section applies, the Tax Authority may determine the tax liability of the person who obtained the tax benefit as if the scheme had not been entered into or carried out, or as if a reasonable alternative to entering into or carrying out the scheme would have instead been entered into or carried out and can make compensating adjustments to the tax liability of any other person affected by the scheme.

(3) If a determination or adjustment is made under this section, the Tax Authority must issue an assessment giving effect to the determination or adjustment.

108 Waerzeggers and Hillier, "Introducing a General Anti-Avoidance Rule (GAAR)."

Authors	Title	Year	Scope of action

(4) An assessment under subsection (3) must be served within 5 years from the last day of the tax year to which the determination or adjustment relates.

(5) In this section:
"scheme" includes any course of action, agreement, arrangement, understanding, promise, plan, proposal, or undertaking, whether express or implied and whether or not enforceable;
"tax benefit" means:
(a) a reduction in a liability to pay tax, including on account of a deduction, credit, offset or rebate;
(b) a postponement of a liability to pay tax;
(c) any other advantage arising because of a delay in payment of tax; or
(d) anything that causes: (i) an amount of gross revenue to be exempt income or otherwise not subject to tax; or (ii) an amount that would otherwise be subject to tax not to be taxed.

United Nations and Organization for Economic Cooperation Development[109]	Treaty models and their respective commentaries[110].	2017	Tax treaty
	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting and Explanatory Memorandum.	2016 Negotiations concluded. 1 July 2018 entered into force.	

Sample GAAR: **ARTICLE 29 ENTITLEMENT TO BENEFITS**

1. [Provision that, subject to paragraphs 3 to 5, restricts treaty benefits to a resident of a Contracting State who is a "qualified person" as defined in paragraph 2].

2. [Definition of situations where a resident is a qualified person, which covers:
   - an individual;
   - a Contracting State, its political subdivisions and their agencies and instrumentalities;
   - certain publicly-traded companies and entities;
   - certain affiliates of publicly-listed companies and entities;
   - certain non-profit organizations and recognized pension funds;
   - other entities that meet certain ownership and base erosion requirements;
   - certain collective investment vehicles.

3. [Provision that provides treaty benefits to certain income derived by a person that is not a qualified person if the person is engaged in the active conduct of a business in its State of residence and the income emanates from, or is incidental to, that business].

4. [Provision that provides treaty benefits to a person that is not a qualified person if at least more than an agreed proportion of that entity is owned by certain persons entitled to equivalent benefits].

109 This reference is clustered since the UN model convention adopted the detailed version of article 29 of the OECD MC 2017 considering it would provide better guidance for developing nations on the elements of the provision. Nevertheless, in the Practical Portfolio the sample GAARs resemble both the detailed and simplified GAARs.

110 Model Tax Convention on Income and on Capital of 2017 and The United Nations Model Double Taxation Convention between Developed and Developing Countries of 2017.

Authors	Title	Year	Scope of action

5. [Provision that provides treaty benefits to a person that qualifies as a "headquarters company"].

6. [Provision that allows the competent authority of a Contracting State to grant certain treaty benefits to a person where benefits would otherwise be denied under paragraph 1].

7. [Definitions applicable for the purposes of paragraphs 1 to 7].

8. *a)* Where
   (i) an enterprise of a Contracting State derives income from the other Contracting State and the first-mentioned State treats such income as attributable to a permanent establishment of the enterprise situated in a third jurisdiction, and
   (ii) the profits attributable to that permanent establishment are exempt from tax in the first-mentioned State, the benefits of this Convention shall not apply to any item of income on which the tax in the third jurisdiction is less than the lower of [rate to be determined bilaterally] of the amount of that item of income and 60 per cent of the tax that would be imposed in the first-mentioned State on that item of income if that permanent establishment were situated in the first-mentioned State. In such a case any income to which the provisions of this paragraph apply shall remain taxable according to the domestic law of the other State, notwithstanding any other provisions of the Convention.

   b) The preceding provisions of this paragraph shall not apply if the income derived from the other State emanates from, or is incidental to, the active conduct of a business carried on through the permanent establishment (other than the business of making, managing or simply holding investments for the enterprise's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance enterprise or registered securities dealer, respectively).

   c) If benefits under this Convention are denied pursuant to the preceding provisions of this paragraph with respect to an item of income derived by a resident of a Contracting State, the competent authority of the other Contracting State may, nevertheless, grant these benefits with respect to that item of income if, in response to a request by such resident, such competent authority determines that granting such benefits is justified in light of the reasons such resident did not satisfy the requirements of this paragraph (such as the existence of losses). The competent authority of the Contracting State to which a request has been made under the preceding sentence shall consult with the competent authority of the other Contracting State before either granting or denying the request.

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

Authors	Title	Year	Scope of action
United Nations[111]	Practical Portfolio: Protecting the Tax Base of Developing Countries through the use of General Anti-avoidance Rules	2019	Domestic

Sample GAARs: Chapter 4 of the Portfolio provides two sample GAARs (simplified and detailed) and respective explanatory notes.

Simplified version[112]:

Section X

1. Where one of the main purposes of a transaction is to obtain a tax benefit and, having regard to all the circumstances, that tax benefit would be contrary to the object and purpose of the tax law, the tax authorities shall determine the tax consequences to any person so as to deny the tax benefit.
2. For the purpose of section (1):
   "transaction" includes an event, agreement, arrangement, course of conduct, undertaking, scheme or series of trans- actions; and
   "tax benefit" includes any reduction, avoidance or postponement of tax payable [under this Act].

Detailed version:

Section X

(1) The tax consequences of any tax avoidance transaction for any person shall be determined as is reasonable in the circumstances in order to deny any tax benefit that would otherwise result from the tax avoidance transaction.

(2) A transaction or a series of transactions is a tax avoidance transaction if, it may reasonably be considered having regard to all the relevant facts and circumstances, that the transaction or the series of transactions:
   (a) (i) results, directly or indirectly, in a tax benefit; and
   (ii) one of the main purposes [the main purpose] of the transaction or the series of transactions was to obtain a tax benefit.

111 Arnold, "Protecting the Tax Base of Developing Countries through the Use of General Anti-Avoidance Rules".

112 This simplified GAAR may be an attractive option for some developing countries that are concerned about their capacity to administer a more detailed provision and want to maximize their discretion in applying a GAAR." Arnold, 123.

Authors	Title	Year	Scope of action

(3) For the purposes of section (2) and without limiting the generality of section (2), the following factors shall be considered in determining the main purpose[113] of a transaction or a series of transactions:
   (a) any changes in the financial position of the persons carrying out or participating in the transaction or series of transactions, or any person related to such persons;
   (b) the manner in which the transaction or series of trans- actions was entered into or carried out;
   (c) the economic substance of the transaction or series of transactions; and
   (d) whether the transaction or series of transactions created rights or obligations that would not have been created by persons dealing at arm's length with one another.

(4) Section (1) shall not apply to any tax avoidance transaction if it is established by the person claiming the tax benefit that the transaction is in accordance with and not contrary to the object and purpose of the relevant provisions of this Act [refer to the relevant Act or Acts] or a tax treaty or the provisions of this Act read as a whole.

(5) For the purposes of section (4),
   (a) the object and purpose of the relevant provisions of this Act or the provisions of this Act read as a whole shall be determined by reference to the wording of the provisions, any relevant extrinsic evidence including any explanatory material issued by [the tax authorities or the Ministry of Finance] and any other relevant information; and
   (b) the following factors shall be considered in determining whether a tax avoidance transaction is in accordance with or contrary to the object and purpose of the relevant provisions of this Act [refer to the relevant Act or Acts] or a tax treaty or the provisions of this Act read as a whole:
      (i) the manner in which the transaction or series of transactions was entered into or carried out;
      (ii) the economic substance of the transaction or series of transactions;
      (iii) whether the transaction or series of transactions created rights or obligations that would not have been created by persons dealing at arm's length with one another; and
      (iv) whether the transaction or series of transactions is artificial or abnormal or involves artificial or abnormal steps.

(6) For the purposes of section (1), in determining the tax consequences for any person, the tax authority may take any action that is reasonable in the circumstances including without limiting the foregoing:
   (a) Allowing or disallowing any deduction, allowance, relief, credit, exemption, or exclusion [in computing gross income, taxable income or tax payable] in whole or in part;
   (b) Allocating or reallocating any income, loss, deduction, allowance, relief, credit, exemption, or exclusion to any person in whole or in part;
   (c) Recharacterizing the nature of any income, loss, payment, expenditure or other amount;
   (d) Ignoring or disregarding any transaction or series of transactions that is or is part of a tax avoidance transaction;
   (e) Ignoring, disregarding or combining one or more transactions that form part of a series of transactions; and
   (f) Considering any two or more persons to be related [connected, associated or not dealing at arm's length] or to be the same person.

113 This provision is probably unnecessary if section (2) use a one of the main purposes test.

Authors	Title	Year	Scope of action

(7) Any person, other than a person who has received an assessment involving the application of section (1), may request, within 12 months of the date of the issuance of an assessment under section (1) with respect to a particular tax avoidance transaction, the tax authorities to make consequential adjustments to that person's liability to tax as a result of that assessment as are reasonable in the circumstances.

(8) Where the tax authorities deny a person's request for consequential adjustments under section (7), the tax authorities shall notify the person of the decision within __ months of the receipt of the request and the person shall be entitled to appeal the decision [to the applicable court in accordance with the normal rules governing appeals].

(9) Definitions:
- (a) "tax benefit" means any reduction, avoidance or postponement of tax payable [or any interest, penalty or other amount payable] under this Act, an increase in any tax refund under this Act and includes any benefit derived from the application of the provisions of a tax treaty;
- (b) "tax" means any tax [imposed under the following Acts] [administered by the Commissioner];
- (c) "transaction" means any transaction, event, action, course of action, course of conduct, scheme, plan, proposal, agreement, arrangement, understanding, promise or undertaking whether express or implied and whether enforceable or not; and
- (d) "series of transaction" means two or more transactions that are connected or related, directly or indirectly, whether express or implied and whether enforceable or not and includes any transaction that is carried out because of prior or subsequent transactions.

Table 13 Advantages and disadvantages of using a sample GAAR

Advantage	Disadvantage
Sample GAARs allow countries to reflect on the elements to be included within the GAAR's text. Different references to each one of the elements can be detected in advance. Choices between including single constructions such as a reference to transactions in general or a transaction in singular coupled with plural forms (e.g., "or series of transactions") can be made based on the examples.	Sample GAARs constitute a reliable source of inspiration for GAAR drafting, although they do not guide the country with the administrative aspects to be solved in order to enact the rule (e.g., date for coming into force, appeal procedures, guidance regarding consulting bodies or committees, etc) based on the idea that these depend on procedural and administrative domestic legislation of each country[114].

114 "The sample GAAR does not contain provisions dealing with the administrative aspects of the application of the GAAR, such as special assessment or appeal procedures, notice requirements and the effective date or coming-into-force provision, because these aspects are heavily dependent on the procedural and administrative aspects of the domestic law of each particular country." Arnold, "Protecting the Tax Base of Developing Countries through the Use of General Anti-Avoidance Rules," 123–24.

Advantage	Disadvantage
In general terminology inspired in legal traditions of other countries can be taken from the sample GAARs. For instance, the CIAT GAAR refers to the theory of the "acto propio", which in English might be acknowledged as the theory of "own acts", "proper acts", or "acts usually performed". Such theory is used in civil law but has been mentioned in regard to tax law legislation in countries such as Uruguay[115], Dominican Republic[116] and Spain[117]. The theory refers to a general presumption on the basis of the conduct of a taxpayer in order to achieve certain goal, which allows other actors to interpret the conduct taken as coherent with the taxpayer's aims. The theory is not limited to taxpayer's acts, however in the context of the GAAR it would be as the tests focus on the study of the taxpayer behaviour.	

115 *Juzgado Letrado de Primera Instancia en lo Civil de 14° Turno, sentencia N° 17/2012 del 26/03/2012.* Beatriz Venturini – In this case, the judges on both instances applied the theory of the "proper acts" to defend the taxpayer from having to return a tax credit requested in the past. The tax authority had taken 14 years to make the claim and the process had been extended up to 19 years while being discussed in the first and second instances. The theory was applied to indicate that taking 14 years to make a claim could already been signaled as a conclusive attitude from the tax authority to not being interested into claiming the refund. A quick summary on the case can be found at: https://www.fder.edu.uy/finanzas/jurisprudencia#ir0020

116 Reference included in the regulations provided tax procedural aspects: https://dgii.gov.do/legislacion/normasGenerales/Documents/Otras%20Normas%20de%20Inter%C3%A9s/Norma02-10.pdf

117 Although mainly developed under case law for civil causes (https://www.ilpabogados.com/la-doctrina-los-actos-propios/) the proper acts theory has been used in tax law cases to identify whether the conduct externalized by the tax administration is coherent with the way it decides to act in regards to the same taxpayer in the future. In ruling STS 962 of 2014 the tax administration claimed that ABC S.L committed tax fraud by repaying in cash the contributions made in capital by its shareholders. When studying the facts and circumstances of the case the Supreme Tribunal of Madrid decided to deny the request arguing that the tax administration was aware of the repayments made in taxable years 1997 and 1998 without manifesting concerns. This conduct constituted a proper act of the tax administration, which was interpreted by the taxpayer as an endorsement for its conduct.

Advantage	Disadvantage
Using common terminology can be useful later on for associating the notions of the GAAR with those of other instances. A country might refer to the main purpose of a transaction within its domestic GAAR and later on be willing to reflect on the guidance given on subsection 3 of the detailed GAAR offered by the OECD model tax convention, either as interpretative criterion or for including this guidance within the domestic legislation.	
If a country has been trying to include a GAAR within its domestic legislation but the political or social environment has interfered with this aim. It might be possible that adopting a simplified GAAR as per the options available by any of the sources presented in the chart will be easier to defend before these instances. Some arguments in favour for this way of acting would be: - the sample GAAR is a proposal that has been discussed by many actors in international instances, which suggests the existence of a rich background discussion; - the sample GAAR does not defend to a certain extent the arguments or a specific political party, as its conformation obeys either international discussions or academic ones; - the drafting process would be less expensive as the sample GAAR already provides the main elements of a general provision, therefore the administrative costs to be incurred are those needed for adjusting the provision to the legal background of the country.	

Takeaway of this section: Sample GAARs include guidance on the following matters:

- reference on the existence of an act, business, transaction or series thereof;
- clarifications on the context in which that act, business, transaction or series of transactions shall be deemed or result having an abusive character;
- providing procedural guidance within the GAAR or in a separate provision;
- determine the time in which the taxpayer is enabled to exercise its right of defense;
- determine which officials within the tax authority should deal with the GAAR and which official is responsible for submitting the final decision on a case;
- introducing commentaries on the thoroughness with which the investigation is expected to be conducted, as to provide certainty to the taxpayers.

If the GAAR wording nurtures from elements present in GAARs developed by other jurisdictions or taken from international standards, tax administrations should ensure that the doctrines and references are clear for the taxpayers and courts, either by explaining what should be understood within the provision on the terms used or provide guidance in additional documents.

The transposition of a sample GAAR is just one part of the process for combating tax avoidance. The rule is a tool to be used by the tax administration of the country to tackle cases not covered in existing legislation. However, the Court's interpretation of the norm will depend on the explanatory memorandums that incorporated the provision. Likewise, the GAARs interpretation can rely on tax avoidance doctrines available in the jurisdiction or the interpretative texts connected to the original sample GAAR. See examples discussed in section 5.2.1 for further guidance on the issues that may arise when interpreting a GAAR.

5.4 Standard concepts

Aim of this section: Provide an overview on the basic elements included in a GAAR and explaining their meaning as well as the options for their drafting.

In this section, the basic elements of a GAAR will be analysed. At first, the section will deal with the notions that frame the scope of the GAAR analysis, such as tax benefit or advantage, transaction or series of transactions, and the purpose or main purpose supporting the transaction. Then additional elements often included in GAARs will be reviewed. By additional elements we refer to the objective and subjective tests and other nuances (i.e., additional tests) that could guide the interpreter when applying the GAAR.

Bear in mind that the description of the elements will show their intrinsic closeness. This is to say that all elements of the GAAR will work together in a circular way providing meaning to the remaining elements. Such coherence is expected, as the GAAR should afford a whole equilibrium for undergoing investigations of tax avoidance. This is easily understood considering that the elements and conduct descriptions will always be attached to the GAARs' consequences. In other words, tax benefits should not be repealed, unless the facts and circumstances of a case prove that a transaction is effectively under the scope of the GAAR.

Therefore, descriptive elements should be accompanied with subjective and objective guidance, in order to clearly establish the scope of the provision. Likewise, the tax investigation will enable new findings to be assessed under the categories considered in the initial phases of the GAAR application. This evidence is expected to be assessed in regard to the existing means of proof. This feature adds coherence to the GAAR's application, as well.

In this light, the GAAR could be seen as a condensed legislative procedure, which offers guidance to both taxpayers and tax officials. In that sense, it is especially important that the GAAR drafting conveys the message of being a provision desired within the system. Hence, the aim is for the GAAR to strike a balance between principles of necessity and proportionality vis-à-vis taxpayer's rights. Only to this extent the GAAR could be seen as a "good law" to adhere too.

Takeaway of this section: Four elements can be seen in the GAAR which are fundamental for its functioning these are the "transaction, scheme or avoidance act", the "tax benefit or advantage", the "subjective test" and the "objective test".

The GAAR elements should be interconnected, as they constitute steps of the analysis expected to be made by the tax administration when assessing a given case under the GAAR.

Bear in mind that the provision constitutes a procedure in itself for analysing situations, which can be considered as tax avoidance. Hence, make sure to provide specific guidance to both tax officials and taxpayers in the manner and time where they need to act during the analytic process.

5.4.1 Tax avoidance act, arrangement, scheme or transaction

Aim of this section: To identify the different terminologies that can be used for identifying the case upon which the GAAR can be applied. Discuss pitfalls to face and possible solutions for them.

This is the initial element to take into consideration when drafting a GAAR, as it refers to the type of conduct deployed by the taxpayer, which shall be assessed by the tax officials or tax courts when appropriate. Among these terms one finds legal acts, legal businesses, transaction(s), avoidance acts, arrangement(s), scheme(s), impermissible avoidance arrangement, operation, and general acts or conducts deployed by stakeholders in order to run a given business, project or venture.

Although these terms might seem to have an equivalent meaning it is important to acknowledge that some of these might be paired with notions available in other branches of law. Particularly one can find references to *legal businesses* in civil law[118], which can be defined as statements of private intent destined to produce effects under the law of a given jurisdiction. Some of these acts only have legal effects if specific procedures are followed.

For instance, certain legislations acknowledge the purchase of a car only after the new owner has been registered in the vehicle's record of existence, alongside with the agreement between the buyer and the seller. Hence, when defining the type of act that falls under the scope of the GAAR it is important to know about these coincidences in the wording used to avoid constraining the GAAR's to specific acts.

Additionally, the term could be employed with a broad or narrow scope. This will depend on the intention given to the GAAR, whether it will operate as a catch-all clause or if it addresses a set of identifiable situations. For the first option the idea is to avoid excluding possible events, to be scanned under the GAAR. Terms such as scheme, arrangement or transaction enable this type of broad scope of application.

In this scenario, instructions can be provided to discern the purpose with which the scheme or transaction was established, or the intent shown by the taxpayer in creating the scheme. As well, additional guidance towards the subjective test could be used. In absence of those additional considerations the norm can be invoked to process taxpayers whose actions are within tax law compliance. In that sense, the certainty for taxpayers is diminished by making un-clear the purpose of the GAAR and the conditions for its application.

118 Which comes from the German theory of Rechtsgeschäft, later called by the French as L'acte juridique and translated to Spanish as Negocio Jurídico. Even though the theory encompassed acts with relevance for law purposes, some civil currents distinguish between legal acts and legal businesses, where the first refer to situations that despite having relevance for law purposes are not considered to encompass manifestation of will that indicate a commitment with other actors in order to conclude a given enterprise. The second implies therefore a direct manifestation of will in which the person acting renders its will to contribute with a given enterprise.

Some GAARs include scoping mechanisms related to the ideal conduct expected from a taxpayer. In doing so the norm draws contrasting concepts such as "acceptable vs. unacceptable", "responsible vs. irresponsible", "ordinary or expected vs. uncommon behaviour in the respective field of business"; all of these concepts connect with the notion of conducting business within the realm of a given business culture, socially and behaviourally speaking (see section 5.2.2). Clearly the individual assessing such a consideration will have to involve its own subjective thinking to assess the transaction vis-à-vis these broad categories, which in turn creates a loss of certainty for the taxpayers[119]. Yet these issues can be controlled by providing further guidance with non-exhaustive lists within the regulations as described in section 5.2.3.

Another qualificator used is the "artificiality" or "fictitious character" of a scheme as a condition for being analysed under the GAAR. Likewise, this consideration calls for subjective interpretations. However, the term "artificiality" might be further defined by objective criteria of economic substance. In those cases, the criteria could cover, for example: the necessity to involve certain actors in the project, selecting a location for setting up a holding or a subsidiary, determining the entity financing the operation, incorporation of the entities present in the transaction, for naming a few. The norm can directly list some of these conditions or they could be referenced in the case law of the country. The latter is often found when the artificiality or fictitious character is adopted within the GAAR in resemblance of a doctrine of abuse constructed by a country's courts. Bear in mind that in absence of a list or a doctrine, the use of this terminology might be controversial, as both the interpreter and taxpayer would not have a reference on how these terms should be interpreted. Ultimately this might render the GAAR inapplicable.

However, adopting a wording implying acts that are usually committed only by certain taxpayers or mentioning schemes that are normally entered into only by specific types of taxpayers, would narrow the scope of the GAAR so that it could rather be considered a specific anti-avoidance rule (SAAR). Unless this is intended by the legislator, it is preferable to narrow the GAAR's scope by means of additional elements within the provision other than the type of act under analysis.

Another possible formulation is to address the "whole transaction, parts thereof, series of transactions, or a combination of all of the former". Such an approach ensures that creative tax avoidance schemes, where detailed steps are put together to achieve a given outcome, are included in the scope of the GAAR. Formulating the GAAR in this sense seems to be comprehensive of all

119 Rosenblatt, "General Anti-Avoidance Rules for Major Developing Countries: A Comparative Taxation Approach".

the possible outcomes to be found in domestic avoidance transactions or when conducting international aggressive tax planning schemes[120].

Nevertheless, the broad consideration might allow the tax official to recharacterize a whole operation even though the avoidance concerned only a portion of it. Dividing a whole operation by steps requires the interpreter to provide reasons for splitting the scheme into portions. Constructing a rationale for this initial step on a case-by-case basis might be burdensome and costly for the administration. Moreover, a series of transactions might be difficult to identify as the transactions may not have a temporal sequence or may have been performed by different actors to achieve an ultimate benefit (i.e., a multinational group engaged with an operation at a global scale).

As mentioned in section 5.2.3 these issues can best be solved by providing guidance to the tax administration by introducing lists of non-exhaustive examples when defining the scheme or transaction element of the GAAR. Likewise, guidance can be included in a brochure to be circulated within the tax administration or even by offering courses for tax officials within the tax administration on how to apply a GAAR. For further ideas on this matter go to section 6.

Takeaway of this section: When defining the term "transaction or series thereof" the legislator could consider the concepts that remain close to the interpretations provided by the existent legislation and try to motivate the selection of scoping conditions for reviewing a transaction under the GAAR. When doing so it is advisable to consider what the interpreter would do with these notions and whether the conditions shed light on the task at hand, namely identifying tax avoidant behaviour.

Provide clarification on the steps to be followed by the tax officials invoking the GAAR. Creating a procedure for enacting the GAAR could be a way to do this.

If the tax official should or could rely on legal presumptions of any kind, make sure to include them in the text of the GAAR.

120 Although internationally there has not been one definition adopted for this term, we will refer to one adopted by the European Commission which identifies aggressive tax planning as to "consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability." European Commission, Commission Recommendation of 6 December 2012 on aggressive tax planning.

5.4.2 Tax benefit or advantage

Aim of this section: Provide an overview of the implications associated with the description of the term "tax benefit". Explain that the concept can be associated with specific types of taxes and the possible ways in which it can be described with positive affirmations or negative ones.

The GAAR on its own cannot establish in full the scope of the tax benefit. Therefore, when the provision accounts for "unintended tax benefits", it refers to any possible outcome endorsed by the tax system in which the GAAR operates. Yet, the connotation of unwillingness or unexpectedness is similarly guided by the additional characteristics attached with the transaction or scheme. This is to say it should be addressed directly in the GAAR by providing examples, either by referring to the cases dealt with by national courts or ultimately drafting rules for the interpreter on the procedure under which the undesirability should be assessed. These features could be coupled up with the subjective and objective tests of the GAAR.

When not connected with additional connotations, the tax benefit term will be guided by the notion of "transaction" or "scheme", since it is the transaction which resulted in the granting of a given tax benefit and the benefit to be given to a determined operation would have been the adequate one. For example, a tax benefit might be the possibility to defer the accrual of income. When looking at the transaction, the analysis is conducted to determine whether the steps followed by the taxpayer provide for the legitimate granting of such benefit. Then it should be reviewed if the transaction is cohesive with the business operation and if other non-tax related aspects support the operation, and the general facts and consequences surrounding the operation should be verified. In this regard, the veracity of the tax benefit depends on the transaction being analysed, which in turn will depend on the assessment of subjective and objective tests.

Therefore, the initial issue with this term is to find out whether the tax benefit or advantage exists in the operation and what it is. Consequently, the legislator will be confronted with the decision as to whether to provide a list of examples within the GAAR to ease the benefit's identification or not. When a list of non-allowed benefits is used, it is common to find among the listed items operations connected with disruptive scenarios for the correct application of a norm (e.g., deviating from the arm's length principle, conducting a transaction guided by non bona fide purposes, simulations, etc.). Following the example on the deferral of income accrual, a transaction being treated as a leasing operation should not be enabling a deferral of the income accrued if the ultimate result converts the operation into a normal rental. Other considerations could be listed in order to indicate several situations that will be perceived as illegitimate. Following this approach, however, runs the risk of converting the GAAR in a SAAR.

Likewise, the advice on how to interpret the terms can be based on the steps to be followed when enacting the provision. For instance, the legislator could identify that the first step to be followed by the tax official is to identify what would have otherwise happened if the taxpayer had not entered into the transaction. Although useful, starting with this step can be seen as too broad for interpretation, since hypothetical cases could open the possibility to find biased scenarios or outcomes that depend exclusively on the imagination or past experiences of the official applying the norm. In order to avoid this, the legislator can introduce wording in their GAARs to highlight that the recharacterization will only take place after conducting a thorough examination of the facts and circumstances of the case.

An alternative option is to describe the tax benefit on its own using portraying language as "reduction in, avoidance of, or a deferral of tax otherwise payable"[121]. These formulations encompass the broad options found in a tax system. Additionally, it could be stated that the tax benefit could be represented by these references but is not "limited to them", so the considerations on what the tax benefit is on a given case can vary depending on the case's circumstances.

Bear in mind that some scheme configurations are chosen by the taxpayer, since the rule providing for a tax benefit can endorse the usage of specific types of entities or agreements. This is the case when benefits are used to steer a desired conduct from taxpayers. Considering this possibility, it might be ideal to exclude from the application of the GAAR certain situations expressly connected with such norms to acknowledge in the provision that formal compliance with conditions in specific norms would not derive in tax avoidance investigations under the GAAR, unless additional proof can be gathered to imply a tax avoidant purpose, for example if the transaction cannot be explained by commercial or business reasons.

121 Rosenblatt, "General Anti-Avoidance Rules for Major Developing Countries: A Comparative Taxation Approach".

List of tax benefits/ advantages

Table 14 **List of examples on how other countries have drafted the benefits/advantages section in their GAARs**

Country	Wording created to define what a tax benefit might be
United Kingdom	"A 'tax advantage' includes: (a) relief or increased relief from tax; (b) repayment or increased repayment of tax; (c) avoidance or reduction of a charge to tax or an assessment to tax; (d) avoidance of a possible assessment to tax; (e) deferral of a payment of tax or advancement of a repayment of tax; and (f) avoidance of an obligation to deduct or account for tax".
India	Section 102 of the Income-Tax Act: "(11) "Tax benefit" means – (a) "a reduction or avoidance or deferral of tax or other amount payable under this Act; or (b) an increase in a refund of tax or other amount under this Act; or (c) a reduction or avoidance or deferral of tax or other amount that would be payable under this Act, as a result of a tax treaty; or (d) an increase in a refund of tax or other amount under this Act as a result of a tax treaty; OR (e) a reduction in total income including increase in loss, in the relevant previous year or any other previous year."
South Africa	Section 80L mentions that for the purposes of applying the GAAR the term ´tax benefit´ "includes any avoidance, postponement or reduction of any liability for tax". In this regard it is important to mention that the same section defines ´tax´ as to include "any tax, levy, or duty imposed by [the income tax act] or any other law administered by the Commissioner".

Takeaway of this section: It is advisable to resort to general formulations accompanied with non-exhaustive lists of types of tax benefits to cover both the granting of benefits otherwise not applicable, and the absence of tax consequences in cases where formal and substantive obligations should have been observed.

The tax benefit can be called as such or represented by several actions or phrasal verbs that describe the manifestation of the benefit (e.g., reduction in, avoidance of, or a deferral of tax otherwise payable).

A tax benefit can be defined regarding the taxpayer being investigated (direct benefit) or extended to those tax benefits achieved by third parties (indirect benefits).

Tax benefits might be regarded attending to the time conditions (e.g., benefits present or future, affecting the year of the transaction or subsequent years) or in attention to given axioms (e.g., as a consequence of given acts, fulfilment of conditions, the happening of a contingency, as a result from the exercise of a power or discretion conferred to a given person).

5.4.3 Subjective test

Aim of this section: Explain the aim of the subjective test within a GAAR. Identify the ways in which the subjectivity of the test can be reduced. Identify the objective of the test, namely analyzing the behavior of the taxpayer or taxpayers involved in the transaction under analysis. Identify additional tests that can be introduced alongside the subjective test.

In addition to the type of transaction and the tax benefit, a GAAR often includes tests considered as circumstantial elements, which analyse the conduct deployed by the taxpayer when entering into the arrangement that led to the tax benefits (subjective test), and consequently, whether the granting of such benefit is aligned with the object and purpose of the norm enabling it (objective test). Both tests construct the assessment's framework, because they enable the interpreter to find the connections between a transaction and its concerning tax benefit.

The first test that sheds light on the interplay present among the GAAR's elements is identified by academics as the subjective test. Its name comes from the consideration that the tax officer is required to assess whether the motivations for entering into the agreement exceed those of tax nature, or not. Commonly this test is formulated with regards to the aim or purpose supporting a transaction. If simultaneous aims are observed, the interpreter will weigh all of them to understand the key motive that led the taxpayer to choose a given set-up for the operation. If it is found that the most important/relevant reason for entering into a transaction is to obtain the tax benefit or advantage, the taxpayer behaviour will fall within the scope of the GAAR.

The former can only take place when the main purpose or one of the main purposes of the transaction is to obtain, retain, achieve, or secure a tax benefit. This is to say that the other alleged motives regarding the transaction were not as relevant, therefore were discharged by the tax authority.

The substantive test is present in the Canadian GAAR, which text indicates the following:

"An avoidance transaction means any transaction:

(a) That, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction **may reasonably be considered** to have been undertaken or arranged **primarily for bona fide purposes** other than to obtain the tax benefit; or

(b) That is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction **may reasonably be considered** to have been undertaken or arranged **primarily for bona fide purposes** other than to obtain the tax benefit"[122].

In this fashion, the Canadian GAAR suggested a double tier approach to identify not only if obtaining the tax benefit was reasonable having regard to the transaction, but as well whether the documentation supporting the transaction revealed *bona fide* purposes. The term "primarily" indicates that purely tax driven purposes may coexist with bona fide purposes, as long as the latter are more important.

Both the reasonableness in the conduct of the taxpayer and the bona fide purposes constitute types of subjective tests in as much as they inquire about the actions of the taxpayer in the context of the transaction performed. Also, these tests aim at identifying external manifestation of the intentions of the taxpayer by looking at its conduct and the possible reasons surrounding the behavior of the taxpayer.

The second example is provided by article 67 of the Trinidad and Tobago Tax Code. This article allows the tax authority to disregard the disposal of income between two individuals, when the arrangement is set to avoid tax obligations. The provision operates as a legal presumption[123] that can only be rebutted by the taxpayer by providing evidence of the absence of a tax avoidance intent in the transfer of property (subjective test) between the original owner (*disponer*) and its receiver. The original provision indicates the following:

"Where, under or by virtue of a disposition made directly or indirectly by any disponer, the whole or any part of what would otherwise have been the income of that disponer is payable to or for the

122 Article 245 (3) of the Income Tax Act (ITA).

123 By legal presumption it is meant to say a legal inference made in light of certain facts and circumstances. In the case at hand, it concerns the transfer of income between two individuals where the recipient is a minor, or other person. This particular presumption is rebuttable, which means that the person from which the inference is being made about, is entitled to provide evidence to reject the application of the presumption.

benefit, whether present or future and whether on the fulfilment of a condition or the happening of a contingency, or as the result of the exercise of a power or discretion conferred on any person, or otherwise, of a minor, such income shall be deemed to be the income of the disponer and not the income of any other person during the minority of such minor and subsequent to such minority shall continue to be so deemed unless the Board is satisfied that the disposition was not made **for the purpose of avoiding tax**".

A third example can be found in the South African GAAR amended in 2006, which incorporated generic purpose tests to be applied to determine whether an "impermissible avoidance arrangement" takes place. Article 80G of the Income Tax Act 1962 mentions:

"An avoidance arrangement is presumed to have been entered into or carried out for the sole or main purpose of obtaining a tax benefit unless and until the party obtaining a tax benefit proves that the reasonably considered in light of the relevant facts and circumstances, obtaining a tax benefit was not the sole or main purpose of the avoidance arrangement.

The purpose of a step in or part of an avoidance arrangement may be different from a purpose attributable to the avoidance arrangement as a whole."

Likewise, article 80A includes the remaining tests that accompany the sole or main purpose test described before[124]. These have been divided in accordance with actions to be taken in the scope of businesses contexts, non-businesses contexts and any other context. It is important to understand that the additional tests come along with the initial verification of the existence of a sole or main purpose driven to acquire a tax benefit.

In business contexts[125] the additional tests to be applied are (article 80A (a) of the Income Tax Act).

- An abnormality test, which appeals to review whether the actions of the taxpayer are not normally those employed for a good faith purpose other than obtaining the tax benefit.

- A lack of commercial substance test, which can concern the whole operation or parts of it and can be scanned by the absence of a direct proportional effect between the tax benefit obtained and correlative effects upon the business risks or net cash flows resulting from the transaction (expressly described in article 80C of the income Tax Act 1962).

Two other characteristics have been mentioned by the norm (ibid article 80C) to highlight the absence of commercial substance in an operation. These are not exhaustive considerations, as expressly provided in the provision.

124 The content of articles 80A to 80L of the South African income tax act can be reviewed in: https://www.gov.za/sites/default/files/gcis_document/201409/a20-060.pdf

125 Article 80A (a) of the South African Income Tax Act 1962

a) Presence of inconsistency or a significant difference between the legal substance of the avoidance arrangement as a whole and the legal form of its individual steps.

b) The inclusion or presence of round tripping financing[126], as described in section 80D, where specific possible outcomes of round tripping financial practices are listed.

In non-business contexts[127] the guidance is offered to identify if the arrangement was "carried out by means or in a manner which would not normally be employed for ***bonafide*** purposes, other than obtaining a tax benefit".

Lastly, in any other context the secondary test to be reviewed concerns:

a) that the arrangement has "created rights or obligations that would not normally be created between persons dealing at arm's length"[128]; or

b) it would "result directly or indirectly in the misuse or abuse of the provisions of"[129] the Income Tax Act.

In sum all these tests can be used as subsequent hallmarks to be tested when applying the GAAR. The tests were added after a long trajectory of cases lost by the tax administration in the South African Courts. The content of the GAAR significantly evolved through each of its recent amendments[130]. The elaboration of the new tests responds to the hardships found when claiming the application of the GAAR before the South African Supreme Court of Appeal[131].

Burden of proof

Some believe that granting the power of applying a GAAR to the tax authority without further guidance is pernicious for the tax system, as it offers the possibility for an unbalanced exercise of power. The imbalance is perceived regarding the burden of proof expected from both the tax administration and the taxpayer. Some commentators argue that bestowing the tax administration with a test that questions the intent of an individual is equivalent to allowing an investigation to gather inconclusive evidence of avoidance, and then asking the taxpayer for proof of the contrary.

126 It is a term used in finance to describe the action of purchasing and selling shares of the same security to make it seem to be in high demand, when the reality is that the operation has a non-profit basis. It is considered as an unethical operation and in some countries, it constitutes an illegal practice.

127 Article 80A (b) of the South African Income Tax Act 1962

128 Article 80A (c) of the South African Income Tax Act 1962

129 Ibid; Article 80A (c)

130 The GAAR was initially amended din year 1941, later on in 1959 to introduce minor changes on its wording and references to the type of taxes and arrangements covered by it. Later on it was introduced in the Income Tax Act of 1962 under article 103 (1) from which year it was reevaluated and consequently amended in 1996, and most recently in 2006.

131 For a comprehensive analysis on the relevant cases steering these amendments go to: E Mazansky, "A New GAAR for South Africa-The Duke of Westminster Is Struck a Blow," Bulletin for International Taxation 60, no. 3 (2006): 124–32.

This view is emphasized when the GAAR allows for presumptions related to the individual's conduct. The presumptive references are held as if the rule was advising the tax authority to conduct a mild judgement of the facts and circumstances of the case at hand. This consideration finds support in the way in which presumptions operate, as the presumed situation does not require the interpreter to run a full disclosure of his train of thought, nor deploy all the investigative means to arrive at a given conclusion. Nevertheless, the role of a presumption in a given provision will be determined by the way in which the rule is written.

Regarding the subjective test, a presumption could also mean avoiding biased judgements as to the taxpayer's intent or the motives supporting the given transaction, if the test requires an analysis of the reasons supporting the operation rather than its actors. In that sense, the presumption will divert the burden of proof to the taxpayer, as they will argue the supporting elements that were considered when adopting a given operational scheme. Some countries include these presumptive clauses considering that the taxpayer himself is better prepared to provide information regarding its decision-making process than the tax authority.

The GAAR should be applied after a proper inquiry, which proved the necessity of applying the anti-avoidance rule in the given case. On one side, this could cause the tax authority to lose time pursuing cases for which a GAAR analysis was not needed, as the issue could have been settled by requesting information to the taxpayer or conducting a regular audit. This would represent a loss of resources for the country, in as much as the collection force is detoured to engage with apparent tax avoidance cases that result in unfounded suspicions.

A way to introduce the presumption, and also to frame it so it would not be used as a tool to avoid responsibility in the investigation, would be to tie the presumption to specific guidance. For instance, in the case of Mexico the GAAR introduced in the tax bill of 2019 included the following guided presumption: 'the tax authority could deem that the legal acts of the taxpayer lack a business purpose given the facts and circumstances known during the investigation, as well as having valuated the elements, information and documentation obtained in the investigative endeavour' (article 5A Fiscal Code of the Federation). As it departs from the norm, the presumption can only be invoked after having conducted a thorough analysis on the case, and the burden of proof will then be given to the taxpayer for him to defend his position.

Likewise, El Salvador includes a presumption in favour of the taxpayers with regards to the ability of the tax administration to formulate its analysis. Section 17 of the General Tax Code[132] indicates

132 The original norm indicates the following "Article 17 of the Tax Code establishes that the tax administration can disregard the acts and conventions agreed between private parties. Likewise, the article recognizes that "the Material Truth Principle contained in article 3 literal h of the Tax Code provide that the tax administration conduct must be funded on the material truth that arises from the facts and circumstances investigated, provided they are known during the course of the investigation¨. Original provision: *"el artículo 17 del citado Código que establece que no son oponibles contra el fisco, los actos y convenciones celebrados entre particulares y el Principio de Verdad Material contenido en el artículo 3 literal h) que estipula que las actuaciones de la Administración Tributaria se ampararán a la verdad material que resulte de los hechos investigados y conocidos"*.

that according to the Material Truth Principle [literal translation of the Spanish term «principio de verdad material»] the investigations carried out by the tax administration need to provide material results achieved in the course of the tax investigation to be able to claim the enforceability of the taxpayer's acts.

Italy determines that the tax authorities shall provide evidence of the alleged abuse of law, while the taxpayer is able to invoke and demonstrate the existence of non-tax reasons supporting the transaction under analysis[133] . In this case, the burden of proof is determined with regards to the notion of "abuse of law", which is observable as per the existence of one or more transactions which lack any economic substance, despite being formally compliant with tax provisions. These transactions are essentially aimed at obtaining a tax benefit that otherwise would be undue.

Another way to curtail the discretionary approach of the tax authority when running the subjective test is to add complementary tests to be followed when applying the provision. One of these tests is the reasonableness test, that has been adopted by both civil and common law countries[134]. Through the reasonableness test the tax authority can quantify the tax benefit, identify a scheme that runs outside of the reasonably expected, or assess the purpose behind a transaction by using logical thinking. In general, the test is intended to make use of logical reasoning when investigating the steps followed in the establishment of a scheme and their outcomes.

However, the term itself calls for interpretation based on the personal views, moral values and experience of both court and tax officials[135]. The ambiguity that can come from the term "reasonable to believe that" will be reduced in time as long as the provision is applied. Before this happens, the assessments made by the tax administration will have to be "subject to judicial review, in order to constrain its arbitrary application"[136].

Another interpretation of the reasonableness test made by academics reflects that this provision lowers the burden of proof for the tax authority for applying the GAAR, because it would be sufficient to conclude with reasonableness that a taxpayer's intent was to obtain a tax benefit. In this consideration the term is read as to relieve the tax authority from its responsibilities towards

133 Article 10 of the Decree 128, incorporated in the Taxpayer Bill of Rights 212 of 2000.

134 Its origin can be traced to criminal law notions in the United States of America and Canada. As well as for the tax legislation from New Zealand and Australia, where a 'reasonable arguable position' refers to "circumstances where the taxpayer is more likely to be correct than incorrect" René David, *Os Grandes Sistemas Do Direito Contemporâneo* (Martins Fontes, 2002); Rosenblatt, "General Anti-Avoidance Rules for Major Developing Countries: A Comparative Taxation Approach".

135 Rosenblatt, "General Anti-Avoidance Rules for Major Developing Countries: A Comparative Taxation Approach."

136 Rosenblatt.

conducting the tax investigation[137]. Contrastingly, a second group of academics believes that this will strengthen the investigation, as the tax authority would be prevented from lightly assessing the cases using biased considerations, for the reasonableness should be tested with what would other taxpayers do. In this sense, the biggest critique concerns the obligation to compare the taxpayers' actions and with the transactions believed as suitable to achieve the respective aims[138].

Both critiques call for an approach to specify the type of reasonableness that is expected from taxpayers when arranging their businesses. Some countries provide guidance on the expected reasonableness based on the tax authority's position towards certain topics. This is done for example when communicating that a certain transfer pricing method is not to be accepted for given economic sectors. Moreover, examples can be drawn by using the reportable aggressive tax planning schemes shared by taxpayers in a given jurisdiction, because these practical cases might set the bar for distinguishing what is not going to be considered as an acceptable normal course of action.

An important feature to be considered when introducing a reasonableness test, is whether the reasonable behaviour is to be reviewed based on the taxpayer's intent or on the suitability of the objective criteria that can be perceived in the scheme. Reviewing in light of the intent increases the potential to find biased judgements, while considering in light of the objective criteria provides a more impartial approach. Likewise, if the reasonableness test is connected with an objective test, the tax administration will look for reasonableness in the scheme's configuration vis-à-vis the object and purpose of the norm granting the benefit. This will be covered further in the following section.

137 "'On the other hand, the requirements are not too demanding - it must be merely "reasonable": but not, for instance, compelling. Therefore, the tax authority does not need to produce full evidence thereof". Michael Lang, "BEPS Action 6: Introducing an Antiabuse Rule in Tax Treaties," 2014, 658. See also, Bhargava, "The Principal Purpose Test: Functioning, Elements and Legal Relevance," in *Preventing Treaty Abuse*, Blum and Seiler (eds.), Series on International Tax Law (2016), 2016, 318. Erik Pinetz, "Final Report of Action 6 of the OECD/G20 Base Erosion and Profit Shifting Initiative: Prevention of Treaty Abuse" (IBFD, 2016), 116; Erik Pinetz, "Use of the Principal Purpose Test to Prevent Treaty Abuse," in *Base Erosion and Profit Shifting (BEPS)*, Lang et al. (eds.), Series on International Tax Law (Linde, 2016), 271.

138 Dennis Weber, "The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) versus the EU Principle of Legal Certainty and the EU Abuse of Law Case Law," *Erasmus L. Rev. 10* (2017): 49–51.

Takeaway of this section: Subjective tests inquire for the conduct deployed by the taxpayer. In order to assess the taxpayer behaviour, the tax official cannot rely on considerations that respond merely to presumptions or light asseverations regarding the conduct of the taxpayer. On the contrary, the investigation carried out is expected to provide the tax official with factual or external evidence of the intent of the taxpayer when establishing the transaction.

Regardless of the condition highlighted by the test (i.e., reasonable to conclude, main purpose, principal purpose, primary purpose) it is expected to find one or more elements influencing the decision-making process and the transaction's subsequent enactment.

5.4.4 Objective test

Aim of this section: To provide information regarding the way in which an objective test can be applied and regarding the possible complementary test that can be added to it. It is emphasized that this element can be tested only at the end of the assessment, specifically after running the subjective test.

This test is intended to apply when the subjective test provided the tax authority with sufficient evidence to suspect that a transaction was arranged to achieve a tax benefit. This conclusion might have been adopted by the tax authority on its own or could have been achieved once the taxpayer failed to provide evidence sustaining that the main purpose or one of the main purposes of the transaction was not tax driven. The former would only take place if the taxpayer is aware of the investigation and has been notified to provide evidence during the subjective test analysis.

Hence, the objective test calls for the intervention of the taxpayer to provide evidence to consider that even though the main purpose or one of the main purposes of the transaction is tax oriented, obtaining the tax benefit would not be contrary to the object and purpose of the provision rendering the benefit. To do so the facts and circumstances of the case should be observed to properly identify the steps of the decision-making process followed to arrange the specific scheme.

Therefore, the objective test gains a residual character, as two types of taxpayers can be involved in it: a) a taxpayer that has taken part in the first round of analysis and its contribution resulted not sufficient to close the investigation; and b) a taxpayer that is notified of the procedure for the first time and will provide evidence to defend its behaviour.

The second type of taxpayer might decide to provide evidence on the fact that there are motives not assessed by the tax authorities, which disregard the findings of the tax administration, or defend that the tax benefit achieved goes in accordance with the object and purpose of the legislation protected by the GAAR and hence should not be repealed.

It is advisable to draft the GAAR in a way that clearly identifies the procedure to be followed by the tax authorities when involving the taxpayer in the tax avoidance analysis. A clear reference to the opportunities a taxpayer has to defend its position would contribute to tax certainty and as well protect the taxpayers' procedural rights.

The Italian GAAR has taken these considerations into account by providing for a detailed procedure to be followed by the tax administration when substantiating the GAAR`s assessment. The Italian provision requires the Revenue Agency to remit a formal communication to the taxpayer before issuing a tax assessment based on the GAAR. In this request the tax authority shall detail the reasons why the taxpayer behaviour is being envisaged as an abuse of law. Equally, the document must request the taxpayer's clarifications on the scheme or transaction being analysed. The formal communication must be served within the ordinary term for the statute of limitations of the tax return under analysis and the taxpayer will have 60 days to reply to the communication[139].

If the tax authority insists on raising the tax assessment, its content cannot include any other type of claims against the taxpayer other than the ones associated with the GAAR analysis. The motivation of such assessment must include the rules and principles allegedly circumvented or violated by the taxpayer and the tax advantages that are being denied. Additionally, it is expected that claims raised by the tax authority include the taxpayer´s defence arguments, providing the reasons for not considering them sufficient to withdraw the tax avoidance accusation.

Another issue that must be considered is the extent to which the term "object and purpose" should be defined. Most GAARs do not define the meaning of the term but refer to the interpretations made by courts of the norm being protected, as well as to the explanatory memorandum used for introducing the norm in the tax system.

When the objective test is associated with a reasonableness test, it means to say that the information to be provided by the taxpayer needs to be organized in a logical manner to be accepted. Normally, if the reasonableness test is introduced in the objective test, it should not be used in the subjective test. The call for reasoning in the objective test implies that a logical connection must be drawn between the provision's object and purpose and the steps followed by the taxpayer. Only if such a connection is found the tax benefit can be granted.

Be aware that the objective test's application is nurtured from the possibility to clearly assess what the legislator intended with the introduction of a given tax rule. In those cases where the tax rules

139 Article 10 bis of Law 27 July 2000, No. 212 Taxpayer's rights statute - https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2000;212~art3

are simply adopted without offering additional guidance on the reason for creating such a rule it will be difficult to identify if the object and purpose of the provision is being defeated.

In contrast, if the regulation being protected with the GAAR provides for both formal and substantive criteria to be complied with by a taxpayer in order to claim a tax benefit or advantage, the tax administration would have clear criteria to assess whether the object and purpose of the tax norm is being defeated or not.

This has to do with the consideration provided in section 5.4.2 regarding issuing a list of tax benefits, which should not be perceived as part of the GAAR's scope. If such a list is used and there are other benefits that depend mainly on formal criteria, these would most likely fall outside the GAAR's scope.

Takeaway of this section: The objective test is intended to be regarded as a secondary confirmation on the application of the GAAR, depending on the object and purpose of the provision being protected. Its existence within a GAAR recognizes that in certain cases the compliance with the tax provision in alternative ways by the taxpayer shall not be regarded as tax avoidance behaviour. The objectivity expected from this test lies in the careful and clear consideration of the motivations supporting the tax legislation enacted. Its application can also be supplemented with the consideration of regulations closely linked to the tax provision being allegedly defeated by the taxpayer.

5.5 Additional considerations in the design of a GAAR

5.5.1 Consequences (re-characterization and penalties)

Aim of this section: To emphasize that the GAAR's end result is not to declare a transaction as abusive, but rather to identify which tax treatment should have been applied to the transaction when disregarding the artificial construction presented by the taxpayers. To bring into awareness that some of the consequences of a GAAR do not result exclusively in the refund of tax benefits being obtained by the taxpayer, but that sometimes penalties can be associated with the avoidant behaviour.

Ideally, the text of the provision will indicate clearly the consequences for the taxpayer if the GAAR tests provide for the existence of tax avoidance. Normally, the tax authority is entitled to recharacterize the transaction in accordance with the evidence found, i.e., to apply the tax treatment that would correspond to the facts and circumstances of the case.

It implies, as well, that the tax authority can request the taxpayer to pay the difference between the benefit obtained and the tax due after recharacterization. When doing so, the norm may enable the tax authority to pierce the corporate veil to treat the duties of the corporation as if they were the duties of the shareholders. However, this would only be possible if the GAAR's outcome is drafted in a way that provides for this consideration and if the adoption of such a consequence is allowed under constitutional standards.

In the case of Colombia this issue was raised by a tax advisor[140] when reviewing the text of the GAAR enacted in 2012 by the legislator and the decrees establishing the administrative and judicial procedure to be followed in its application. In the tax advisor's opinion, the authority to pierce the corporate veil was only granted to a jury and could not be exercised by the tax authority as it was against ordinary tax procedural law and commercial law. The government took this claim in consideration and proceeded to eliminate the possibility for the tax authority to pierce the corporate veil on its own while investigating based on the GAAR. Thus, the GAAR formulated in 2016 did not include the provision granting discretionary power to the tax administration.

Some countries not only allow tax administration officials to recharacterize a tax avoidance operation in generic terms, but mention the possible ways in which the recharacterization can take place. Take for example article 80B (1) of the South African Income Tax Act 1962, which indicates the following:

"The Commissioner may determine the tax consequences under this Act of any impermissible avoidance arrangement for any party by:

- disregarding, combining, or re-characterising any steps in or parts of the impermissible avoidance arrangement;
- disregarding any accommodating or tax-indifferent party or treating any accommodating or tax-indifferent party and any other party as one and the same person;
- deeming persons who are connected persons in relation to each other to be one and the same person for purposes of determining the tax treatment of any amount;
- reallocating any gross income, receipt or accrual of a capital nature, expenditure or rebate amongst the parties;
- re-characterising any gross income, receipt or accrual of a capital nature or expenditure; or

140 See opinion on this matter shared by Juan Esteban Sanín in the bulletin of the 9th of November 2019, available at: https://www.asuntoslegales.com.co/analisis/juan-esteban-sanin-511016/abusando-de-la-clausula-anti-abuso-2930539

- treating the impermissible avoidance arrangement as if it had not been entered into or carried out, or in such other manner as in the circumstances of the case the Commissioner deems appropriate for the prevention or diminution of the relevant tax benefit".

This provision does not constitute an exhaustive list of options, rather it determines specific actions that, as highlighted, *may* take place when recharacterizing an operation. Thus, the final bullet expressly provides for the possibility to disregard the apparent arrangement by another method than those mentioned in the list.

The introduction of a non-exhaustive list is relevant for both the tax authorities and taxpayers because it can serve as inspiration and as guidance on the possible ways to recharacterize an operation declared as tax avoidant. Yet, the existence of this list might as well limit the actions of the tax authorities when applying the GAAR. Therefore, it is advisable to add a final remark, after the list or within it, that expresses the possibility to recharacterize by another method than mentioned in the list as long as the method is in accordance with the facts and circumstances of the case.

Another question to consider when introducing a GAAR is whether a taxpayer's non-compliance with the rules should trigger any penalties beyond the payment that results from the recharacterization of the transaction. According to the 2018 IFA report on GAARs, countries have addressed the question in different ways: some countries do not apply penalties to tax avoidance cases (e.g., Belgium, Netherlands, Peru), some impose penalties between 20 and 100% of the disputed sum (e.g., France, Italy, United Kingdom)[141].

Penalties for non-compliance with the GAAR increase the rule's deterrent effect. In the absence of penalties, taxpayers may be incentivized to take excessive risks. However, due to the many potential cases that lie at the border of permissible and impermissible tax avoidance, penalties should not be as high as in situations of tax evasion. Moreover, the broader a GAAR is worded, the lower the penalty should be. In contrast, if the GAAR is relatively narrowly worded and clear, higher penalties could be charged. For instance, the French GAAR could be considered as relatively narrow, since it applies in cases where a transaction "could not have been inspired by any other purpose" than avoiding taxation[142]. However, if these conditions are met, a penalty of 80% is applied, in addition to the restitution of avoided taxes and interest for late payment[143].

141 Paulo Rosenblatt and Manuel E. Tron, "General Report," IFA Cahiers 2018 - Volume 103A: Anti-Avoidance Measures of General Nature and Scope - GAAR and Other Rules (IFA, 2018), 22.

142 Ariane Calloud, "France," IFA Cahiers 2018 - Volume 103A: Anti-Avoidance Measures of General Nature and Scope - GAAR and Other Rules (IFA, 2018), 6.

143 Calloud, 13.

Takeaway of this section: The re-characterization of a scheme represents the final step for enacting a GAAR. The description of the recharacterization will provide the tax authority with the power to lay down tax consequences to be faced by the taxpayer. Therefore, the ministry and the legislator should be advised to review other tax dispositions on procedural law before conferring special powers to the tax administration regarding the recharacterization of the transaction.

It is advisable to carefully consider if the tax authority can be entitled to pierce the corporate veil when providing its final assessment or not, in accordance with the tax procedure statutes of the jurisdiction and its commercial law.

Some jurisdictions take the tax avoidance as an indication of a reprehensible action, hence provide for the inclusion of penalties additional to the refund of the tax benefits dubiously achieved.

5.5.2 Faculties of the tax authority

Aim of this section: Explain the considerations that the tax inspector should need to take into account when applying the GAAR.

The GAAR provision serves as a tool to require the tax authority to behave in accordance with the faculties conferred, avoiding deviations from the application of the subjective and objective tests.

The wording with which a GAAR is framed will have a direct incidence on its application. This quality is predicable for every rule in a legal system, however, in the GAAR's context this correlation is paramount as the rule focuses on cases that have not been discussed already. The level of broadness in its terminology should not convey the message that the tax authority has unlimited powers to determine unlawful situations, since there is no "taxation without representation". At the same time, the rule is not supposed to be so targeted that it would only operate in given circumstances, as its purpose is to precisely catch events that are not already deterred by other norms.

Moreover, it could state which administrative unit within the tax administration will apply the provision. Ideally the GAAR could show the criteria of assistance in the application of the provision's subjective and objective tests.

For illustration purposes, the General Tax Code of Angola includes article 119A-[144] which states the application of the GAAR introduced in article 26[145]. According to this provision the local tax

144 Both articles were introduced in the amendment of the General Tax Code through Law 21 issue by 9 July 2020.

145 The general provision states that: "Fiscal acts, developed, under any circumstance, with the volition to obtain a fiscal advantage by abusing legal forms, having regard on all relevant facts and circumstances, shall be disregarded for fiscal purposes, applying the tax rules suitable to the businesses or acts as per their economic substance. For the effects of the preceding paragraph an act is abusive of the tax forms, when it is not put in place for valid economic reasons reflecting the act's economic substance".

authority is the one determined to settle and collect the taxes to be paid after applying the GAAR. Additionally, it is clarified that the final settlement and collection cannot take place if the head of the local tax authority does not provide proof of the existence of a tax abusive conduct aimed at reducing, eliminating or differing the payment of taxes otherwise payable if a different act of the same economic nature would have been implemented.

Likewise, the provision indicates that the consequences of the GAAR application should not be executed before having a preliminary hearing with the taxpayer, which should be held within the term of 15 days after notifying the taxpayer of the existence of the tax avoidance investigation. In such a hearing the taxpayer is expected to provide all the necessary evidence to defend its interests, as this is the only opportunity to do so.

Once this procedure is completed the head of the local tax authority must provide an opinion which shall be remitted to the highest authority within the tax administration to issue a final decision on the case. It is explained that the former shall constitute the general procedure to be followed when applying the GAAR. However, the statutes of specific types of taxes can develop an alternative procedure to implement the GAAR within their field of application.

In this way the law provides guidance to both taxpayers and tax authority regarding procedural aspects of the GAAR's enactment. No additional detailed information is stipulated, and it is not foreseeably needed at this stage because the GAAR has been recently introduced (2020). However, the provision covers the possibility to extend procedural considerations via specific tax regulations.

As mentioned within Angola's case, the taxpayer is equally guided in its interactions with the tax authority while being investigated. The norm expressly indicates the moment in which it is possible to provide additional evidence supporting the taxpayer's interests.

Takeaway of this section: It is important to provide guidance on the way in which the GAAR operates, either by using hypothetical cases or describing a list of procedural aspects summarizing the steps to be followed when applying the GAAR.

It is advisable to create this document and circulate its content within the tax administration web page. In this manner it will be available for both taxpayers and tax officials. The value of such a document would not supersede the GAAR legislation or its regulations, this can be stated within the document for the clarity.

5.5.3 Interaction of GAAR with SAARs

Aim of this section: Identify the role of a GAAR within the legislation and how it interacts with other means of protection of tax law, such as SAARs.

A GAAR works as a last resource clause that should be exercised in those cases where despite of formal compliance with tax laws, the taxpayer's operation does not bear commercial and business consequences affecting the taxpayer's position. This situation could highlight the existence of a tax driven attitude from the taxpayer, however to actually identify such situation the GAAR should be applied in order to consider the facts and circumstances surrounding said transaction.

The way in which the GAAR operates, the notions it involves, the procedural interactions between the taxpayer and the tax inspector might vary from GAAR to GAAR, yet all the general anti-avoidance provisions are intended to reconstruct the fact pattern, identify the underlying motives to create such pattern and lately confront the tax consequences with the object and purpose of the tax law providing for the tax benefit. The assessment would enable the tax inspector to confirm the abusive character of the transaction and in so doing enable him to assess the situation using the tax rules that should have been observed instead.

In this sense, GAARs constitute a whole procedure in their own. They do not merely serve for declaring tax schemes as abusive, instead they permit to undercover the operation on the grounds of much more than just tax consequences (e.g., commercial or financial purposes, market desirable options, reduction of administrative costs, etc). In so doing their applicability is expected to be restricted to certain cases (see section on monetary thresholds), alternatively it would not be exercised if the costs of running the GAAR procedure are significantly higher than the revenue expected from the recharacterization of the operation.

Contrasting, a SAAR provides a construction of specific events which can be corroborated by comparing the provision wording with the facts of the case. A SAAR leaves no space for interpretation, unless the notions used in the norm are not interpreted directly within the country's legislation (e.g., the notion of beneficial ownership seen in rules dealing with the payment of royalties or interests). Most of the cases the SAAR is expressed as an axiom: If a certain situation arises there is a clear outcome. Most SAARs require no or only little involvement from the tax administration, as their mandate can be directly complied with by the taxpayer. In the audit cases where a SAAR's breach is observed, the tax inspector can easily deny tax benefits invoking the literal content of the provision. An inconvenience of specific rules is the fact that they only work towards a determinate fact pattern and they tend to be circumvented by creative taxpayers defeating their object and purpose.

In practice, GAARs and SAARs pursue the same aim, namely impeding avoidance behaviour, and therefore the flaws observed in the strictness of SAARs can be overcome with the extended analysis allowed under the GAAR. The use of one provision or the other to solve a case will be left at the tax inspector's choice. The decision on which rule to use, will in turn depend on the fact pattern being counteracted. If a clear breach of a SAAR is at stake than the most effective way to attract the scheme would be to invoke said breach. However, if formally the operation carried on complies with tax requirements, but the effects observed in other areas bring doubts of the reasonableness on the taxpayer behaviour the GAAR would be a better alternative to counter tax avoidance.

Takeaway of this section: The function of the GAAR is to be a last resource provision in those cases that fall within the scope of a SAAR. This implies that the successful application of a SAAR upon any case defeats the need for applying a GAAR. Otherwise, the unsuccessful application of a SAAR cannot hinder the possibility to apply the GAAR.

In this context, successful and unsuccessful terms identify the existence of a perfect coherence between the facts of the case being analysed and the conduct being described within the SAAR as prohibited or alternatively the inconsistence between the facts of the case with those requirements present in the SAAR for obtaining a tax benefit.

5.5.4 Interaction of GAARs and judicial anti-avoidance doctrines or principles

Aim of this section: Identify how the GAAR is read alongside with other anti-avoidance principles and doctrines.

As mentioned in section 4.3.5, courts can use anti-avoidance principles to counteract situations that were present before the GAARs enactment. Likewise, it is possible that courts decide upon anti-avoidance issues by complementing the GAAR with the use of other anti-avoidance doctrines or principles.

This is for instance the case of the South Africa Court of Appeal, which integrated the doctrines that were being used before the GAAR's enactment in 1996[146] to study the cases where the GAAR was invoked. The logic followed by the Court of Appeal was to consider the case presented in light of the doctrines and then follow the analysis by applying the GAAR. This way of acting reinforced the opinion that the GAAR was a last resource for combating tax avoidance. Yet, at the same time it pushed the South African Revenue Service (SARS) to tackle transactions by pleading for the sham doctrine and business purpose doctrine before

146 "The GAAR was originally inserted into a predecessor to the Act, Sec. 90 of the Income Tax Act (No. 31 of 1941) (…) In 1996, Sec. 103(1) of the Act was further amended in an attempt to introduce a business purpose-type test, following the recommendation of a commission of enquiry at the time (the Katz Commission)." Mazansky, "A New GAAR for South Africa-The Duke of Westminster Is Struck a Blow," 1 and 2.

using the GAAR[147]. This particularity arose in part because the country had already a long tradition in applying the substance over form doctrine for combating abusive situations in both tax law and non-tax law cases[148].

The approach taken by the South African Court of Appeal can be supported by addressing it from a logical point of view. In essence, each anti-avoidance doctrine is intended to question a particular aspect of the arrangement under study. Therefore, one can start by reviewing the legal nature of the arrangements made by the taxpayer. In this way the court will apply the sham/simulation doctrine[149], which is intended to uncover the actual legal reality distinguishing it from the constructed legal reality that can be dismissed[150]. When applying this doctrine, the court will be able to disregard any agreement fictitiously created in order to cover an actual agreement.

Since the sham/simulation doctrine reflects exclusively on the legal nature of the agreements enacted by the taxpayer, in absence of an agreement covering the factual reality, the doctrine would only be successful to disregard the apparent agreement. Thus, the court could be inclined to apply another anti-avoidance doctrine that allows it to inquire about the economic reality of the scheme. In this way, the substance over form doctrine can be used to evaluate the economic substance supporting the transaction or parts thereof[151]. This doctrine questions indeed the evidence provided in the case, to understand whether the actions taken by the taxpayers involved are aligned with the situation that it wanted to take care off in the first place (e.g., creating a regional hub, assigning rights upon intangible property of a group to a subsidiary, etc).

147 Ernest Mazansky identifies that "Sec. 103 (1) will be invoked only where the SARS is unable to attack a transaction on any other grounds, for example, whether income is taxable or an expense is deductible, etc., applying general principles. (…) It is clear, therefore, that the general anti-avoidance provision will only be resorted to, first, where the SARS would not succeed on general principles and, second, where the transaction cannot be attacked on the basis of substance over form." Ernest Mazansky, "The Duke of Westminster Still Lives in South Africa (But Is Very Careful When He Crosses the Road)," *IBFD Bulletin*, March 2005, 117.

148 See for instance: *Zandberg v. van Zyl* (1910 AD 302); *Dadoo Limited and Others v. Krugersdorp Municipal Council* (1920 AD 530); *Commissioner of Customs and Excise v. Randles Brothers and Hudson Limited* (1941 AD 369); *Erf 3183/1 Ladysmith (Proprietary) Limited & another v. CIR*. 1996 (3) SA 942 (A); 58 SATC 229; *Michau v. Maize Board; Income Tax Case No. 1625* (59 SATC 383).

149 The sham/simulation doctrine has been widely applied in both civil and common law countries. As examples of civil law countries applying the scham/simulation doctrine one can mention Mexico, Spain, Colombia, Brazil, Chile, Turkey, among others. In regards to common law countries the sample might be more reduced as they prefer to apply a substance over form doctrine or a business purpose doctrine, however, some of the ones that include the simulation doctrine are Canada, United Kingdom, India and Hong Kong (in the later country the cases Kan Lai Kwan v Poon Lok To Otto & HSBC International Trustee Ltd [2014] HKEC 1174, H v W [2014] HKEC 955, and Tao, Soh Ngun (AKA Lo To Li Kwan or Lo To Lee Kwan) v. HSBC International Trustee Limited [2019] HKCFI 1268 can be looked at for further information on the sham doctrine).

150 Irma Johanna Mosquera Valderrama and Craig West, "Tools Used by Countries to Counteract Aggressive Tax Planning in Light of Transparency," *Intertax 46*, no. 2 (2018): 146.

151 Valderrama and West, 146.

One could believe that using these doctrines combined is enough to tackle tax avoidance. Yet, it cannot be forgotten that both doctrines stem from private law notions (e.g. simulation, commercial substance, business substance) and their application is usually guided by terminology of commercial or civil law, which respond to objectives different than those of tax laws (see section 6.4.2). In this sense, the court might encounter a case where the agreement's legal nature and substance are aligned with the tax benefits provided, yet the elaboration of this scheme obeys mainly to tax avoidant purposes.

In this event, the GAAR would be applied to assess the reasoning used by the taxpayer to enter into the scheme (e.g., whether the actions taken are reasonable in regard to those taken by peers of its own business sector) and later, if the taxpayer's actions despite being motivated for tax purposes are defeating the object and purpose of the tax law providing the tax benefit or not.

In this manner, the GAAR application is necessary to clarify considerations which are not inherent to the agreement's functioning but concern the reasons to enter into and observe the effects of such agreement in light of the object and purpose of the tax legislation providing the tax benefit. As such the GAAR is a tool that combined with the doctrines of sham and substance over form, can assist both the tax authority and the courts in the assessment of possible tax avoidance cases.

Although the incorporation of anti-avoidance doctrines might as well disregard the application of the GAAR, the plain identification of coherence of the agreement's legal nature and its substance might serve the court to disregard an avoidance attempt from the taxpayer. In that case further investigation under the GAAR may not be necessary.

In sum, the GAAR might be applied directly by the courts, however it is highly possible that the judges integrate anti-avoidance doctrines when conducting their analysis. It is worthwhile to review the application of the doctrines to the case being studied as to identify the strengths and weak points of the argumentation.

Take away of this section: Anti-avoidance principles or doctrines can and most certainly will be used by courts when deciding about anti-tax avoidance cases.

The tax administration might consider reviewing the cases in advance to identify whether the principles can be applied to strengthen the argumentation for the GAAR's usage. Alternatively, they can reflect upon the cases' arguments and facts to identify possible counter arguments to be raised by the taxpayer or the juries.

5.5.5 Monetary thresholds

Aim of this section: Provide examples of different thresholds, identify the reasons for introducing those and consider some pros and cons of introducing a threshold into a GAAR.

A monetary threshold can be adopted for GAARs to focus resources on the most salient cases, while the remaining avoidance issues presented by fewer material cases are dealt with by the existing regulations and doctrines. It is possible to expect the GAAR to be curtailed with the application of SAARs.

This threshold can be included directly in the provision or can be instructed as a non-public directive for the tax administration's dependencies dealing with multinational audits or major taxpayer's audits. In any case, a threshold can simply be an advice a recommendation for the dependency appointed to investigate cases under the GAAR's scope.

The amount considered in the threshold can be guided by statistics of net income reported by taxpayers or even the turnover expected by them. As well, this metric might be guided by the previous experience of the tax authority after their investigations of major or large taxpayers. The general idea behind establishing this threshold is to limit the administrative costs that the GAAR enactment would have, as the number of cases for which the GAAR can be applied would be substantially reduced, opposing to open GAARs applying to the whole tax system or parts of it (e.g., specific taxes, as VAT or income tax).

Takeaway of this section: A monetary threshold can be included in the GAAR's wording to make sure that the cases scoped under the GAAR are only those that bare a great interest for the tax administration.

Likewise, the provision of a threshold for the GAAR's application can reduce the tax administration costs to be incurred for creating a task force specially designed to deal with tax avoidance cases. In tandem, costs for capacity building regarded to training of already existing employees and probably cooperation programs to be organized with officials located in other jurisdictions can be reduced as well.

5.5.6 Approving Panel / GAAR committee

Aim of this section: Explain that some countries include expert panels as ancillary assistance in the study of tax avoidance cases. Provide information regarding the type of individuals that can be members of the panel.

Decisions under the GAAR can be restricted to be taken only by a committee or panel within the tax administration or as a combination of appointed senior officials from both the ministry and the tax authority. Having a panel of senior officials might endorse a prudent observation of the facts and circumstances of sensitive cases, as those intended to be scanned with the GAAR. By using appointed individuals, the preparation of the officials and their experience with dealing with the tax system can be assured. Thus, the committee would be prepared to disentangle highly technical schemes, which is also useful to understand the motives of a given transaction.

From this perspective, a committee would provide for a good opportunity to require the adoption of a monetary threshold that defines the type of cases that would result material for the GAAR's enactment. Having a threshold would ensure that the costs incurred in calling the committee are covered as the result expected from the GAAR's application is highly important for the raising of revenue, or at least it is salient enough to be pursued with the GAAR.

Contrastingly, the use of a panel can be burdensome in practical terms as the people appointed might have highly conflicting agendas and prove to be impossible to gather within a given taxable period. This might as well contribute to the loss of the opportunity to assess the tax return in which the benefits have been granted. Likewise, taxpayers will feel less deterred from incurring into avoidant practices, since they will not believe that a committee of this nature would be able to effectively apply the GAAR.

Calling for external advisors to integrate the panel might involve the problem that confidential information of the taxpayer should not be disclosed before third parties other than the tax administration. Claims for the breach of commercial secrets might be invoked by the taxpayer in those cases.

A country that has developed the requirements for constructing a committee that can help not only the tax administration, but the taxpayer is France. The country introduced the Committee of Abuse of the Law in order to assist the tax authority when conducting the GAAR's investigations, but as well provides for the possibility of a taxpayer to access the Committee when facing a difference of criteria with the course in which the investigation was carried on by the tax administration. Likewise, the rulings issued by this body are to be shared publicly on a yearly basis.

Regarding the Committee's composition the *Bulletin Officiel des Finances Publiques* of 31 January 2020 (BOI-CF-IOR-30-30) determined the details on its composition, on the following terms:

"The committee provided for in article L. 64 of the LPF includes:

- a councillor of state, president;
- an adviser to the court of cassation;
- a lawyer with expertise in tax law;
- a master adviser to the Court of Auditors;
- a notary;
- a chartered accountant;
- a university professor, associate professor of law or economics.

The provision refers as well to possible considerations to be given if one of the persons appointed cannot take part in the Committee by suggesting possible replacements, as follows:

"30. The members of the committee are appointed by the minister in charge of the budget on a proposal from the National Council of Bars with regard to the lawyer, the Superior Council of the Notariat with regard to the notary and the Superior Council of the Order of Chartered Accountants. acting as the chartered accountant.

40. The substitutions on these appointees shall be appointed under the same conditions.

50. The minister in charge of the budget will as well appoint one or more agent's category A of the public finances department to act as rapporteurs of the commission.

60. The secretariat of the committee will be the responsibility of the tax legal department within the public finance department (bureau.jf2b@dgfip.finances.gouv.fr)"[152].

152 Subsections 30, 40, 50 and 60 of the Bulletin Officiel des Finances Publiques for 31 January 2020 (BOI-CF-IOR-30-30)

The Bulletin expands on the consequences of the decisions taken by the committee in sections 230 to 270, stating that:

"B. Opinion of the Abuse of Tax Law Committee
230. The committee meets when convened by its chairman. Committee meetings are not public.

240. When, in the matters and for the reasons provided for an Article L. 64 of the LPF, the administration or the taxpayer refers to the Abuse of Tax Law Committee, this body issues an opinion on the merits of the disputed rectifications envisaged.

250. A copy of the report sent by the central administration to the committee is sent by the latter to the taxpayer who is invited to submit his observations within thirty days.

260. In addition, if he considers it useful, the chairman of the committee communicates his observations to the authority which referred him. He may also collect from the latter any additional information necessary for the investigation of the case.

270. Pursuant to article 1653 E of the CGI, when the tax abuse committee is seized, the taxpayer and the administration are invited by the president to present their observations in the context of an oral and contradictory debate. The taxpayer retains the possibility of not appearing or of being represented."

When Chile introduced a GAAR in 2015[153], it initially made its application dependent on the opinion of a committee. After a year, however, a new regulation was introduced that made appeal to the committee no longer mandatory but voluntary[154].

153 Regulation 65 of 23 July, 2015 made mandatory the conformation of a committee for the GAAR to be enacted. However it did not mention the conditions to conform such a committee.

154 Regulation No. 41 of 2016 repealed the mandatory clause limiting the conformation of the committee in those cases where the Director of the Tax Administration would estimate necessary to help in the GAAR's analysis.

Takeaway of this section: The panel or committee can include officials from diverse departments within the tax administration and their involvement in the cases can be used as a way to offer certainty for the taxpayers, as their affairs are being assessed by different tax administration officials with assistance of highly specialized individuals.

Guidance regarding the panel or committee conformation can extend over the structure of the panel, voting rights, competences and functions. It is advisable as well to design a timeframe for communications to be held, if any, between the panel and the tax administration or the taxpayer.

6. How to apply a GAAR in practice?

6.1 Capacity

A GAAR is a complex legal instrument and applying it in a way that effectively raises revenue without jeopardizing legitimate business practices. Therefore, it is important to ensure that there is sufficient capacity in the tax administration.

6.1.1 Human Resources

Managing a GAAR requires different skill sets, since applying the rule is no mechanical process. The following profiles should be included in GAAR teams:

- lawyers with knowledge in international tax law and comparative tax law (that are able to understand why companies structure investments through certain countries for example);
- accountants;
- data analysts / economists for undertaking risk assessments;
- specialists for different industries that understand business models as well as value chains of different industries and who are able to judge whether a certain scheme corresponds to normal business practice.

6.1.2 Capacity development

- Trainings are offered by multilateral and bilateral technical assistance providers, as well as private institutes, e.g., CIAT, OECD, World Bank, IMF, GIZ, NORAD, Dutch Ministry of Foreign Affairs, IBFD, ICTD. It is important to establish own priorities in technical assistance.
- Studying of the resources mentioned in this toolkit can help develop capacity.
- Attending international meetings to exchange informally with auditors that have experience with GAARs.
- Courts should be included in capacity development efforts.

6.2 Internal Procedure

6.2.1 Assigning responsibility

To avoid misunderstandings on the cases that can be assessed with the GAAR, countries implement additional regulations explaining the type of individuals that might know about cases concerning the GAAR.

It is advisable to provide definitive guidance on this matter to avoid issues of internal misplacement of competences between the different dependencies of the tax administration and to protect the taxpayer’s sensitive information involved in the case.

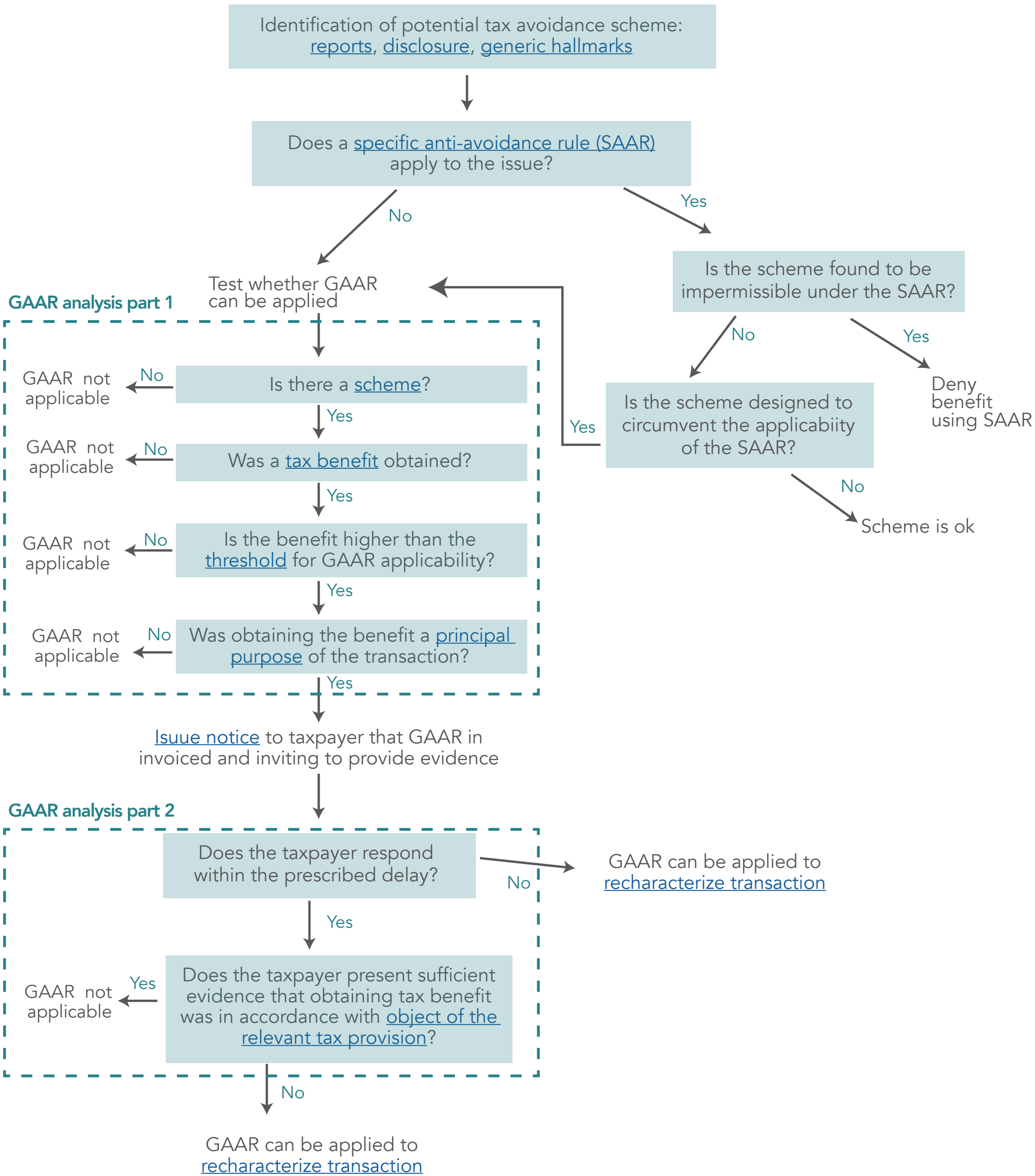
A way to clearly determine these issues is as it was looked at in Angola and France (section 5.5.2), where the additional regulations supporting the GAAR implementation establish the position of the person that will take the final decision when applying the GAAR (i.e. article 119A- of the amendment of the General Tax Code (9 July 2020) in Angola).

6.2.2 Assessment procedure

To help the different departments and individuals within the tax administration apply the GAAR, flowcharts could be produced that detail the different steps in the GAAR analysis and different departments involved. Figure 5 contains such a flowchart which displays the generic steps of the GAAR analysis.

Such flowcharts could also be published to increase transparency and help taxpayers understand how the GAAR is applied.

Figure 5 **Generic GAAR analysis procedure**



Source: *The authors.*

6.2.3 Internal database on cases

To ensure a consistent application of the GAAR by different individuals within the tax administration and over time, a database of GAAR cases could be constructed.

Cases could be broadly organized into three categories:

- cases where the GAAR was invoked by the tax administration and confirmed by courts;
- cases where the GAAR was invoked and not confirmed by courts;
- cases where the tax administration considered invoking the GAAR but decided not to.

Additional helpful categories would be: the amount in question, countries involved in a scheme, business sector, or other hallmarks of the transaction in question.

Such a database can help delineating acceptable from unacceptable tax planning in a more consistent way and can be used for producing guidance on GAAR application. It can also be helpful for reformulations of the GAAR legislation. For example, it can serve to analyze why cases have been rejected by courts.

6.3 Communication with taxpayer

Effective communication with the taxpayer is crucial for the GAAR's success. Next to involving taxpayers prior to the introduction of the GAAR, explaining and communicating with the taxpayer about changes to legislation or guidance, as well as providing sufficient information during GAAR application processes, is important for creating an environment of trust.

6.3.1 General guidelines and explanations about GAAR

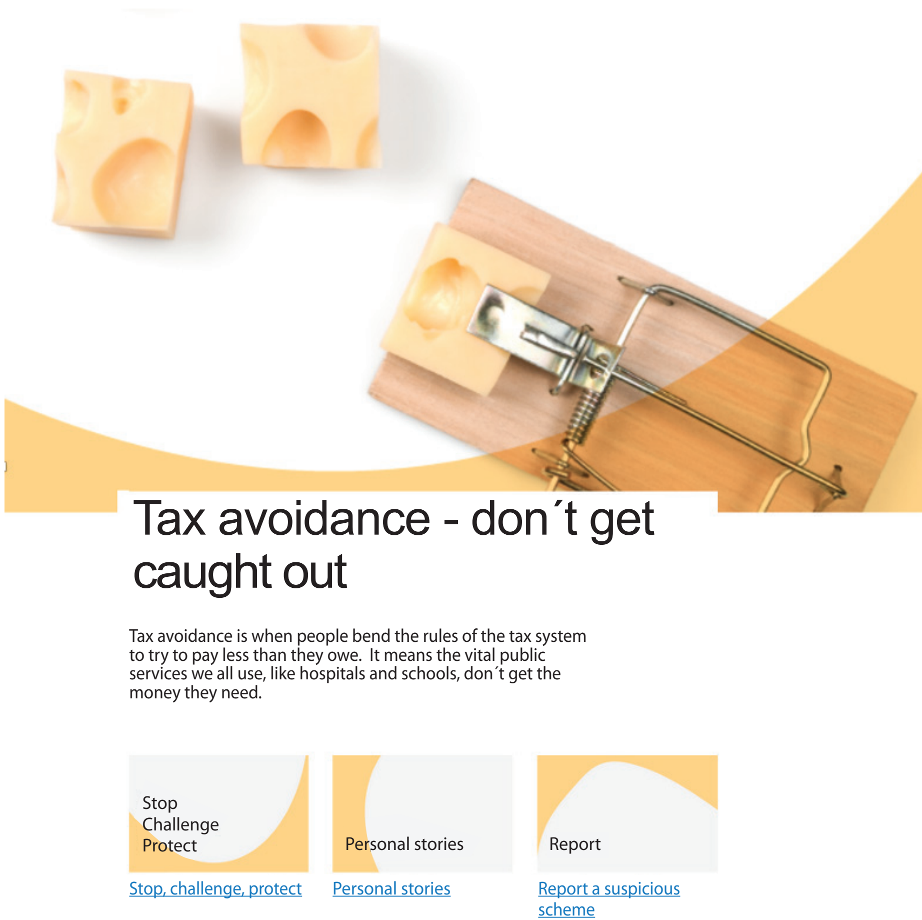
Raising awareness about the GAAR and explaining how it is applied is important for generating trust. This is especially important when a GAAR is newly introduced into a taxpayer and when the tax administration intends to apply it not only with respect to large corporate groups but also smaller and less sophisticated types of taxpayers. One particular purpose of educating taxpayers about the GAAR is to protect taxpayers from so-called promotors that knowingly sell tax avoidance schemes that are very likely to be considered illegal under a GAAR.

Some countries with a GAAR publish general explanations and guidelines about the GAAR, often written in plain language and addressing the taxpayer directly, using the "you" form and phrases such as "If it sounds too good to be true it almost certainly is"[155]. The United Kingdom,

155 See, for example, the United Kingdom's website https://taxavoidanceexplained.campaign.gov.uk/ or the Australian Tax Office's explanation of the boundaries between acceptable and unacceptable tax planning: https://www.ato.gov.au/General/Tax-planning/

for example, set up what could almost be called a marketing campaign after the GAAR was introduced, including personal stories of taxpayers who faced hardships after getting caught in a tax avoidance scheme.

Figure 6 Screenshot from United Kingdom "Tax Avoidance Explained" website



Source: https://taxavoidanceexplained.campaign.gov.uk/

6.3.2 Publishing descriptions of tax avoidance schemes

Countries can publish lists of schemes that it would consider as falling under the scope of the GAAR and/or schemes that have been "defeated", i.e., that have been effectively confirmed as falling under the scope of a GAAR by a court.

The United Kingdom, for example, publishes "schemes currently in the spotlight" and Australia published "schemes of concern". For a list of countries that publish schemes and links, see section: Tax avoidance cases in other countries.

Publishing descriptions of schemes can be a way of enhancing certainty for taxpayers. However, it is important to clarify that such a list is non-exhaustive and that cases that can potentially be subject to the GAAR in the future need not resemble those included in the list. On the other hand, under circumstances schemes that resemble the description may not amount to avoidance. The Australian Tax Office, therefore, reminds the reader at the beginning of each scheme description that it is possible to apply for an advance ruling, in which the legality of the scheme would be clarified.

6.3.3 Taxpayer involvement in ongoing case

When a GAAR procedure is started against a taxpayer, a good practice is to provide the taxpayer with general information about why the GAAR is invoked, the procedure, the opportunities to appeal or to ask for a settlement.

These communications can be made accessible in a specific "GAAR" section of the tax administration's websites. References to such material should be made when a taxpayer is notified for the first time that the case may fall under the GAAR. For instance, when the United Kingdom tax administration applies a GAAR, it directs affected taxpayers to short factsheets which contain information on the GAAR procedure and taxpayers' rights[156].

More generally, taxpayers should be granted some degree of involvement in the case, i.e., after the start of the procedure, taxpayers should be granted the possibility to deliver additional information within a reasonable time frame that may clarify the matter. If the procedure involves an advisory panel that pronounces an opinion on the case, the taxpayer may be invited to appear in front of the panel.

6.4 Dispute settlement procedures

In case a GAAR is applied, and a taxpayer is requested to pay an additional amount of tax, access to the standard dispute settlement procedure in the country should be granted like in all other tax cases. Since applying a GAAR is a complex task and errors from the part of the tax administration may occur, an effective and independent dispute resolution procedure is very important.

This section elaborates on a few issues that are specific to a GAAR: whether settlements should be offered; whether GAAR cases that involve a treaty should be eligible for the treaty's mutual agreement procedure (MAP).

6.4.1 Settlements

If a country levies any penalties on top of the tax due because of a re-characterization of the transaction, a tax authority can choose to offer a settlement and waive or reduce penalties if the taxpayer accepts the verdict without further disputing it in an appeal procedure. The advantage is that litigation costs can be saved. The disadvantage of offering settlements is that the risk associated with setting up an avoidance scheme is reduced for the taxpayer.

156 See https://www.gov.uk/government/publications/compliance-checks-protective-gaar-notices-ccfs36a

For example, the United Kingdom opened a consultation process in 2015 in order to introduce a specific tax penalty applicable to cases successfully tackled by the GAAR. This penalty was introduced in the 2016 Tax Bill in order to address a "small but persistent number of tax avoiders who remain undeterred from engaging in abusive tax avoidance"[157]. The provision was approved, and a new section was introduced to the Finance Act of 2013[158] enabling the tax authority to impose a penalty of 60% of the counteracted tax. However, such penalty will not be charged in those cases where the taxpayer corrects its tax position before the arrangement is referred to the GAAR Advisory Panel. In this manner, the law already provides for an expedite solution.

6.4.2 Capacity development for courts

It can be expected that, especially in the early phase after a GAAR is introduced, many cases will be disputed. It is therefore important to include judges in capacity development efforts. It is advisable to make sure that the GAAR proposal and later the GAAR's final content is presented to higher courts of the country. The integration of the courts in these processes could help the tax administration to make courts aware of the logic followed when creating the GAAR and clarify possible questions or unclear terminology.

In addition, workshop sessions can be offered to courts in order to provide them with a background on the reasoning behind the GAAR and the way it could interact with already developed doctrines (see sections 4.3.5 and 5.5.4).

Regular updating sessions with the courts might also help to breach some of the knowledge gaps that might be present in the interpretation of tax issues based on concepts stemming from the logic of other legal disciplines.

This particularity is well explained by William Barker when he acknowledges that most terms used in tax law are based on common private law terminologies. In this sense the courts will be initially inclined to associate private law explanations with the raw facts of the case instead of directly identifying a tax logic to it. To properly comprehend the tax logic the judges would have to critically assess the facts of the case considering

157 Policy objective of the United Kingdom government for introducing the GAAR's penalty: https://www.gov.uk/government/publications/penalties-for-the-general-anti-abuse-rule/penalties-for-the-general-anti-abuse-rule

158 Section 158 of the Finance Act 2016 amended Part 5 of the Finance Act 2013 to include section 212A (penalty for the GAAR). The penalty of section 212A can be applied in combination with already existing penalties (known as ´normal penalties´) as long as the total amount being charged is restricted to 100% of the tax; or the maximum amount allowed in the existent legislation, if the result is higher than 100% of the tax. The provision can be consulted at: https://www.legislation.gov.uk/ukpga/2016/24/section/158/enacted

fiscal and social relations, as well as principles of taxation (e.g., ability to pay, proportionality, equality, etc)[159].

6.4.3 Access to the Mutual Agreement Procedure in avoidance cases related to a tax treaty

Most tax treaties allow a taxpayer who faces taxation not in accordance with the treaty to request that both state parties to enter into a Mutual Agreement Procedure (MAP). Through this procedure, both treaty partner states attempt at solving a conflict of tax jurisdiction that resulted in taxation not in accordance with the treaty.

The Action 14 report of the OECD BEPS project elaborates on whether MAP access[160] should also be granted in cases where a tax authority denies treaty benefits based on a GAAR. It recommends that taxpayers should be granted access to MAP both in cases where a treaty GAAR or a domestic GAAR was invoked by a tax authority. However, it also stresses that granting access should not imply that the tax authorities must endeavour to resolve any double taxation resulting from the application of the GAAR[161].

159 Barker identifies that the objectives of both the private law and tax law are different, inasmuch the first intends to "facilitate and sanction the existing economic and social relations that are normal or typical. In contrast, tax law's principle purpose is to raise revenue on a fair and efficient basis using a comprehensive approach to the totality of the taxpayer's activity". Hence, he concludes that "[w]here private law purposes differ from the purposes behind tax law, tax law that follows private law characterization may fail its objective". William B Barker, "The Disconnect Between Tax Concepts and the World of Fact: State Law as the Gatekeeper," *Washburn LJ 57* (2018): 130 and 131.

160 On general issues relating to mutual agreement procedures, refer to CIAT's Transfer Pricing Cocktail, which addresses best practices and recommendations for strengthening mutual agreement procedures focusing on transfer pricing issues. See specially section named "condiment 3". Carlos Pérez Gómez Serrano, Enrique Bolado Muñoz, and Isaác Gonzalo Arias Esteban, "Cocktail of Measures for the Control of Harmful Transfer Pricing Manipulation, Focused within the Context of Low Income and Developing Countries.," 2019, 71–78.Pérez Gómez Serrano, Bolado Muñoz, and Arias Esteban, 71–78.

161 OECD, "Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report," Base Erosion and Profit Shifting (Paris: OECD Publishing, 2015), 14–15.

7. Conclusion

GAARs are generic clauses that provide tax authorities with the faculty to deny benefits if taxpayers undertake transactions that lack economic substance but have as main purpose to obtain a tax advantage. They are tools of last resort that prevent taxpayers from taking advantage of tax laws in ways that cannot have been intended and have not been anticipated by the legislators.

Nevertheless, GAARs are no "magic bullet" against tax avoidance but need to be embedded in broader efforts to increase the analytical and risk management capacity of tax authorities. Often, GAARs are a mere codification of general anti-avoidance principles applied by tax administration and courts. In that sense, introducing a GAAR does not necessarily mean prohibiting activities that were previously allowed. Whenever a GAAR is applied, it may be subject to judicial review. If applied too expansively or too frequently, courts may be induced to a restrict a GAAR's scope through their judgments.

The advantage of a statutory GAAR is that it permits to clarify important questions concerning penalties, recharacterization, timing issues, taxpayers' rights and application procedures. But how should these issues be managed?

This toolkit's purpose is to support policymakers and administrators with a GAAR's application, its drafting or when it comes to deciding if a GAAR should be introduced at all. Practices among countries are diverse and there is a scarcity of evaluative studies that delve into the details of GAARs. This makes it difficult to select "best" practices. Often this toolkit's main utility therefore lies in providing a comprehensive list of relevant issues that need to be considered, in offering initial ideas of how to deal with them and in directing the reader to relevant references to learn more from other countries or academic literature. However, what works in one context may not work in another. This toolkit can therefore not replace the inherently local process of tailoring a GAAR to a country's tax code and practices.

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9. Annex: GAAR Checklist

Table 15 GAARs "checklist"

Area	Sub-area	Item	How this toolkit can help
Risk assessment	Legal assessment	Are tax avoidance risks in domestic tax codes assessed?	Explaining the relationship between tax code complexity and GAARs
		Has the country's tax treaty network been analyzed for treaty shopping risks?	Explaining indicators of risks in treaty network
	Empirical assessment	Does the country assess tax avoidance risk through empirical data?	References to different methodologies and databases to assess tax avoidance risks
		Does the country exchange with other countries about tax avoidance schemes?	Overview of CIAT countries with legislated GAARs List of opportunities to exchange with other countries
		Has the country considered disclosure rules?	References to countries that have introduced voluntary and/or mandatory disclosure rules
		Are relevant pieces of information necessary to detect tax avoidance requested in tax returns?	List of pieces of information needed in tax returns to detect tax avoidance risks

Area	Sub-area	Item	How this toolkit can help
Effective GAAR design	**Connection to local practice**	Has local tax avoidance case law been considered when drafting or updating the GAAR?	Examples of how countries have connected GAARs to previous case law
		Have known tax avoidance practices that cannot currently be tackled been considered when drafting or updating the GAAR?	
	Learning from other countries	Have the experiences of other countries been considered when drafting or updating the GAAR?	References to comparative legal literature
		Have sample GAARs by international organizations been considered?	List of sample domestic GAARs Reference to OECD model for treaty GAARs
	Standard concepts	Does the GAAR include a reference to a scheme, act, arrangement or similar term?	Explanation Options for wording
		Does the GAAR include a reference to a tax benefit?	Explanation Options for wording
		Does the GAAR include a subjective test?	Explanation Options for wording
		Does the GAAR include an objective test?	Explanations Options for wording

Area	Sub-area	Item	How this toolkit can help
Effective GAAR design	**Additional design considerations**	Are the consequences of GAAR application clarified?	Showing different options for recharacterization Showing examples of penalty regimes
		Is the interaction of the GAAR and SAARs clarified?	Explaining interaction of SAARs and GAAR
		Have monetary thresholds for GAAR application been considered?	Examples of different thresholds used by countries
		Has the option of instituting an approving or consultative panel been discussed? If so, has the role of the panel been clarified?	Discussing pros and cons of, as well as different options for a GAAR panel's composition
Managing GAAR introduction	**Consultation process with civil society and private sector**	Organizing consultation process	Guidance for organizing consultation processes, list of stakeholders to include
	Memorandum	Has a memorandum been drafted accompanying the introduction of a GAAR?	Guidance on memorandum
	Treaty (re-) negotiation	Has a strategy been developed to negotiate GAARs in tax treaties?	Explaining when a treaty GAAR is necessary (should be prioritized) Explaining procedures to introduce a GAAR in a tax treaty
	Considerations of timing	Have timing and transition issues been considered when introducing a GAAR? Have these issues been clarified to taxpayers?	Listing different timing issues and guidance how they could be resolved Example of timeline of relevant events when introducing GAAR Examples of clauses

Area	Sub-area	Item	How this toolkit can help
Effective and consistent application	**Capacity**	Human resources needed	Profiles of people that should be included in a GAAR unit
		Has a program been set-up to develop capacity among officers responsible for GAAR application?	List of options to develop capacity for GAAR application
	Internal procedures	Has the advance ruling unit been integrated and made aware of the GAAR procedure?	
		Have flowcharts for the assessment procedure been developed?	Example of a flowchart of the assessment procedure
		Has an internal database GAAR cases been developed?	Example of possible design of a database on GAAR cases
	Communication with taxpayer	Does the tax administration provide general explanations on its website? Have awareness campaigns been organized after initial introduction of the GAAR?	Examples of websites and documents that countries use to provide guidelines
		Has it been considered to publish a list of defeated avoidance schemes and schemes the tax administration would consider as unacceptable tax avoidance?	Discussing pros and cons of publishing lists of schemes Providing country examples
		Do taxpayers have opportunities to provide additional information and explain their position during an on-going investigation? Are the moments of taxpayer involvement clarified and communicated?	Discussing potential moment of taxpayer involvement References to letters that can be sent to taxpayer

Area	Sub-area	Item	How this toolkit can help
Effective and consistent application	**Dispute settlement procedures**	Are effective dispute resolution procedures in place?	Explaining importance of effective dispute resolution procedures
		Has the possibility for taxpayers to apply for settlements been considered and clarified?	Pros and cons of offering taxpayer settlements
		Have courts been included in capacity development efforts?	Explaining importance of including courts in capacity development efforts
		Has it been clarified whether taxpayers can access MAP procedures when a GAAR is applied to tax treaty cases?	Explaining the BEPS Action 14 report's recommendation with regard to MAP access for avoidance cases.

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