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PROMOTING ECONOMIC RECOVERY THROUGH TAXATION IN THE BRI JURISDICTIONS

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Tel: 86-10-63584624
Website: http://www.britacom.org
Email: britj@britacom.org

Submissions
Tel: 86-10-63886739, 63886745
Email: britj@britacom.org

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Email: dl@ctax.org.cn

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投稿方式：电话 86-10-63886739，63886745
　　　　　邮箱 britj@britacom.org
订阅方式：电话 86-10-63543735，63543753
　　　　　邮箱 dl@ctax.org.cn
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Algeria's Recent Reforms on Tax System and Tax Administration:

An Exclusive Interview with Ms. Amel Abdellatif, General Director of Taxes, Algeria

BRITJ Editorial Team

Over the past two years, significant changes have taken place in the economic and social fields, falling within the concretization of the general policy advocated by the Algerian public authorities, based in particular on the principles of law and equity. In this context, taxation is a major concern of this policy, insofar as it constitutes one of the levers on which they rely to carry out the program of economic and social development, to improve the quality of life of all citizens. Ms. Amel Abdellatif, General Director of Taxes of Algeria, presented, in this interview, the main axes of the tax reform and the main measures which have been put in place in recent years.

BRITJ: Thank you very much for being with us. On 30 December 2021, the Algerian government promulgated the Finance Act for 2022. Would you please make a brief introduction about the tax measures contained in this Act?

Amel Abdellatif: As attentive observers and analysts have been able to observe, the action taken by the public authorities in economic matters in Algeria remains marked by considerable efforts to attract foreign direct investment (FDI), encourage national private investment, promote productive activities and small and medium enterprises (SMEs), and more generally, encourage investment in activities with positive externalities.

Hence, to reinforce this trend, various measures have been taken within the framework of the Finance Act for 2022 to encourage investments in recent years.

Among these measures, mention may be made of that relating to the reduction of the Corporation Tax (IBS) rate for the portion of profits intended for reinvestment in the production sector, which is set, from now on, at 10% instead of 19%.

This measure was accompanied by other provisions aimed at alleviating the tax burden on businesses. For instance, the raising of the deduction limit for certain expenses, of the taxable base for the Corporation Tax and the Global Income Tax (IRG), and the abolition of the Tax on Professional Activity (TAP) related to production activities, with revision from 2% to 1.5% of the rate for other activities.

Other measures have been also taken within the framework of this Finance Act, in favor of certain sectors of activity, such as tourist activities and aquaculture, which benefit from a reduction in the rate of the value-added tax (VAT) from 19% to 9%, as well as the breeding activity for which a reduction of 60% in terms of Global Income Tax has been introduced, in addition to the measures that existed. Let me put the example here of the activities of production of goods and services intended for export, whose profits are exempted in terms of Corporation Tax, as well as the VAT exemption for the acquisition of materials and equipment by startups, in addition to a period of four-year exemption from Corporation Tax or Global Income Tax, to help them set up their businesses.

BRITJ: On the 3rd BRITACOF in September 2022, Algeria shared some of the measures in tax digitalization. Could you give us details about those measures?

Amel Abdellatif: Adapting to the digital age remains a major issue and challenge for the Algerian tax authority. The awareness of these societal changes, toward the massive use of information and communications technology (ICT), is not new. Indeed, the Algerian tax authority has for years been committed to a process aimed at modernizing its procedures and structures. Digitalization is, of course, the central axis of this program. Its strength and advantages no longer need to be demonstrated for either the tax authority or for taxpayers. For the tax authority, ICT should certainly contribute to the improvement of its management and overall performance. For taxpayers, the positive effects they can derive from ICT in terms of the quality of the service provided to them are also significant.

With this in mind, the tax authority is working to gradually implement a series of measures to complete the project to fully digitize its structures.

Among these measures, it may mention the institution of a legal framework for the deployment of digital services and the signing of two protocols for online payment and bank direct debit between the General Directorate of Taxes (DGI) and its partners in the banking sector.

Also, there was the deployment of the information system of the General Directorate of Taxes called "Jibaya'tic", which is one of the most ambitious projects that the tax authority has undertaken as part of the modernization program. This system devotes the use of digital technology as a working tool and reconciliation between the tax authority and its environment.

This integrated system essentially aims to implement a dematerialized management of all business processes, from the declaration and collection of taxes by going through the control process until the processing of litigation appeals.

The "Jibaya'tic" online declaration and payment portal offers taxpayers eligibility for the new structures: Directorate of Large Companies (DGE), Tax Centres (CDI) and Proximity Tax Centres (CPI) who have integrated the information system "Jibaya'tic", to declare and pay their taxes via an electronic service.

This solution is being rolled out gradually, as and when new sites are received and interconnected.

In addition to this integrated system, it has been decided to deploy an online declaration and payment portal called "Moussahama'tic", intended for taxpayers under tax collection offices, pending their transfer to the CDI and CPI.

Finally, other online services have been put in place, namely in terms of taxpayer registration and online tax authentication of the tax identification number of suppliers and customers.

BRITJ: In terms of fighting tax evasion and tax fraud, what are the legal means of intervention of the Algerian tax authority?

Amel Abdellatif: The mechanism for fighting tax evasion and tax fraud implemented by the General Directorate of Taxes includes several means of intervention, including procedures for seeking tax information, such as the right of communication, the right of inquiry and visiting rights.

There are also procedures of tax control, including accounting control, spot accounting control and in-depth control of the overall tax situation.

In addition to these conventional procedures, other means of intervention currently exist, which allow:

- To initiate inquiries within the framework of the cooperation mechanism governing the mixed control brigades (Tax, Customs and Commerce);
- To sanction fraudulent taxpayers by applying penalties for fraudulent practices;
- To prosecute fraudulent taxpayers at the criminal level;
- To register fraudulent taxpayers in the national file of fraudsters;
- To use international administrative assistance for the needs of the fight against international tax fraud and evasion, which allows the tax administration to request information of a tax nature from foreign tax authorities; and
- To resort to the use of the planned tax flagrance procedure, which allows the administration to have direct access to the accounting, financial and social documents of persons concerned, in real time, even for a period for which the reporting obligation provided for by the tax legislation in force has not yet expired. This action allows the administration to prosecute taxpayers for whom presumptions of evasion or insolvency organization are established.

BRITJ: The COVID-19 pandemic has seriously hit the global economy. What tax policies and measures has Algeria taken to support economic recovery since 2020?

Amel Abdellatif: Similar to other countries, Algeria has not been spared by the harmful effects of the COVID-19 pandemic on its economy, with a slowdown in its growth, as a direct consequence of the health restriction taken, within the framework of fighting against this pandemic.

Adaptation measures have been taken to stem the impact of this pandemic and compensate, as much as possible, the losses that have caused to activities.

As an urgent matter, measures have been taken, within the framework of the complementary Finance Act for 2020, with the aim of preserving, at all costs, business activities.

Thus, as an emergency response, this complementary Finance Act instituted the following tax provisions:

- The temporary exemption from VAT and customs duties for pharmaceutical products, medical devices, detection equipment used in response to the COVID-19 pandemic;

- The extension, on an exceptional basis for the year 2020, of the deadlines for tax and customs declarations, and for the payment of taxes and duties relating thereto without application of late payment penalties; and

- The increase in the amount of subsidies and donations allowed as a deduction for the determination of the tax benefit granted to establishments and associations with a humanitarian vocation.

As an extension of the measures taken by the complementary Finance Act for 2020, the Finance Act for 2021 has also provided other measures, in particular:

- The extension of the tax debt payment schedules to 60 months instead of 36 months; and

- Exemption from VAT for donation operations carried out for the benefit of the Algerian Red Crescent and humanitarian associations.

BRITJ: Foreign direct investment is crucial for economic growth. Could you brief us about the tax strategies and administration measures to attract foreign investors in Algeria?

Amel Abdellatif: In the era of globalization, the economic growth of a country is closely linked to the rate of integration of foreign direct investment in its national economic fabric. With this in mind, the new investment law was enacted recently (Law No. 22-18 of 24 July 2022).

This law provided several provisions, aimed at ensuring legal certainty, further consolidating the attractiveness and raising the competitiveness of Algeria as an investment destination, through the consecration of the principles of freedom to invest, transparency and equal treatment of investments, by reinforcing the guarantees granted to the investors.

In terms of preferential regimes, three regimes have been established under this new law, providing specific tax and customs advantages, namely:

- **The sectors regime**: benefiting from incentives for priority sectors;
- **The zones regime**: benefiting from incentives for zones to which the State grants a particular interest; and

- **The regime of structuring investments**: benefiting from incentives for investments of a structuring nature.

Hence, tax advantages are granted for the periods of realization and exploitation of the investment. For instance, the investor benefits from exemption from customs duties and VAT (for implementation stage) and may also benefit from the temporary exemption from Corporation Tax (IBS) and Tax on Professional Activity (TAP).

BRITJ: The BRITACOM is three years old now. As one of the Founding Member Tax Administrations, what positive attempts has Algerian tax authority made to optimize the tax environment and deepen cooperation between jurisdictions?

Amel Abdellatif: The Algerian tax authority has ratified the Memorandum on the Establishment of the BRITACOM in 2019 at the First BRITACOF.

As a Member Tax Administration of this multilateral cooperation mechanism between tax authorities, Algeria is committed to doing everything possible to achieve the objectives set out in the framework of facilitating cross-border trade and investment. It is in this context that the government's action plan includes a large number of measures and mechanisms to support the growth of economic exchanges, the development of foreign investments, the resolution of tax disagreements, transparency, the rationalization of global compliance and digitalization, including the promulgation of law on investment.

In the same context and in order to promote the multilateral cooperation, particularly in the area of taxation, the General Directorate of Taxes would like to develop cooperation mechanisms between tax authorities by providing actions and tools allowing the sharing of experience, the exchange of information and best practices, in order to harmonize tax systems and thus collaborate to ensure a real development of economic activities. In this spirit, collaboration between the tax authorities of the Belt and Road jurisdictions can lead to the pooling of skills and expertise in resources mobilization through training courses, technical assistance exchanges, study visits, etc.

Dealing with the COVID-19 Pandemic: Economic Recovery Through Taxation in Africa

Nthabiseng Debeila, Frankie Mwana Mbuyamba, Ezera Madzivanyika and Mary Baine

Nthabiseng Debeila
Specialist
Applied Research &
Statistics
ATAF

Frankie Mwana Mbuyamba
Manager
Regional Coordination
ATAF

Ezera Madzivanyika
Manager
Applied Research &
Statistics
ATAF

Mary Baine
Deputy Executive
Secretary & Head
Member Services and
Domestic Resource
Mobilisation
ATAF

Abstract: COVID-19 negatively impacted the economies of many African countries that had previously been on a positive trajectory. Both economic growth and revenue collections were severely eroded, triggered by the lockdowns implemented, stimulus packages offered to small and medium enterprises, financial support to vulnerable households, and the tax relief measures to businesses. ATAF administered three surveys on its member tax administrations to gauge the tax administration and policy responses to COVID-19, assess the customs revenue losses, and evaluate the tax administrations' preparedness on business continuity and risk management. Results showed that tax administrations implemented a variety of tax relief measures which included accelerated refunds, tax deferrals, suspension of audits, suspension of duties on health products imported for fighting COVID-19 and tax amnesty programs. Some of the non-tax measures included measures meant for enhancing business cash flow, enhancing business continuity, enhancing household cash-flow and supporting the informal sector and small businesses. Customs revenue was negatively impacted on, with an estimated loss of USD400 million ~ USD500 million from February to April 2020, for the 18 countries whose data was available. Additionally, some African tax administrations either did not have, or were not implementing Business Continuity Plans (BCPs) and enterprise risk management. Sectors that benefitted from the pandemic include the health, pharmaceuticals and medical supplies, and telecommunication and information technology. The hardest hit sectors were the tourism, education, accommodation and food services and mining. Some countries realised positive revenue growth, despite the pandemic, due to increased usage of automated tax systems. To recover from negative effects of COVID-19, tax administrations should embark on reforms geared towards implementation of the following measures: taxation of digital economies through digital services taxes and a comprehensive VAT strategy for e-commerce transactions; combating transfer pricing and other forms of illicit financial flows; reducing the informal sector; and streamlining tax incentives. Tax administrations could also embrace digitalisation and leverage on big data considering the Fourth Industrial Revolution.

Keywords: Tax administrations; Tax relief measures; COVID-19; VAT; E-commerce; Tax incentives; ATAF

1. Background of Economic Development in Recent Years

The 2019 African Economic Outlook[1] presented a positive economic outlook of Africa, which showed that the continent had made significant economic strides in the positive direction. This was a welcome development that was buoyed by general improvement in Gross Domestic Product (GDP) which had reached approximately 3.5 percent in 2017 and 2018 compared with 2.1 percent in 2016. Albeit the pronounced good state, it was clear that the growth path needed to continue on a positive trajectory to increase employment levels and address fiscal deficits and debt vulnerability (2019 African Economic Outlook, 2019).

The projected acceleration of GDP was 4 percent in 2019 and 4.1 percent in 2020. However, in 2020, the trajectory of economic activity quickly changed due to the unprecedented global crisis perpetrated by the COVID-19 pandemic that affected livelihoods and claimed millions of lives. The Sub-Saharan Africa (SSA) region was projected to register a reduced growth of 3.1 percent in 2020 versus a global recovery of 5.2 percent (IMF, 2020).

The projections revealed above were in fact conservative, since Africa experienced a recession with GDP contracting by 2.1 percent in 2021 (African Economic Outlook, 2021). This emanated mainly from the lockdowns implemented, which entailed amongst others: movement restrictions, closure of businesses and various institutions including schools, suspension of gatherings, and night curfews. Additionally, governments had to offer stimulus packages to small and medium enterprises, financial support to vulnerable households, and tax relief measures to businesses — all, having been severely affected by the pandemic. The COVID-19 fiscal packages averaged 3 percent of GDP in 2020, the ratios varied significantly from about 32 percent for Mauritius, to 10 percent in the

1 African Development Bank Group (2019). *African Economic Outlook (AEO) 2019*, https://www.afdb.org/en/documents/document/african-economic-outlook-aeo-2019-107319.

Republic of South Africa (RSA) and less than 1 percent in Tanzania (AFDB, 2021). Both tax and non-tax revenue were also negatively affected on the revenue side (ATAF, 2021).

Tax administrations faced a twin-challenge between maximising domestic revenue mobilisation and providing relief to various economic agents. On one hand, there was the need to cushion businesses from closure and save lives and prevent additional negative effects. On the other hand, there was the imperative to collect more revenue to finance the governments' effort in the fight against COVID-19.

The International Monetary Fund (IMF, 2020) projected a fiscal revenue loss of about USD70 billion from 2019 to 2020 for Sub-Saharan Africa alone on account of the pandemic. A survey, administered by the African Tax Administration Forum (ATAF) in 18 member tax administrations on the impact of COVID-19 on customs revenues, revealed an estimated revenue reduction of between USD400 million and USD500 million in the three months from February to April 2020. When the whole continent was included in the simulations, the customs revenue loss was more than USD1 billion, within the three months (ATAF, 2021; IMF, 2022).

2. Tax Administration and Policy Measures Implemented to Boost the Economy

Three surveys were administered by ATAF to its member tax administrations in 2020, mainly to gauge the tax administration and policy responses to COVID-19, but also to assess the customs revenue losses due to COVID-19, as well as the tax administrations' preparedness regarding business continuity and risk management. The main survey which focused on tax administration and policy responses to COVID-19 pandemic received responses from 23 ATAF member tax administrations, while the one that focused only on customs revenue was responded by 18 tax administrations. The third survey that focused on business continuity and risk management received responses from 18 tax administrations (ATAF, 2020). The results from the different surveys are discussed in the following paragraph.

In summary, the main survey revealed that ATAF member tax administrations put in place several tax and non-tax relief measures to combat the effects of the COVID-19 pandemic. The tax-related measures included accelerated refunds, extension of filing and payment deadlines/tax deferrals, suspension of audits, suspension of duties on health products imported for fighting COVID-19 and tax amnesty programmes. Some of the non-tax measures included measures meant for enhancing business cash flow, enhancing business continuity, enhancing household cash-flow and measures to support the informal sector and/or small businesses. The second survey on COVID-19 impact on customs revenue revealed that: the lockdowns imposed by African jurisdictions, suspension in customs duties on importation of health-related products, and reduction in physical examinations at ports of entry resulted in a major drop in customs revenue for African tax administrations. The third survey on business continuity and risk management revealed that some African tax administrations did not have Business Continuity Plans (BCPs) in place. Even those that had the BCPs in place were not implementing them, with some administrations citing inadequate financial resources. In addition, some of the tax administrations were not implementing risk management practices, with some acknowledging that risk registers were not yet in place.

In the following table, we focus on measures reported by seven selected countries (Eswatini, Kenya, Madagascar, Nigeria, Rwanda, Togo and Zimbabwe).[2]

2 Eswatini, Kenya, Madagascar, Nigeria, Rwanda, Togo and Zimbabwe participated in the ATAF Research Webinar held on 22 April 2021 and reported on these measures.

Table 1: Relief measures adopted by selected African tax administrations[3]

Relief Measures	Description
Provisional tax payments postponement	• In Eswatini, the due date for provisional tax was postponed by 3 months. • Togo and Madagascar offered tax reductions in the transport, hotel, restaurant, tourism, and similar sectors. • Togo also granted a deferral of the tax payment upon request by companies in industries heavily affected by the pandemic. Further, Togo offered a reduction of up to 25 percent on the advance payment of taxes by companies in these sectors
Returns filing extensions	• Eswatini extended filing deadlines of returns by three months before penalties are applied. • Nigeria offered an extension of the due date for filing Corporate Income Tax (CIT), Value-added Tax (VAT), and Withholding Tax (WHT) returns by one month and offered a 3-month extension period for filing Personal Income Tax (PIT) annual returns. • Togo also adjusted the deadlines for filing tax returns and financial statements
Special filing/ payment arrangements for current Income Tax Dues	In most countries, taxpayers facing cash flow problems are required to provide evidence to be considered for special payment arrangements. • Nigeria firstly allowed CIT taxpayers to file their returns using unaudited accounts but having to submit audited financial statements within two months after the revised, due date of filing. Secondly, taxpayers facing challenges in sourcing foreign currency to offset their tax liabilities can pay in local currency. Thirdly, equalisation of insurance companies was offered, thereby allowing the companies to carry forward losses beyond the statutory four years required for other categories of companies. • Togo suspended the application of tax sanctions in the event of tax adjustment. • Madagascar allowed payment in two instalments, half by 15 May 2020, and the other half by 15 June 2020. • Madagascar and Rwanda accelerated VAT credit refunds. • Rwanda waived Pay As You Earn (PAYE) for six months for teachers at private schools and three months for employees in the tourist sector
Waiver of penalties and interest	For old debts, revenue administrations have waived penalties and interest. • In Eswatini, penalties were waived if the principal was cleared by the end of September 2020. This offer applied to all debts (excluding customs debt). • Kenya also waived penalties for warehouse goods delayed by COVID-19. • Nigeria waived penalty and interest on tax arrears arising from desk reviews, tax audits, or tax investigations. Further, Late Returns Penalty (LRP) for taxpayers that pay early, and file later was waived

3 ATAF (2020). *Tax Administration & Policy Developments in Response to the COVID-19 Pandemic in Africa*, https://events.ataftax.org/index.php?page=documents&func=view&document_id=66&token=434f82517b482222496d6c35fb9a58e1&thankyou.

Relief fund and exemptions for compliant SMEs	• Eswatini set aside an E90 million (USD6.24 million) relief fund for small and medium enterprises (SMEs). All fully compliant SMEs with a turnover of up to E8 million (USD0.55 million) received a refund of Company Tax paid in the 2019 tax year. • Nigeria exempted small companies from income tax and reduced the tax rate by up to 20 percent for medium companies to support business start-ups and encourage recapitalisation and job creation for small and medium businesses. Nigeria also lowered the VAT compliance threshold to reduce compliance burdens on start-ups and small companies
Customs exemption and other special considerations of all COVID related equipment	• Countries granted duty (including VAT for Eswatini and Madagascar) exemption for all COVID-19 related equipment (masks, sanitizers, personal protective equipment, and any other medical items related to the COVID-19 pandemic). • Togo went further to exempt from customs duties and taxes, and the importation of agricultural equipment. • Kenya extended the warehousing period for all products in the bonded warehouses whose clearance was impacted by COVID-19. Most countries also expedited the clearance of critical supplies
Increased service provision via online channels	• In Eswatini, only electronic payment is allowed; no taxpayer may pay in cash. This has resulted in electronic filing improving from around 1 percent to 57 percent. • Kenya adopted online dispute resolution and enhanced usage of the call centre. • Nigeria and Togo suspended external on-the-spot tax audits of companies, field audits, investigations, and monitoring visits until further notice. • Nigeria has also adopted electronic platforms for filing tax returns, paying taxes, and applying for Tax Clearance Certificates (TCCs). Moreover, the scope of Stamp Duties was expanded to include electronic transactions and cross-border transactions. • Togo and Madagascar enforced remote declaration and remote payment. Madagascar also limited all internal and external correspondence to all directorates and operational units to electronic means only
Increased adoption of technological solutions that minimise contact with taxpayers	• In Kenya, there was increased utilisation of scanners in cargo verification. • Nigeria implemented taxation of offshore digital services with a significant presence in Nigeria. • Zimbabwe implemented: (1) Change in ICT policies; (2) Change of ICT hardware from fixed to mobile devices; (3) Change in the ICT Security & Risk Management framework
Taking preventive health measures	• Kenya embarked on fumigation of high-risk cargo and banned the importation of second-hand clothes. • Zimbabwe implemented several measures such as: (1) Provision of personal protective equipments (PPEs) such as masks, face shields, sanitizers, and gloves to tax administration staff; (2) Office disinfection which is done at all tax administration offices at least once every 2 weeks or whenever there is a confirmed positive case; (3) Institution of health desks where temperature checks and hand sanitization is done before entry into offices, and foot baths installed at all building entry points; (4) COVID-19 testing targeting high risk and emergency cases; (5) Flexible working arrangements which include working from home arrangements and staff rotations to decongest offices

3. Impact of Relief Measures on Economic Sectors and Tax Types in African Tax Outlook (ATO) Countries[4]

A sectoral analysis of the measures implemented by African jurisdictions showed the following sectors as the main winners in the COVID-19 era: Health Sector due to increased demand for healthcare services, pharmaceuticals and medical supplies; Telecommunication and Information Technology as a result of lockdown restrictions, which increased mobile phone services, e-learning, e-commerce, and development of apps. In some countries, the Finance & Insurance sectors also positively benefited from a boost in business. The Foodstuffs Manufacturing Sector also benefited due to positive supply-side response.

The main losers in terms of sectors as reported by ATAF member tax administrations were the Tourism Sector, mainly due to travel restrictions imposed by countries, the Education Sector (due to closure of schools and educational institutions as a result of movement restrictions); Accommodation and food services (due to lockdowns); Construction industry; Mining (mainly due to declining commodity prices and reduced output); and the Arts and Entertainment industry (also due to the imposed lockdown).

The measures that were instituted had a varied impact across African countries. As already noted in Table 1, Eswatini improved electronic filing from around 1 percent to 57 percent due to a ban on cash payments. Through the tax amnesty, in 2020, Eswatini also reported a reduction in tax arrears. On the other hand, in 2020 Rwanda reported that the suspension of physical tax audits might result in an estimated revenue loss of RWF2 billion (about USD1.99 million). Although not at the estimated margin, according to data from the ATO Databank portal there was a reduction in total tax revenue from USD4.4 billion in 2019 to USD4.3 billion in 2020 and improved to USD4.9 billion in 2021.[5]

The reduction of property registration fees in Togo from 5 percent to 1.5 percent resulted in a 67 percent increase in land transfers in 2020 compared with 2019. Indeed, despite granting several concessions, Togo surpassed the 2020 revenue target by 4.8 percent. However, the 2020 nominal revenue rise of 4.8 percent was lower than the 2019 rise of 11.5 percent, implying that the economy of Togo had just been experiencing a positive growth trajectory which could not be thwarted, even by the COVID-19 pandemic.

Although the ATO countries had recorded a high tax revenue growth on average of 2.7 percent in 2019 (see Figure 1 below), since the outbreak of the pandemic, it dropped to a negative rate of 0.5 percent in 2020 before it picked up in 2021 to 7.1 percent. The drop in revenue growth in 2020 is attributable to the economic impact of the COVID-19 pandemic across the African continent, and the restrictive measures governments took to contain it. Similarly, because of the COVID-19 crisis, the fiscal space became more restricted and tax arrears increased in many ATO countries. The negative effects of the pandemic were quickly offset as a sharp increase of tax revenue was witnessed in 2021.

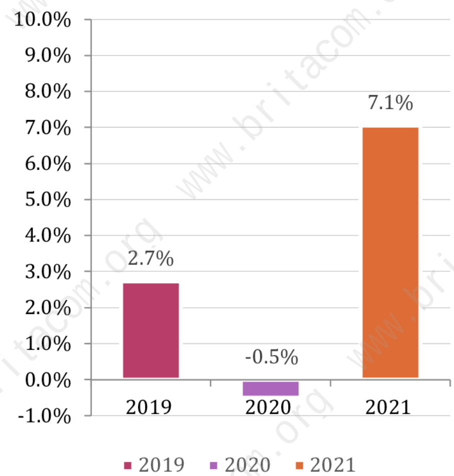

Figure 1. Average tax revenue growth in 35 ATO countries (2019–2021)

4 African Tax Outlook (ATO) countries include 35 African countries. They participated in the 2021 ATO publication. This publication is released annually by ATAF.

5 ATAF. *ATAF Databank*, https://ato.ataftax.org/atafdatabank/data-resources.

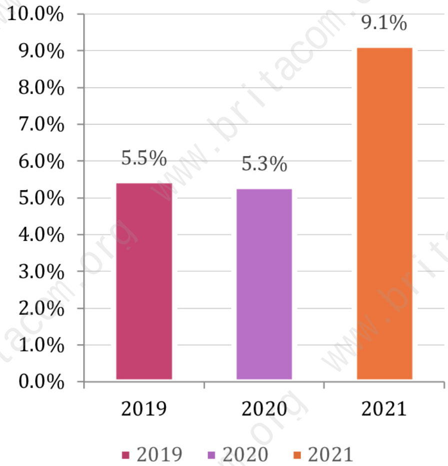

Figure 2. Gross VAT revenue growth

According to Figure 1, African countries were quick to adjust, and the revenue losses were only pronounced in 2020.

As earlier mentioned, for 18 countries who responded to the 2020 ATAF Survey on Tax Administration and Policy Measures to Combat COVID-19 the reduction in customs revenues was estimated to be between USD400 million and USD500 million, while for the whole continent the reduction in customs revenue reached above USD1 billion (ATAF, 2020).

A decline in spending for over two years was expected as the government measures negatively impacted the spending behaviours of most consumers. As indicated in Figure 2, unlike in the case of total tax revenues, the growth of gross VAT revenues (domestic and import consumption) did not decrease significantly during this period.

Figure 2 shows that, while the growth in VAT revenue remained constant between 2019 and 2020, there was significant growth in revenue from VAT in 2021.

4. What Lies Ahead for Tax Administrations in Africa?

Given the ability of tax administrations and ministries of finance to curtail socio-economic shocks due to the pandemic, the resilience needs to continue given that the impact of the pandemic is still much underway. Thus, there are measures recommended by ATAF to support sustainable revenue collection amidst the current turbulent environment. Some of those are noted below.

Going forward, it is important to consider reinforcing the functioning and design of good VAT systems in African countries as VAT revenue is the large tax contributor to total taxes with a contribution of 32.1 percent in 2018, 30.7 percent in 2019 and 35.3 percent in 2020 (African Tax Outlook, 2021). Particularly, to boost the efficiency and the revenue mobilisation capacity of VAT systems, it is well advised to consider reducing the number of VAT exemptions that exist. The online sales of services and digital products, specially by non-resident companies, on which VAT is not collected, is a potential source of tax revenue and countries should be guided in the implementation of a comprehensive VAT strategy for e-commerce transactions.

Countries are expected to engage in tax policy reform discussions to expand their tax bases and close their tax gaps — taxation of digital economies, combating transfer pricing and other forms of illicit financial flows, reducing the informal sector, effective enforcement measure, intentional taxpayer engagement and increasing voluntary tax compliance are some of the proposed solutions. Exploring previously uncharted revenue streams such as digital services taxes, wealth taxes and property taxes may boost revenue collections. Since customs revenues were negatively impacted on, these can be safeguarded through post clearance audits; harnessing modern technologies such as drones and scanners to curtail smuggling activities; dealing with trade mis-invoicing and mis-classification through joint controls and enforcement, and strict unit value inspections. With most countries investing in electronic cargo tracking systems, and increased opportunities due to joint controls and enforcement, loss of customs revenue is now largely due to trade mis-invoicing and mis-classification.

Modernising tax administration in the advent of the Fourth Industrial Revolution is also key. In the 2021 ATO (African Tax Outlook, 2021), a distinction between digitisation and digitalisation was made. On one hand, digitisation aims to improve transition processes, while on the other hand, digitalisation is data driven transformation which creates new revenue streams, as such has the opportunity to help revenue authorities increase revenue mobilisation. The Fourth Industrial Revolution and COVID-19 have propelled the use of technologies on the continent albeit at varying degrees. ATAF continues to support its members through technical assistance and policy briefs to ensure *Efficient Implementation and Maintenance of ICT Tax Systems in Africa*[6] and how to navigate accordingly *Digital Services Taxation in Africa*[7].

Regarding non-tax measures, enterprise risk management is recommended to analyse institutional risks and map recovery plans through Compliance Risk Management frameworks. Further, the monitoring and evaluation of BCPs will aid tax administrations to discover appropriate prevention and recovery from possible threats.

In summary, in line with global and regional trends, tax administrations should frequently monitor and review the relief measures implemented during the pandemic. In that regard, tax administrations can benefit from comparative data and analysis from multilateral and regional institutions such as ATAF who keep abreast of the developments across the region. Comparative data and analysis would inform countries about which measures to uphold and which measures to freeze, since there are no sunset clauses. Again, governments could also learn from the global statistics and updates on COVID-19 to inform policy, since in a global context, countries have been affected differently.

5. Conclusion

In this article, the change in dynamics of tax policy and administration was illustrated in the negative impact of COVID-19 on tax revenue and economic growth in Africa. Countries had to respond swiftly to curtail the negative impact of the pandemic not only from a public health perspective, but also from tax administration and policy perspectives prompting response measures necessary to support taxpayers. Some of the measures implemented left huge revenue gaps, and it is necessary to revisit some of the reliefs granted, as in some member tax administrations, they were not granted with caps or sunset clauses.

6 ATAF (2021). *Efficient Implementation and Maintenance of ICT Tax Systems in Africa: Compilation of Good Practices, Success Stories, and Lessons Learnt*, https://events.ataftax.org/index.php?page=documents&func=view&document_id=136.

7 ATAF (2020). *Domestic Resource Mobilization (Digital Services Taxation in Africa),* https://events.ataftax.org/index.php?page=documents&func=view&document_id=61.

Italy's Fiscal Response to the COVID-19 Crisis

Simona Massai

Simona Massai
Head
Relations with International Organisations Unit
Italian Revenue Agency

Abstract: This article focuses on measures envisaged and adopted by the Italian Revenue Agency during the COVID-19 pandemic to prevent the spread of virus and to support businesses and individuals in mitigating the worst economic impact of the crisis. In particular, measures such as suspension of tax payments and processing, grants allocation, tax credits and increased use of digital services have been adopted to recover and relaunch the financial system. As a member state of the European Union, Italy has also submitted its recovery and resilience plan that is committed to boosting a sustainable growth while fostering the digital and green transition.

Keywords: Tax incentive; Tax credit; Recovery and resilience; COVID-19; Digitalisation; Grants allocation

1. Introduction

The COVID-19 pandemic strongly hit the global economy, spreading uncertainty at different levels. In this scenario, the intervention of each state is still crucial in recovering the economic system by supporting businesses and individuals. With this purpose, the Italian government also considered it necessary to adopt specific tax policies and measures.

It should be underlined that Italy adopted many initiatives at the beginning of the pandemic in order to address the most urgent difficulties due to the lockdown and the healthy measures in force to prevent the spread of the virus. Some of these measures are still being implemented since they have positive effects in terms of efficiency. For instance, working from home is now an ordinary way of working in the public administration and in the private sector. On the other hand, other measures are closely related to the pandemic period and have a limited application.

Furthermore, Italy has recently adopted a recovery and resilience plan, as better described below.

2. Suspension Measures

Starting with the relief from tax obligations, at the beginning of the pandemic the Italian government provided a suspension of tax payments and formalities for specific sectors affected by the restriction imposed, in order to respond to the health emergency, as detailed below.

The government allowed the suspension of the payments for withholding tax, regional and municipal surtax, social security contributions, insurance compulsory premiums and VAT.

Moreover, during the initial period of the COVID-19 pandemic, the payments of the sums due following tax inspections resulting in a settlement, rectification and liquidation and as part of the recovery of tax claim have been suspended.

Meanwhile, the audit activities carried out by the Italian Revenue Agency were suspended from 8 March 2020 to 31 May 2020.

Furthermore, a notice of assessment that expired between 8 March 2020 and 31 December 2020 might be served from 1 March 2021 to 28 February 2022. The postponed deadline was applicable only to notices of assessment formed before 31 December 2020.

3. Grants Allocation

In addition to the measures described above, the Italian government also made policies aimed to recover the financial situation.

With reference to those policies, it provided for a non-refundable grant proportioned to the revenue decrease suffered by companies and professionals, with specific focus on the categories most affected by the COVID-19 pandemic.

The measure benefited taxpayers who meet two requirements:

i) a total amount of income not exceeding a specific threshold (modified by the subsequent law decrees several times) in a certain fiscal year; and

ii) revenues, in a specific period of the fiscal year, lower than those in the same period of the previous fiscal year, at least of a specific percentage (for example, the condition for accessing the grant in 2021 was having registered in 2020 revenues lower at least 30 percent of those related to FY 2019).

This grant was available to all companies and professionals, regardless of the specific activity carried out.

4. Tax Credits

Some of the most important measures adopted during the pandemic to relaunch the economy include tax credits aimed at addressing the difficulties arising from the crisis. Tax credit for recurring and extraordinary expenses is worth mentioning.

Another important tax credit has been allowed for the expenses concerning sanitisation of workplaces and purchase of Personal Protective Equipment.

The expenses allowable are, for example, those incurred for the administration of COVID-tests to employees and for the purchase of cleaning and disinfectant products, safety devices (such as thermometers, thermos scanners, decontaminating and sanitising mats and trays) and devices suitable for guaranteeing interpersonal safety distance (such as protective barriers and panels).

With regard to the safety at workplaces, the Italian Government also provided tax credit for

adjustments of workplaces. The beneficiaries of this tax credit are persons doing business in public places, such as bars, restaurants, hotels, theatres and cinemas. Interventions qualified for the tax relief include specific building works and innovative investments.

In addition, some tax measures have been taken to mitigate the impact of the COVID-19 pandemic on these activities due to their relevance to sectors of the Italian economy such as tourism, entertainment, catering and fashion.

In particular, starting with the touristic sector, the so-called "*bonusvacanze*" must be mentioned. It includes a financial contribution – given to the Italian families by the government, under certain conditions – for services offered in Italy by tourist-accommodation companies with bed and breakfasts.

Moreover, there is an exemption of the IMU (municipal tax on real estate) payments due for the fiscal years 2020, 2021 and 2022 for certain categories of buildings used in tourism and entertainment, for example those used for cinema shows, theatres and concerts.

With reference to the entertainment sector, a tax credit on the expenses sustained for the use of digital services for the transmission of live shows as concerts, ballets or theatrical performances has been introduced.

With regard to the fashion industry, which was hardest hit by the pandemic both in terms of demand and supply, a tax credit was granted for companies active in the fashion and textile sector. The tax credit is proportional to the value of the inventory and stocks exceeding the medium value of that registered in the previous three years.

Finally, it is worth mentioning the incentive to improve energy efficiency and reduce the earthquake risk (the so-called "110 percent" or "ecobonus and sismabonus"), considering the success this credit is having in Italy. The measure provides for a 110 percent deduction for expenses incurred in a certain period for works carried out to improve the buildings' energy performance (as thermic insulation work and other measures to improve energy efficiency, as the installation of photovoltaic system) and/or for earthquake protection. The individuals who incur eligible expenses may opt to transfer a tax credit of the same amount to third parties, including credit institutions and other financial intermediaries, rather than using the deduction directly. This also applies to most of the other credits mentioned above.

5. Italy's Recovery and Resilience Plan

Following the crisis arising from the pandemic, being a member state of the European Union, Italy has presented its recovery and resilience plan, which responds to the urgent need of enhancing a rapid economic recovery. The reforms and investments mentioned in the plan should boost sustainable growth while fostering the digital and green transition. All reforms and investments have to be implemented by August 2026 and have generated great expectations. Indeed, it has been estimated that Italy's gross domestic product will grow by 1.5% to 2.5% and 240,000 jobs will be created.

The Italian recovery and resilience plan is based on three main areas of key measures.

The first package of reforms and investments is aimed at securing Italy's green transactions, by granting sustainable mobility, energy efficiency in residential buildings and renewable energy and circular economy.

The second area of intervention is focused on supporting Italy's digital transition. This implies reforms and investments in development of ultra-fast and 5G networks, digitalisation of businesses and public administration.

The last key measures are aimed at reinforcing Italy's economic and social resilience. These measures cover many sectors. Indeed, several reforms have been planned to renew and modernise the education and labour market, the public administration and justice system and the business environment. In addition, social and territorial cohesion will be enhanced, by investing in local social services to improve the quality of life. Finally, special attention is paid to healthcare, telemedicine and homecare, including the use of new technologies to improve hospitals and home healthcare.

Promoting Economic Recovery Through Taxation in Indonesia

Yusuf Alaidrus Hidayatullah and Frans Hans Z D Manik

Yusuf Alaidrus Hidayatullah
Tax Official
Directorate of International Taxation
Directorate General of Taxes of Indonesia

Frans Hans Z D Manik
Tax Official
Directorate of International Taxation
Directorate General of Taxes of Indonesia

Abstract: After two consecutive quarters of decreasing GDP, Indonesia experienced a recession for the first time in 22 years. The Indonesian government has responded since the COVID-19 pandemic and started with new measures to reduce the pandemic's potential for further harm. In 2021, efforts to revive and speed up economic growth continued. Indonesia's economic recovery has been boosted by the country's tax policy, particularly concerning the tax incentives to mitigate the harm from the COVID-19 outbreak.

Keywords: Tax policy; Tax incentive; Economic recovery; COVID-19

1. Introduction

Indonesia, like most countries in the world, has been confronted with an unprecedented challenge due to the COVID-19 outbreak. In 2020, Indonesia's Gross Domestic Product (GDP) decreased, bringing the economic growth for the year down by 2.07%.[1] For the first time in 22 years, Indonesia fell into recession after two consecutive quarters of declining GDP.

The Micro, Small and Medium Enterprises (MSMEs) that are regarded as the backbone of Indonesia's economy were severely affected. Nine out of ten MSMEs faced lower demand for their products during the pandemic.[2] About 1.8 million people became unemployed between February 2020 and 2021, and 2.8 million people fell into poverty.[3]

Taxation plays an important role in Indonesia, both as a significant source of revenues and as an instrument of fiscal policy. Since the beginning of the

1 Badan Pusat Statistik (2021). *Ekonomi Indonesia 2020 Turun sebesar 2,07 Persen (c-to-c)*, https://www.bps.go.id/pressrelease/2021/02/05/1811/ekonomi-indonesia-2020-turun-sebesar-2-07-persen--c-to-c-.html.

2 United Nations Development Programme (2021). *Micro, Small and Medium Enterprises Bear the Brunt of the COVID-19 Pandemic in Indonesia*, https://www.undp.org/asia-pacific/news/micro-small-and-medium-enterprises-bear-brunt-covid-19-pandemic-indonesia.

3 The World Bank (2021). *Indonesia Economic Prospects (IEP), June 2021: Boosting the Recovery*, https://www.worldbank.org/en/country/indonesia/publication/indonesia-economic-prospects-iep-june-2021-boosting-the-recovery.

COVID-19 outbreak, the Government of Indonesia has been taking action by launching new measures to prevent greater damage from the pandemic. In 2020, the Government of Indonesia enacted the Government Regulation in Lieu of Law No. 1 of 2020, which governs some policies aimed at rescuing the economy.

The regulation that was then passed into law by enacting Law No. 2 of 2020 also includes tax measures focusing on the business sectors disrupted by COVID-19 pandemic. The law lowers the corporate income tax rate from 25% to 22%, extends the due date for certain tax matters, and mandates the Minister of Finance (MoF) to provide facilities on customs.

In the law, the government also introduced taxes on electronic commerce, both the income tax and the value-added tax (VAT). However, the income tax implementation is currently being suspended due to the discussion on the Two-Pillar solution to address tax challenges arising from the digitalization of the economy.

Further, in Minister of Finance Regulation No. 23 of 2020, which was subsequently amended by Minister of Finance Regulation No. 44 of 2020, and Minister of Finance Regulation No. 86 of 2020, the tax incentives were more specific.

The Income Tax Article 21 (payroll tax) on certain business sector would be borne by the government. The government would also bear the Final Income Tax on taxpayers with certain gross turnover (specifically the MSMEs). Income Tax Article 22 on Import for certain criteria of taxpayers would not be collected by the government. Taxpayers with certain criteria would also be eligible for deduction of Income Tax Article 25 (tax installments).

In addition, VAT incentives in the form of an early refund of VAT overpayment would be provided to certain taxpayers. Moreover, in Minister of Finance Regulation No. 21 of 2021, the government also offered VAT incentives for housing.

Indonesian economy started moving toward recovery in 2021. Indonesia pulled out of recession with 7.07% GDP growth in the second quarter. The economy grew by 3.69% in 2021. The momentum will continue in 2022. The economic growth, accelerated by 5.44% in the second quarter, is still on track for the target projected by the government at 5.2%.[4]

The work on recovering and accelerating economic growth continued in 2021. The Government of Indonesia reformed the tax law by enacting Law No. 7 of 2021 regarding the Harmonization of Tax Regulation.

The primary objectives of this article are to outline the work on recovering and accelerating economic growth from the impact of the COVID-19 outbreak in Indonesia. In doing so, this article will describe the Indonesian tax policies regarding the tax incentives in the pandemic era and the prospects of Indonesian tax policies after the COVID-19 outbreak.

2. Indonesian Tax Policies

2.1 VAT on Transactions Carried out Through Electronic Systems (PMSE)

In 2020, the Directorate General of Taxes of Indonesia (DGT) issued new regulations for VAT on PMSE as part of a tax policy package aimed at boosting economic growth in response to the effects of the COVID-19 outbreak. Furthermore, the introduction of the regulation was also beneficial to create a level playing field in terms of tax treatment for conventional and digital economy businesses as well as between domestic and foreign businesses.

As is well known, Indonesia released a healthy rule to restrict citizen activities and slow the spread of the COVID-19 outbreak. This circumstances made using a digital platform for economic transactions more favorable than traditional commercial activities.

According to the Bank Indonesia (BI), the Indonesian central bank, e-commerce

4 Katriana (2022). *Finance Ministry Projects 5.2% Economic Growth in 2022*, https://en.antaranews.com/news/213937/finance-ministry-projects-52-economic-growth-in-2022.

transactions reached IDR401 trillion in 2021, an increase of IDR135 trillion (50.7%) from IDR266 trillion in 2020.[5]

The current VAT rule has numerous restrictions on capturing the VAT for e-commerce transactions, notably with regard to the details of the transaction, payment information, and the involved parties, particularly from the foreign e-commerce platform.

In ways to collect, pay and report the VAT on the consumption of intangible taxable goods and/or taxable services from outside the Indonesian Customs Area (ICA) within the ICA, on trading through an electronic system platform, Director General of Taxes Regulation No. 12 of 2020 (PER-12) was issued as the implementing regulation of Minister of Finance Regulation No. 48 of 2020 (PMK-48).

Additionally, Minister of Finance Regulation No. 60 of 2022 (PMK-60) was started to change PMK-48 following the amendment of Law No. 2 of 2020 into Law on the Harmonization of Tax Regulations No. 7 of 2021, specifically in regard to the adjustment of VAT rate from 10% to 11%.

Since the core business operations of the e-commerce sector are carried out digitally, the imposition of VAT on PMSE has a unique arrangement that differs from the imposition of other VAT.

First, one of the key regulations that will optimize the VAT collection for e-commerce transactions, particularly for foreign e-commerce platforms, is the appointment of PMSE Entrepreneur consisting of Foreign Trader, Foreign Service Provider, and Foreign PMSE Organizer.

PMK-60 and PER-12 set the threshold, including IDR600 million in transaction value per year and/or the quantity of traffic exceeding 12,000 per year in Indonesia, when determining the overseas PMSE Entrepreneur as a VAT collector.

In terms of tax administration, DGT will provide PMSE Entrepreneur with an identification number to carry out his obligation to collect VAT from customers or users.

Second, the terms "Buyers and/or Service Users" that will be involved in e-commerce transactions and be subject to VAT are also defined in PMK-60 and PER-12.

Individuals or entities who reside or are domiciled in Indonesia, make payments using payment methods offered by Indonesian financial institutions, or conduct business using Indonesian IP addresses or phone numbers with the Indonesian country code are defined as buyers and/or service users based on the regulation.

With this agreement, the imposition of VAT on PMSE transactions will be restricted to those involving intangible goods and services utilized solely in Indonesia.

Third, the proof of collection, which may be in the form of a commercial invoice, billing statement, order receipt, or other similar documents that state the amount of VAT that has been collected and paid, is what distinguishes the VAT on PMSE from other VAT that needs more specific tax invoice.

Fourth, regarding the tax payment, the VAT collector shall use Rupiah, United States dollar, or other foreign currency determined by the DGT to pay the collection of the VAT on PMSE.

This arrangement provides more flexibility in terms of the payment method for the imposition of VAT on PMSE transactions considering that the VAT collector is a foreign resident.

2.2 Tax Incentives for Taxpayers Affected by the COVID-19 Outbreak

2.2.1 Incentive for Income Tax Article 21 (payroll tax)

Employees who receive income from employers with certain Business Classifications (KLU), granted an Import Facility for Export Purposes (KITE), granted a Bonded Zone Operator permit (PDKB), have the tax identi-

5 Maria Elena (2022). *BI Catat Nilai Transaksi E-Commerce Tembus Rp401 Triliun pada 2021*, https://ekonomi.bisnis.com/read/20220127/9/1494047/bi-catat-nilai-transaksi-e-commerce-tembus-rp401-triliun-pada-2021.

ty number, and earn a fixed gross income less than IDR200 million per year will be eligible for a tax incentive under Income Tax Article 21 Borne by Government (DTP).

2.2.2 Incentive for Final Income Tax for MSMEs

The business income received by Taxpayers who have a certain gross turnover in accordance with the provisions as referred to in Government Regulation No. 23 of 2018 (PP-23), is subject to a Final Income Tax of 0.5% of the total gross turnover.

During the COVID-19 outbreak period, the Indonesian government will bear the Final Income Tax of 0.5% of the total gross turnover for the eligible taxpayers who meet the criteria as referred to in PP-23.

2.2.3 Incentive for Income Tax Article 22 on Import

According to Indonesian income tax law, when taxpayers import goods into Indonesia, the Income Tax Article 22 on Import is collected by the foreign exchange bank or the Directorate General of Customs and Excise.

The Indonesian government provides incentives, particularly for the Income Tax Article 22 on Import, in the form of exemption to taxpayers with a KLU related to some sectors, such as transportation, health, education and restaurant. This is conducted to lessen the effects of the COVID-19 outbreak.

The exemption of Income Tax Article 22 on Import requires an exemption certificate issued by the DGT.

2.2.4 Incentive for Income Tax Article 25

The Income Tax Article 25 is the tax installments in the current fiscal year that must be paid by the taxpayer per month and calculated based on the annual tax return.

The Indonesian government gives an incentive in the form of a 50% reduction in the amount of Income Tax Article 25 for the taxpayers with a KLU related to some sectors, such as transportation, health, education and restaurant.

2.2.5 Incentive for VAT on sales of certain properties

The government provides a VAT cut on new home sales to boost the property sector's economic activity. The incentive is subject to certain criteria, among others, the maximum selling price is IDR5 billion.

The incentive was launched in 2021 through the enactment of Minister of Finance Regulation No. 21 of 2021 (PMK-21), then amended by Minister of Finance Regulation No. 103 of 2021 (PMK-103), stipulating that the VAT cut of 100% would be provided for the houses with selling price up to IDR2 billion, 50% for the houses with a selling price between IDR2 billion to IDR5 billion. The incentive was provided from March 2021 up to December 2021.

Further, in 2022, Minister of Finance Regulation No. 6 of 2022 (PMK-6) was enacted to extend the incentive provision up to September 2022 with an adjustment to the percentage of incentive provided. The houses with selling prices up to IDR2 billion would be eligible for a 50% VAT cut, then the homes with a selling price between IDR2 billion and IDR5 billion would be eligible for a 25% VAT cut.

3. The Effect of the Tax Policies

In general, the Indonesian tax policy to prevent more significant damage from the COVID-19 outbreak has positively impacted Indonesian tax revenue in boosting economic growth.

In 2021, the income tax revenue increased by 3.6% over 2020. The income tax revenue rebounded after a decrease of 23.1% last year. Furthermore, the VAT and luxury sales tax revenue in 2021 also increased 11.4% compared with 2020. It also rebounded after a decrease of 15.3% last year (see Figure 1).

Regarding the VAT on PMSE, as of July 2022, the DGT had appointed 127 PMSE Entrepreneurs to collect VAT on e-commerce transactions, among others, Amazon Web Services, Google Asia Pacific, Netflix International, Apple Distribution International and Microsoft Corporation. The implementation of the PMSE regulation contributed to additional VAT revenues. It has been continuously growing since the initial issuance. In 2020, the DGT raised VAT on PMSE by as much as IDR731.4 billion. In 2021, it increased significantly up

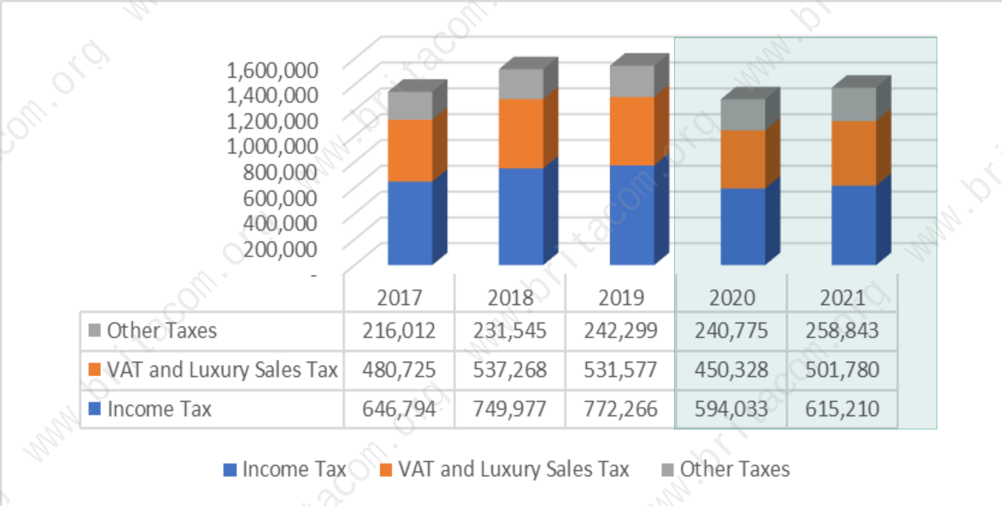

Figure 1. Indonesian tax revenue composition (in billion rupiah)
Source: Indonesian Central Bureau of Statistics.

to IDR3.9 trillion, and as of August 2022, the DGT already generated the VAT amounted to IDR3.5 trillion.[6]

Furthermore, the incentive for Income Tax Article 21 (payroll tax) was provided to maintain the spending power of employees that generate less than IDR200 million per year from the employer in a certain business. In 2020, 131,889 qualified employers utilized the incentive with a total value of incentive utilization of IDR3.5 trillion. Furthermore, in 2021 the facility was used by around 106,100 eligible employers with an increase in total value by IDR5.23 trillion.

The incentive for payroll tax, included in the tax incentive package, lessens the wave of layoffs, as seen by the decline of 0.58% in open unemployment in 2021. Additionally, this tax incentive helps employees have more money to spend, as evidenced by the rise in household consumption growth from -2.63% in 2020 to 2.02% in 2021 (see Figure 2). It is because payroll tax, which the business ought to have paid into the DGT, has instead been used to pay employees in cash.

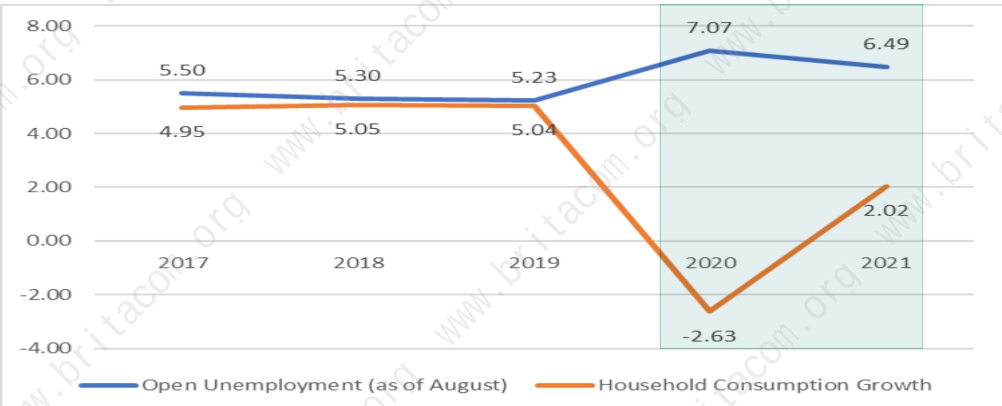

Figure 2. Open unemployment & household consumption growth (in percentage)
Source: Indonesian Central Bureau of Statistics.

6 Triyan Pangastuti (2022). *Hingga 31 Agustus, Setoran PPN PMSE Capai Rp8,2 Triliun*, https://investor.id/macroeconomics/306166/hingga-31-agustus-setoran-ppn-pmse-capai-rp-82-triliun#.

For MSMEs, the Indonesian government gives more attention since MSMEs have a significant contribution to GDP, which is 61.97% of the total national GDP.[7] The main problems that MSMEs entrepreneurs face during the pandemic are the changes in consumption patterns from offline to online and the worker problems due to the implementation of Large-Scale Social Restrictions (PSBB).

The incentive for Final Income Tax on MSMEs was intended to support the affected MSMEs, which boosted economic activities. In 2020, 248,275 MSMEs made use of the incentive with a total value of up to IDR782.3 billion. In 2021, around 138,600 taxpayers utilized the incentive with a total value of up to IDR800 billion.

As shown in Figure 3, the considerable increase in MSMEs entrepreneurs — up to 30.2 million by 2021, indicates the beneficial effects of tax incentives on these businesses. After declining by 31.47 million entrepreneurs in 2020, it has recovered. The growth of commercial bank MSMEs loan by 12.19% compared with the year 2020 is another successful indicator of the tax incentive on MSMEs.

Additionally, the exemption for Income Tax Article 22 on Import was provided for qualified taxpayers that engage in the import of goods. The Indonesian government considered that the listed industrial sectors would be stimulated by this incentive to keep up the pace of imports and business sustainability in the midst of a pandemic. In 2020, 14,941 taxpayers took advantage of the incentives. The tax exemption amounted to IDR13.6 trillion, with import value at IDR529 trillion. Further, in 2021, the incentive was used by around 9,700 taxpayers with a total value of tax exempted by IDR17.87 trillion.

Regarding the incentive for Income Tax Article 25, which was provided in the form of tax installment reduction, the facility was used by 66,682 taxpayers with a realization value amounting to IDR20.6 trillion in 2020. Then in 2021, around 58,300 taxpayers used the facility with an incentive value of IDR26.89 trillion.

Lastly, the Indonesian government provided the incentive for VAT on sales of certain properties for 941 property developers, with the incentive value amounting to around IDR790 billion in 2021.

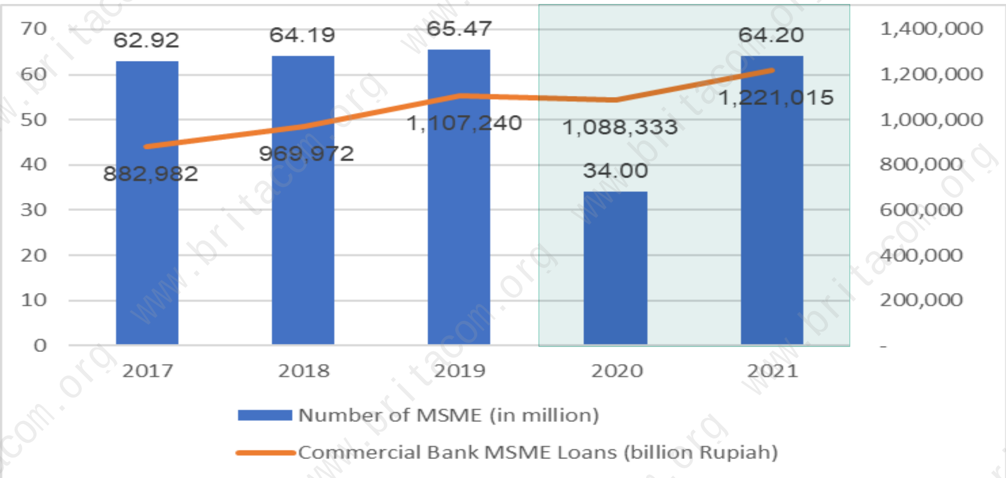

Figure 3. MSMEs entrepreneurs and commercial bank MSMEs loan
Source: Indonesian Central Bureau of Statistics and Ministry of Cooperatives and SMEs.

7 *Upaya Pemerintah Untuk Memajukan UMKM Indonesia*, https://www.bkpm.go.id/id/publikasi/detail/berita/upaya-pemerintah-untuk-memajukan-umkm-indonesia#:~:text=Pentingnya%20Peran%20UMKM%20Terhadap%20Perekonomian%20Indonesia&text=UMKM%20memiliki%20kontribusi%20besar%20terhadap,dunia%20usaha%20pada%20tahun%202020.

From this perspective, we believe that the Indonesian tax policy, particularly regarding the tax incentives to mitigate the damage from the COVID-19 outbreak, has contributed to Indonesia's economic recovery.

4. Outlook

The Indonesian government continues to place more emphasis on the economic growth following the pandemic in line with Indonesia's economic recovery and the declining COVID-19 outbreak wave in 2022.

Tax revenues have been the main source of the Indonesian state budget, contributing up to 80%. The government continues its endeavor to balance economic recovery and tax revenues.

On the tax policy side, the enactment of the Tax Regulation Harmonization Law sets the ground for Indonesian tax policy. It aims to support sustainable economic growth, accelerate economic recovery, and increase taxpayers' compliance. The law governs a wide range of changes to the previous tax law together with the introduction of new measures, including:

- Introduction of a new top marginal rate of 35% for individual taxpayers that earn more than IDR5 billion per year;
- Introduction of the carbon tax;
- Redesigning the tax sanctions;
- Treatment of certain benefits in kind as income tax object;
- New VAT rate at 11% from 1 April 2022 and 12% from 1 January 2025; and
- Enhancing anti-avoidance rule.

Furthermore, the government would also pay attention to taxation on the digital economy. The value of the digital economy in Indonesia in 2021 was recorded at USD70 billion or around IDR1,000 trillion, the highest among Association of Southeast Asian Nations (ASEAN) countries. E-commerce contributed up to USD53 billion or IDR750 trillion, and it is estimated to grow up to USD104 billion in 2025.[8]

Considering the significant growth of the digital economy in Indonesia, it is reasonable to expect additional revenues in years to come. The government also anticipates the outcome of the OECD Two-Pillar Solution discussion that would determine Indonesia's tax policy on the digital economy.

On the tax administration side, the Indonesian government is developing the Core-Tax System. Through the legislation of Presidential Regulation No. 40 of 2018, the Core-Tax System is intended to provide a tax administration that is simple to comply with, dependable, integrated with other taxpayers' data, and capable of improving taxpayer services and monitoring.

References:

[1] Bahtiar Rais Agil (2021). Dampak Pandemi Covid-19 Terhadap Sektor Usaha Mikro, Kecil, dan Menengah serta Solusinya. Jakarta: Research Center for Economics and Public Policy Expertise Board of the People's Representative Council of the Republic of Indonesia.

[2] DGT (2022). CRMBI Langkah Awal Menuju Data Driven Organization. Jakarta: Directorate General of Taxes.

[3] DGT (2021). Insentif Pajak Pandemi Covid-19 Tahun 2020 Fasilitas dan Dampaknya Terhadap Dunia Usaha. Jakarta: Directorate General of Taxes.

[4] Iswahyudi Heru (2021). The Persistent Effects of Covid-19 on the Economy and Fiscal Capacity of Indonesia. 29 *Jurnal Ekonomi dan Pembangunan* 2, pp. 113-30.

[5] Saputra N., Satispi E. & Prihandoko D. (2022). Strategi UMKM Bertahan Melewati COVID-19: Menjadi Fleksibel dan Kolaboratif. 7 *Indonesian Treasury Review: Jurnal Perbendaharaan, Keuangan Negara dan Kebijakan Publik* 1, pp. 33-47.

[6] Tairas D. R. (2020). COVID-19 Pandemic and MSMEs: Impact and Mitigation. 9 *Jurnal Ekonomi Indonesia* 1, pp. 67-80.

8 Kumparanbisnis (2022). *Pemerintah akan Genjot Penerimaan Negara dari Pajak Digital*, https://kumparan.com/kumparanbisnis/pemerintah-akan-genjot-penerimaan-negara-dari-pajak-digital-1yuKeKCYIZ4/full.

Stimulating the Economy Through Tax Initiatives: A Malaysian Perspective

Noriza Esa

Noriza Esa
Tax Specialist
Finance Department
Special Industry Branch
Inland Revenue Board of Malaysia

Abstract: Malaysia was not spared from the COVID-19 pandemic crisis. The Malaysian government has been proactive in crisis handling and allocated various aid packages to individuals, businesses and sectors affected. As part of the expansionary fiscal policy, the government has strengthened existing tax measures and introduced some new ones to maintain resilience of the economy, encourage domestic investment and attract foreign investments into the country. This paper highlights the key fiscal policies and tax measures deployed by the Malaysian government to drive the economic recovery.

Keywords: COVID-19 pandemic; Economic impacts during the pandemic; Tax policies and measures

1. Introduction

The COVID-19 pandemic has hit the world with unprecedented consequences and left countries with severe health, economic, and social crises. As countries were underprepared to deal with catastrophes of such magnitude, delayed responses exacerbated the crises and caused high rates of fatality. Countries were forced to close their borders, disrupting the supply chains and export and import of goods across the globe. More than two years have passed since the beginning of the pandemic, and countries around the world are at various paces on the road to recovery while mending the damages brought by the pandemic.

2. Malaysian Economic Performance

Malaysia introduced a strict eight-week Movement Control Order (MCO) in March 2020 to hamper the spread of the virus. Essential services in food supply, household supplies and healthcare were allowed to operate while most non-essential economic sectors and social activities were put to a complete halt. This has caused the country an economic loss of an estimated RM2.4 billion daily, leaving it on the verge of economic collapse if the lockdown had continued.[1] The gov-

1 Adib Povera, Hana Naz Harun & Haranya Arumugam (2020). *PM: Malaysia has Suffered RM63 Billion Losses due to MCO*, https://www.nst.com.my/news/nation/2020/05/588982/pm-malaysia-has-suffered-rm63-billion-losses-due-mco.

ernment then eased on the MCO by introducing the Conditional Movement Control Order (CMCO) which marked the reopening of the economy.

According to data from the Department of Statistics of Malaysia (DOSM), Malaysian economy was already slowing down at the end of 2019, with the GDP growth rate reduced to 4.4%.[2] Most sectors were deeply affected, particularly the tourism, transportation, entertainment, as well as cultural and creative industries. Micro, small and medium-sized enterprises (MSMEs) which accounted for almost 98% of the overall establishments in Malaysia were affected most.[3] MSMEs faced restricted cash flows, dwindling demand and supply shortages during the prolonged MCOs.[4] The business owners were able to survive with their problem-oriented mindset, upgrading skills, raising social capitals via the internet, and optimizing digital marketing.

Although some sectors of the economy were badly hit by the pandemic, some sectors were performing well. The service sector, particularly sub-sectors of finance, insurance, and information and communication, recorded a positive growth. The information and communication technology (ICT) industry was actually thriving in the year of 2020, marking a double-digit growth of 10.4% compared with 7.3% in 2019.[5] Changes in the pattern of consumer spending through online and digital platforms contributed to the growth of ICT-related businesses. Other sub-sectors of petroleum, chemicals, rubber and plastic production also saw a vigorous growth. Malaysia, being one of the world's largest manufacturers and exporters of surgical masks and gloves, benefited from the surging demand for these essential items which has made glove-manufacturing a lucrative industry during the pandemic.

3. Fiscal Policies and Tax Measures

The Malaysian government has been proactive in implementing wide-ranging measures to cushion against the adverse impacts of the pandemic. Priorities are given to the improvement of the health system for the welfare of the people affected by the pandemic as well as business owners struggling for survival. It is equally important for the government to maintain resilience of the economy and encourage both domestic and foreign investments.

The government introduced a total of eight stimulus packages in the form of financial assistance and relief programme during the pandemic, in an effort to ease the burden of Malaysians across the board. Cash assistance was allocated to specific vulnerable groups. Incentives were approved and loans were granted to eligible applicants verified by various government agencies and participating financial institutions. Various incentives involving direct and indirect taxes were also introduced, targeting at affected businesses and individuals.

This "new normal" requires changes in the lifestyle to accommodate working and learning from home. Tax incentives were given to employers for expenses deduction in enabling this new working environment. Digitalisation projects were funded to improve coverage and internet network capacity. In addition to tax reliefs for the purchase of ICT devices, internet

2 DOSM (2022). *Is Our Economy in the Recovery Phase?*, https://www.dosm.gov.my/v1/uploads/files/6_Newsletter/Newsletter%202022/DOSM_BPE_4_2022_Series%2052-%20BI_compressed.pdf.

3 SME Corp. (2022). *Profile of MSMEs in 2016-2021*, https://www.smecorp.gov.my/index.php/en/policies/2020-02-11-08-01-24/profile-and-importance-to-the-economy.

4 Putri Noorafedah Megat Tajudin, Nur Aira Abd Rahim, Khairuddin Idris, et al. (2021). Weathering the Economic Impact of COVID-19: Challenges Faced by Microentrepreneurs and Their Coping Strategies during Movement Control Order (MCO) in Malaysia. 29 *Pertanika Journal of Science and Technology* S1, pp. 271-290.

5 DOSM (2022). *Malaysian Economic Statistics Review*, https://www.dosm.gov.my/v1/uploads/files/6_Newsletter/Newsletter%202022/NEWSLETTER%202022%20BI_MESR_compressed.pdf.

connection of 1GB per day was provided free between 8am and 6pm from April to December 2020 during the pandemic.

The government was keen on transforming the MSMEs into a new driver of growth in Malaysia. Various loans, grants and repayment assistance were continuously provided for MSMEs in the stimulus packages. SME Corp. Malaysia provided guidance for MSMEs and facilitated their recovery. MSMEs were also encouraged to operate on digital platforms through co-funded programme with participating agencies. Key points of the tax reliefs and incentives for individuals and businesses are listed in Table 1 and Table 2.

Table 1: Tax reliefs and incentives for individuals

Reliefs/Incentives	Description	Validity period
Income tax rate reduction from 14% to 13%	For taxable income between RM50,001 and RM70,000	Effective from YA 2021
Exemption on compensation for loss of employment	Increased from RM10,000 to RM20,000 for each completed year of service	For individuals who have ceased employment from 1 January 2020 to 31 December 2022
Special individual income tax relief of up to RM2,500 on the purchase of a smartphone, a notebook or a tablet	• Additional relief to the existing lifestyle relief • For self use/spouse/children	• For purchase during 1 June 2020 and 31 December 2022 • For YA 2020—YA 2022
Relief for up-skilling or self-enhancement courses to encourage Malaysian citizens affected by the pandemic to acquire new skills	• Expanded on existing relief for tertiary education RM1,000 • Increased from RM1,000 to RM2,000	• Effective from YA 2021 to YA 2022 • Effective from YA 2022 to YA 2023
Individual income tax exemption of up to RM5,000 to employees who receive a smartphone, a notebook or a tablet from their employer	To encourage and support employers to adopt work-from-home practice	Effective from YA 2020
Relief on medical expenses of up to RM1,000 for full medical check-up and RM1,000 for cost of vaccination for oneself, his/her spouse and children	• Expanded to cover COVID-19 detection tests and purchase of self-detection test kit • Expanded to cover mental health examination or consultation services	• Effective from YA 2021 • Effective from YA 2022

Note: YA = Year of assessment

Table 2: Tax reliefs and incentives for businesses and MSMEs

Relief/Incentives	Description	Validity period
For businesses		
Double deduction for cost of detection test of COVID-19 incurred for employees	For any resident employer in Malaysia	For expenses incurred from 1 January 2021 to 31 December 2021
Special tax deduction for renovation and refurbishment of business premises to accommodate social distancing	Total qualifying costs at the maximum of RM300,000	For expenses incurred from 1 March 2020 to 31 December 2022
Unabsorbed current year losses are only allowed to be carried forward and deducted for a maximum period of up to 10 consecutive years	• Unabsorbed business losses up to YA 2018 deductible against statutory income from YA 2019 to YA 2028 • Unabsorbed current year losses in YA 2019 deductible against statutory income from YA 2020 to YA 2029	• Effective from YA 2019 • Balance of unabsorbed business losses available at the end of the 10-year period shall be disregarded
Special Reinvestment Allowance (RA) for manufacturing and selected agriculture activity	For companies that have exhausted RA and special RA period	Effective from YA 2020 to YA 2024

Extension of Accelerated Capital Allowance (ACA) on eligible capital expenses including ICT equipment	• Qualifying capital expenditure incurred on the machinery and equipment including ICT equipment • ACA given to enable businesses to fully claim the capital allowances within 2 years • Initial allowance – 20% • Annual allowance – 40%	Valid for expenditure incurred from 1 March 2020 to 31 December 2021
Flexible Work Arrangement		
Deduction for the costs of implementation of flexible work arrangements	• Double deductions given to employer on qualifying costs determined by Talent Corporation Malaysia Berhad • Maximum deductions of RM500,000 per year for 3 consecutive years of assessment from the certification year	• Effective from YA 2020 • Application period: From 1 July 2021 to 31 December 2022
Deduction by employer for expenses in relation to the cost of the personal protective equipment for the purpose of prevention and protection of its employees from COVID-19	Expanded to cover COVID-19 testing and purchase of thermal scanners	• Effective from YA 2020 • Valid for expenditure incurred from 1 March 2020
For MSMEs		
Special rebate for eligible new companies incorporated and commence operations on or after 1 July 2020 but not later than 31 December 2022	Eligible tax rebate is equivalent to operating expenses or capital expenditure incurred but limited to RM20,000 for each year of assessment	Rebate can be claimed for a period of 3 consecutive years of assessment
Deferment of tax instalments	6-month deferment of tax instalments for MSMEs	Applicable for instalments for the months from January 2022 to June 2022

4. Other Reliefs and Incentives for Specific Sectors

4.1 Tourism

The year 2020 had been expected to be a prosperous year for Malaysian tourism as the Visit Malaysia 2020 was launched. International travel bans and multiple domestic travelling restrictions dampened the campaign with only 4.33 million tourists recorded in the year of 2020 and with tourism receipts of RM12.7 billion.[6] This was a far cry from the year 2019's record of 26.10 million tourists, with tourism receipts of RM86.1 billion. Prolonged conditional and extended MCOs in the year of 2021 worsened the situation with only 0.13 million arrivals and RM0.24 million tourism receipts.

Tourist related businesses, namely hotels, travel agencies, aviation and transportation, were mostly SMEs. Temporary or permanent business closures would be followed by major employees laid-off. Wage subsidies were given to employees on unpaid leave in the tourism sector and businesses which were prohibited from operating during CMCO.

As the vaccination percentage of Malaysian adult population reached 90% by 10 October 2021, the government has finally lifted all interstate and international travel restrictions for fully vaccinated residents. Malaysia has transitioned to the endemic phase beginning on 1 April 2022 and reopened all its international borders. Since then, a record of over 2.1 million travelers have entered Malaysia, with the majority coming from Singapore. Tax reliefs are given to residents on selected travel expenses to boost local tourism. For business owners, incentives and exemptions are also given to ease their burden.

Tax reliefs and incentives relating to tourism are listed in Table 3.

6 Tourism Malaysia (2022). *Tourist Arrivals*, https://mytourismdata.tourism.gov.my/?page_id=14#!from=2019&to=2022&destination=34MY.

Table 3: Tax reliefs and incentives on tourism

Reliefs/Incentives	Description	Validity period
Income tax relief of RM1,000 for travel expenses made by resident individuals	• Accommodation expenditures on premises registered under Ministry of Tourism, Arts and Culture Malaysia (MOTAC) • Entrance fees to tourist attractions • Domestic travel packages with registered tour operators	Tax relief for expenses incurred during 1 March 2020 and 31 December 2022
Deferment of tax instalment payment for tourism industry	Deferment of tax instalment payment for hotel operators, airline companies and travel agents	Instalment payment for the period between April 2020 and December 2020
Extension of accelerated capital allowance (ACA) for the purchase of tourism vehicle	• Expenses on new, locally assembled or constructed excursion buses • ACA given to enable businesses to fully claim the capital allowances within 2 years • Initial allowance – 20% • Annual allowance – 40%	Effective from YA 2020 to YA 2024
Tax exemption on income from a tour operating business which provides a domestic tour package for travel within Malaysia	Participated by not less than 200 local tourists per year	Tax exemption on 100% statutory income from YA 2021 to YA 2022

4.2 Arts, Cultural, Sports and Recreational Activities

To revive the arts, cultural, sports and recreational activities which were severely affected by the pandemic, 50% tax exemption on statutory income for organising the approved activities is given to the organisers. For arts and cultural activities, approval must be obtained from the Ministry of Tourism, Arts and Culture. For international sports and recreational competitions, approval must be obtained from the Ministry of Youth and Sports. This incentive has been effective from the assessment year of 2020 and extended to the assessment year of 2025.

4.3 Foreign Investments

To spur economic recovery through new investment mainly in selected industries, incentives are given to foreign companies to relocate their business to Malaysia. Incentives are also given to manufacturers of selected products. Application must be made to Malaysian Investment and Development Authority (MIDA). Key highlights of the main tax reliefs and incentives for foreign investments are listed in Table 4.

Table 4: Tax reliefs and incentives for foreign investments

Reliefs/Incentives	Description	Validity period
Foreign companies relocating and making new investments in manufacturing sectors in Malaysia	• 0% tax rate for new investment in manufacturing sectors with capital investment between RM300-RM500 million for 10 years • 0% tax rate for new investment in manufacturing sectors with capital investment above RM500 million for 15 years	Application received by MIDA from 1 July 2020 to 31 December 2022
Existing Malaysian companies relocating their overseas manufacturing facilities to Malaysia	• Eligible for tax allowance of 100% for 5 years • With minimum investment of RM300 million	Application received by MIDA from 1 July 2020 to 31 December 2022
Tax incentives given to the manufacturers of pharmaceutical products, including vaccines, to invest in Malaysia	Preferential income tax rate of • 0% up to 10% for the first 10 years • 10% for the subsequent period of 10 years	Application received by MIDA from 7 November 2020 to 31 December 2022

5. Other Tax Measures

Apart from the incentives and reliefs specific for individuals and businesses, some new tax measures have also been introduced or implemented.

5.1 Loan Moratorium

To ease the burden of loan borrowers, Bank Negara Malaysia (Central Bank of Malaysia) announced a blanket automatic moratorium on loan repayments.[7] During the first MCO which started in March 2020, Malaysia was the only country in Southeast Asia to introduce such measure. The moratorium was a postponement of loan repayments granted to SMEs and individuals for six months beginning on 1 April 2020. Interest and principal repayments during the six-month period would not be waived. However, no compounding interest or profit would be charged on the deferred loan repayments.

When the moratorium ended in September, a finding made by Bank Negara Malaysia showed that 85% of borrowers resumed payments while the other 15% were still struggling with repayments.[8] The blanket moratorium benefited the wealthy who were unnecessarily given the moratorium. This was evidenced by an increase in the bank deposits and retail participation in the stock market.

Therefore, when the government decided to implement the second optional moratorium in July 2021, it was not a blanket approach and the focus was to aid the vulnerable and those in dire need of financial assistance. Besides offering the second moratorium, financial institutions also offered various repayment assistance to eligible borrowers.

The financial institutions involved in the loan moratorium programme were allowed to defer declaring the interest/profit accrued. The amount of interest/profit accrued during the moratorium period was not regarded as the income of the financial institution until the moratorium ended. However, for any repayment received voluntarily from borrowers during the moratorium period, the accrued interest/profit received was treated as the gross income for the basis period for that year of assessment.[9]

5.2 Cukai Makmur

In the Budget 2022 speech, the Financial Minister announced the imposition of "Cukai Makmur". Cukai Makmur or Prosperity Tax is a one-off special windfall corporate income tax charged to large companies generating more than RM100 million taxable income for the assessment year of 2022. Companies with chargeable income above RM100 million will be subject to income tax rate of 24% for the first RM100 million and the remaining taxable income will be taxed at 33%.

Prosperity tax or windfall tax is a common tax measure imposed using a different mechanism. Policies concerning levies of higher rates imposed on economic sectors generating extraordinary profits are common in certain jurisdictions.

Cukai Makmur is targeted at large businesses making extraordinary profits. The government is expecting to collect RM6 billion from Cukai Makmur by the Inland Revenue Board of Malaysia (IRBM), a double from the initial estimate of RM3 billion.[10] According to

7 Azril Annuar (2020). *Bank Negara Announces Automatic Six-Month Moratorium on All Bank Loans — Except for Credit Card Balances*, https://www.malaymail.com/news/malaysia/2020/03/24/bank-negara-announces-automatic-six-month-moratorium-on-all-bank-loans-exce/1849820.

8 Tengku Datuk Seri Zafrul Aziz (2022). *Is There a Case for Another Blanket Automatic Loan Moratorium?*, https://www.theedgemarkets.com/article/there-case-another-blanket-automatic-loan-moratorium.

9 IRBM (2022). *FAQ on Special Tax Treatment to Financial Institutions in Relation to Moratorium Granted to Customer*, https://phl.hasil.gov.my/pdf/pdfam/FAQ_Moratorium_2.pdf.

10 Amir Imran (2022). *'Cukai Makmur' Collection Likely to Exceed Target*, https://www.freemalaysiatoday.com/category/business/local-business/2022/08/02/cukai-makmur-collection-likely-to-exceed-target/.

Bloomberg data, among over 900 publicly listed companies on Bursa Malaysia, 113 companies made a profit before tax of over RM100 million in the financial years 2019 and 2020.[11] Companies targeted by Cukai Makmur are those in the banking and plantation sectors. For the purpose of calculating Cukai Makmur, foreign sourced income remitted to Malaysia is excluded.

5.3 Tax on Remittance of Foreign Income

Since the assessment year of 2004, Schedule 6, Paragraph 28 of the Income Tax Act 1967 has introduced an exemption on income received by Malaysian residents from sources outside Malaysia. This exemption is not applicable to a resident company carrying on businesses like banking, insurance, sea or air transport.

Effective from 1 January 2022, the exemption has been withdrawn. An income remitted to Malaysia by a resident from sources outside Malaysia, being it active or passive, is subject to income tax. The types of income from sources outside Malaysia include business income, partnership income, dividends, interest, discounts, rents, royalties and premiums.

Responding to the concerns raised by various parties on the withdrawal of the exemption, the Ministry of Finance announced that the exemption is applicable to all categories of foreign sourced income received by individuals, while for companies, only foreign sourced dividends are exempted.[12] This concession is given for a period of five years from 1 January 2022 to 31 December 2026. Other remittances received from 1 January 2022 to 30 June 2022 will be charged at 3% of the gross income. From 1 July 2022 onwards, the normal tax rate under the Income Tax Act 1967 is applicable to these remittances.

If the foreign income has been taxed outside Malaysia, taxpayers may eliminate double taxation by claiming tax credit under the provisions of sections 132 and 133 of the Income Tax Act 1967. The taxable foreign income is excluded for the purpose of calculating Cukai Makmur.

Tax exemption on foreign sourced income is harmful in the way that the income may avoid being taxed in both the source and resident countries, resulting in double non-taxation. By removing the tax exemption, Malaysia has addressed the issue of harmful tax practices, fulfilling our commitment to compliance with international best practices.

6. Future Outlook on Tax Reform in Malaysia

6.1 Fiscal Responsibility Act

Moving forward, the Ministry of Finance plans to table the Fiscal Responsibility Act in the Parliament in an effort to strengthen the fiscal policies and build resilience against future shocks and pandemics.[13] Strategic plans will be made to broaden the tax base, tax the shadow economy and improve tax compliance to collect more revenue for the government. It is also important to enhance the efficiency of tax administration by simplifying the processes for taxpayers.

6.2 Tax Corporate Governance Framework (TCGF)

In Malaysia, there is a growing expectation on a level of governance that ensures accountability, transparency and integrity of the tax system. Companies are expected to disclose their internal processes to identify and assess tax risks and formulate plans of actions in alleviating the

11 Seah Eu Hen (2021). *These Companies may be Subject to the One-off 33% Prosperity Tax*, https://www.theedgemarkets.com/article/these-companies-may-be-subjected-oneoff-33-windfall-tax.

12 Voon Y.H. & Cheah M. (2022). *Taxability of Foreign Sourced Income*, https://www.crowe.com/my/insights/taxability-of-foreign-sourced-income.

13 MOF, Press Citation (2022). *MOF Mulls Tabling Fiscal Responsibility Bill at Next Parliament Session, Says Tengku Zafrul*, https://www.mof.gov.my/portal/en/news/press-citations/mof-mulls-tabling-fiscal-responsibility-bill-at-next-parliament-session-says-tengku-zafrul.

impacts of these risks. IRBM has launched the TCGF on 15 April 2022, serving as a part of the cooperative tax compliance process[14]. A few selected organisations that fulfil the prerequisites have been invited to participate in the pilot project. Upon acceptance into the programme, compliant participants may benefit from no tax audit or investigation during the validity period, expedited tax refund process and priority consideration on the penalty imposed. IRBM encourages organisations to participate in the programme and will provide assistance in developing their TCGF.

7. Conclusion

Malaysia is on the right path to economic recovery amidst uncertainty of the current global economic situation. Its GDP growth for the first half of 2022, spurred by robust economic and social activities along with strong domestic and foreign demand, is recorded at 8.9%. The government projects that the national economy will achieve a growth rate between 5.3% to 6.3% for the year of 2022.

Funds in the stimulus packages have been allocated to respective recipients. In the upcoming 2023 budget, a larger allocation on aids and subsidies is foreseeable to cushion the impacts of price hikes mainly in basic goods.

The government has affirmed that the reintroduction of the GST or the implementation of new taxes, such as windfall tax or inheritance tax, will not be available in the near future. Previously, GST at 6% was introduced on 1 April 2015 and was replaced by the sales and services tax on 1 September 2018. Although the reintroduction of the GST or other new taxes is probable, the government is still conducting studies on how to structure a balanced, fair, and equitable taxation system to support and increase the country's revenue. Feedbacks from various stakeholders are needed before new tax measures are implemented so as to balance and control their impacts on the economy. The tax reforms should not only foster economic growth and attract new foreign investments, but also generate revenues to support the government's development agendas.

References:

[1] Ministry of Finance (2020). *Budget Speech 2021*, https://belanjawan2021.treasury.gov.my/pdf/speech/2021/bs21.

[2] Ministry of Finance (2021). *Budget Speech 2022*, https://budget.mof.gov.my/pdf/2022/ucapan/bs22.pdf.

[3] Ministry of Finance (2021). *Penjana Booklet*, https://penjana.treasury.gov.my/pdf/PENJA-NA-Booklet-En.pdf.

[4] Ministry of Finance (2022). *Press Citations*, https://www.mof.gov.my/portal/en/news/press-citations.

[5] IRBM (2022). *Company Return Form Guidebook 2022*, https://phl.hasil.gov.my/pdf/pdfam/Guidebook_C2022_2.pdf.

[6] IRBM (2021). *Company Return Form Guidebook 2021*, https://phl.hasil.gov.my/pdf/pdfam/Guidebook_C2021_2.pdf.

14 IRBM (2022). *Tax Corporate Governance Framework*, https://phl.hasil.gov.my/pdf/pdfam/Tax_Corporate_Governance_Framework_TCGF_2.pdf.

Targeted and Effective Tax and Fee Policies of China to Support High-Quality Economic Development

State Taxation Administration, the People's Republic of China

***Abstract*:** Tax and fee cut is an important policy tool to reduce the tax burden of enterprises and individuals, enhance their vitality and thus promote high-quality development. This article makes a brief introduction to China's new tax and fee support policies since the beginning of 2022, as well as its mechanism to ensure that tax and fee payers enjoy the benefits of these supportive policies directly and efficiently. These policies have achieved significant effects, benefiting enterprises and individuals and helping promote economic and social development.

***Keywords*:** Tax and fee cuts; COVID-19; Tax administration; Market entities

State Taxation Administration the People's Republic of China

In response to the complicated and severe international and domestic environment and downward economic pressure, China has implemented a new package of tax and fee policies since the beginning of 2022 to support enterprises, especially the VAT credit refund on a large scale. A series of follow-up regulations and measures have also been rolled out to stabilize the economy. These policies have created synergy and played an unprecedented role in revitalizing and reinvigorating market entities, demonstrating China's firm determination to ease the difficulties and boost the development of enterprises, and to stabilize the macro-economy and promote its high-quality development.

1. Multiple Tax and Fee Policies to Ease the Burden of Businesses

Going for tax and fee reduction is an important trend in China's tax and fee policy making in recent years. Practice shows that tax and fee cuts are the fairest, the most direct and effective measures to relieve enterprises of difficulties. The supportive policies implemented in 2022 have played a positive role in alleviating the financial pressure on market entities and restoring their vitality.

1.1 Large-Scale VAT Credit Refund

The refund policies focus on small and micro enterprises (SMEs) and key industries. In line with plans of the Chinese government, the State Taxation Administration (STA), together with the Ministry of Finance (MOF), issued four notices on the implementation of the full refund of outstanding VAT credits and monthly refund of newly-added VAT credits for eligible SMEs and the manufacturing, wholesale, and retail industries.

1.2 Ease the Difficulties of MSMEs

In order to encourage the development of medium, small and micro enterprises (MSMEs), the STA has also implemented a series of supporting measures in addition to the above-mentioned refund policies. These measures include temporary exemption of VAT for small-scale taxpayers, extended application of the reduction on six local taxes and two fees[1] from small-scale VAT taxpayers to small and low-profit enterprises and self-employed individuals, continued partial tax deferral for MSMEs in the manufacturing industry, and increase in the pre-tax deduction on expenses of equipment and appliances for MSMEs.

1.3 Support the Recovery of Epidemic-Hit Industries

A package of tax and fee policies has been carried out to boost the development of COVID-stricken industries in the service sector, including continuing additional VAT deduction and reduction for production and living services, exempting public transport services from VAT, deferring the pre-payment of VAT by branches of air and railway transport enterprises, and keeping on reducing the premium rates for work-related injury insurance and unemployment insurance for another period of time, etc.

1.4 Promote Scientific and Technological Innovation of Enterprises

To implement plans of the Chinese government, the STA, together with the MOF and the Ministry of Science and Technology, stepped up tax support for scientific and technological innovation by increasing the proportion of super deduction of R&D expenses for small and medium enterprises engaged in science and technology from 75% to 100%, and continuing to allow enterprises to enjoy preferential policies on R&D expenses for the first three quarters of 2022 when they prepay income taxes in October.

1.5 Foster the Development of New Energy Vehicle (NEV) Industry

According to the plans of the Chinese government, the STA, together with the MOF and the Ministry of Industry and Information Technology, issued a notice to extend the exemption of Vehicle Purchase Tax for NEVs which is going to expire at the end of 2022 to the end of 2023.

In addition, to reduce the tax and fee burden on individuals and enterprises, China has also introduced personal income tax incentives on personal pensions and for individuals who buy new housings within one year of selling previous ones, and expanded the application of temporary deferral of social insurance premiums and compensation fees for soil and water conservation and domestic waste disposal.

2. Improve Services to Deliver the Benefits of Supportive Policies to Tax and Fee Payers

While implementing the supportive tax-and-fee policies, with the large-scale VAT credit refund in particular, Chinese tax authorities have employed the five-pronged measures of quick refunds, severe punishments on frauds, strict investigation of internal errors, external supervision, and ongoing publicity. Besides, they've tapped into cross-departmental coordination to improve targeted services and three-dimensional risk prevention and control system, strengthened policy interpretation and counseling to guide market expectations and help stabilize the macro economy.

2.1 Establish Sound Mechanisms to Provide Organizational Guarantee

Working mechanisms at three levels have been set up to cope with a myriad of complexities and to help ensure the effectiveness of national governance. At all levels of government, mechanisms led by local government officials rather than tax officials have been established across the

1 Six local taxes and two fees refer to resource tax, urban maintenance and construction tax, real estate tax, urban and township land use tax, stamp tax, farmland occupation tax, educational surcharge and local educational surcharge.

country. Under these mechanisms, local tax administrations can timely report to and gain support from local governments on important matters like VAT credit refund and earmarked funds. At the ministerial level, for one thing, a consultation mechanism among the STA, MOF, and the People's Bank of China was initiated to provide fund guarantee and ensure timely VAT credit refund; for another, the fight against fraudulent refunds was incorporated into a regular work mechanism of six ministerial-level departments, namely, the STA, the Ministry of Public Security, the Supreme People's Procuratorate, the General Administration of Customs, the People's Bank of China, and the State Administration of Foreign Exchange, to launch joint crackdowns and vigorously safeguard the authority of tax laws and the safety of tax payments. A top-down mechanism has been established in tax administrations across the country so that tasks are assigned to and responsibilities are assumed by each level.

2.2 Enhance Work Efficiency to Ensure Quick Delivery of the Benefits to Tax and Fee Payers

Chinese tax authorities use information technology to strengthen targeted policy counseling and notification, expedite refund review, and slash processing time to inject impetus into market entities. The STA has established a nationwide unified system covering tax and fee knowledge labels in nine categories, organized special groups to pre-label large, medium and SMEs with "Publicity and Guidance", and sorted out information such as main lines of business and credit rating to complete multi-dimensional profiles. Through local communication platforms between taxpayers and tax administrations, telephone and SMS, 36 batches of tax incentives have been precisely promoted to taxpayers, benefiting 457 million tax and fee payers, including eight batches of VAT credit refund policies which have benefited 15.27 million taxpayers. China's tax authorities never stopped accelerating refund processing, and in the second quarter of 2022 when the number of tax refund nationwide exceeded 100 times that of the same period of 2021, the average time taken for enterprises to get their refunds after application was compressed by nearly 40% compared with that of the same period of 2021. On this basis, the average time for eligible manufacturing enterprises to receive the refund of newly-added input VAT credits was slashed to no more than two working days, ensuring direct and quick delivery of policy dividends to taxpayers.

2.3 Optimize Services and Simplify Business Processing

The STA expedited the digital upgrade and transformation of tax administration, optimized core administration and e-Tax Service application systems, and simplified the process of business handling by means of pop-up reminders and pre-filled tax returns. For example, while processing VAT credit refund applications, the IT system will pre-fill more than 85% of declaration data including enterprise name, amount of VAT credit refund, and input VAT that has been credited, etc., and this will effectively reduce the burden of enterprises. Nationwide, 11.67 million annual reports of incentive granting were sent to taxpayers through e-Tax Service and other channels on a peer-to-peer basis to enhance their sense of gain.

2.4 Respond Quickly to Enterprises' Needs

The STA selected 100 grass-roots tax offices and 100 tax service halls across the country and 100 taxpayers in each province as direct contact points to widely collect front-line opinions, solve practical problems in a timely manner and remove obstacles in the process of policy implementation. In an effort to improve service, tax authorities at all levels invited representatives such as the National People's Congress (NPC) deputies, members of national and local committees of the Chinese People's Political Consultative Conference (CPPCC) , special supervisors of government departments and stakeholders from different sectors to experience tax payment procedures, interact with IT systems in tax service halls, and give advice and suggestions. The "Tax Refund and Tax Reduction Suggestion Box" has been set up on the official website of the STA, and a special line has been dedicated to "Tax Refund and Tax Reduction Suggestion" under the 12366 tax and fee payer service hotline, so as to clarify the processes of receiving, transferring and replying to advice and suggestions and ensure that the suggestions are heard, handled and responded.

2.5 Prevent and Address Potential Risks in an Accurate and Consistent Way

The tax authorities have been coordinating efforts in expediting refunds and fortifying risk management. In line with a prevention-oriented multi-pronged approach, the STA has established an integrated and multi-dimensional process for risk prevention and control, continued to expand and refine early warning indicators, carried out in-depth scanning for potential risks and responded accordingly. In the phase of refund application, the STA will assess the risks of applicants and promptly remind them to rectify abnormalities if any; when reviewing and verifying applications submitted, the STA will determine the risk status of taxpayers on a comprehensive basis, and turn down ineligible claims in time; for those whose claims have been approved, regular scanning and analysis will be conducted to capture and tackle potential frauds. In addition, big data is employed for accurate selection based on the characteristics of new types of tax frauds, in order to target at violations such as false invoicing as well as fraudulent claims of VAT credit refunds and other tax incentives, and safeguard policy benefits from the exploitation of wrongdoers while avoiding unnecessary burden on compliant enterprises.

2.6 Perpetuated Communication to Guide Social Expectations

Outreach to taxpayers will be enhanced to help market entities learn about and enjoy tax benefits as much as they are entitled to. With this aim in mind, the STA has carried out 15 rounds of campaigns to communicate and interpret these preferential policies in a panoramic way, compiled operation manuals on 13 key policies including VAT credit refunds, and posted more than 570 pieces of information on social media platforms such as WeChat, Weibo and Douyin, with a total reading of over 40 million times. Typical cases regarding fraudulent claims like those in VAT credit refunds with serious violations, involving obviously deliberate intention and of major warning effect are under continual disclosure to demonstrate warning and deterrence to wrongdoers.

3. Substantial Effects in Supporting Enterprises

With the new package of tax and fee policies to support enterprises and stabilize the economy as well as follow-up measures, positive effects continue to be produced in boosting the resilience, confidence and momentum of enterprises as well as their sense of gain. From 1 January to 30 September 2022, China has seen consequent cuts, postponement and refund of taxes and fees totaling more than RMB3.4 trillion, namely, RMB2,228.7 billion of VAT credits refunded to taxpayers, of which there were RMB2,105.4 billion refunded since April; RMB591.6 billion of tax and fee cuts newly introduced; and RMB632.6 billion of deferral in tax and fee payment.

China's continued stepped-up efforts in tax-and-fee reduction and refund policies are delivering solid outcomes, benefiting enterprises and individuals and driving economic and social development. Going forward, the STA will forge ahead with enterprise and fortitude to respond to the expectations of taxpayers and to give better play to the role of tax as a foundation, pillar and safeguard in national governance, contributing tax strengths to building China into a modern socialist country in all respects. For one thing, the STA will continue to deliver policy support. The STA will resolutely implement the decisions and plans of the Chinese government, collect tax revenue in accordance with laws and regulations, and steadfastly crack down on fraudulent claims and other violations to safeguard fairness and tax security. Meanwhile, the STA will see to it that the implementation of tax and fee policies benefit market entities, so as to help stabilize and invigorate the Chinese economy. For another, the STA will continue to improve its services. Guided by the decisions and plans of the Chinese government on deepening the reform to streamline administration and improve business environment, the STA will adopt a demand-oriented approach to reduce institutional costs on transactions, improve services, and provide tax and fee payers with easier access to favorable policies.

Promoting Economic Recovery Through Taxation*

Chris Sanger and David Snell

Chris Sanger
Leader, Partner
Global Government Tax
Ernst & Young LLP
London UK

David Snell
Director
Tax Policy
Ernst & Young LLP
London UK

Abstract: The role of taxation in promoting economic recovery has attracted greater attention in recent years, with economic dislocation following the Global Financial Crisis and the COVID-19 pandemic. While taxation is only one of the factors impacting economic recovery, both economic literature and practical experience show that tax policy can contribute to enhanced growth and therefore greater economic activity. Tax instruments used as a means for promoting economic recovery include tax holidays, preferential tax rates, investment allowances, tax credits and special economic zones. However, there are a range of constraints over tax incentive design imposed by bodies such as the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting, the Forum on Harmful Tax Practices of the OECD and the Code of Conduct on Business Taxation of the European Union. Given the above, this paper sets out practical issues to inform governments seeking to promote economic activity through taxation.

Keywords: Taxation; Special economic zones; Tax incentives; Tax holidays; Preferential tax rates; Investment allowances; Tax credits; Growth; Investment; Policy framework; Cost-benefit analysis; Tax expenditure; Effective tax rate; Pillar Two; OECD Forum on Harmful Tax Practices; OECD Global Forum on Transparency and Exchange of Information for Tax Purposes; European Union Code of Conduct Group on Business Taxation; Tax policy; Tax administration; Economic recovery

1. Introduction

Developing and emerging economies widely use tax and financial incentives to promote economic growth, attract private investment and direct it into certain sectors, activities and locations. The post-pandemic environment provides an opportunity to undertake a fundamental re-assessment of how tax is used in this regard. Plans to respond to the economic and social costs of the COVID-19 pandemic will often

* The views reflected in this article are the views of the authors and do not necessarily reflect the views of the global EY organisation or its member firms. This publication contains information in summary form and is therefore intended for general reference only. It is not intended to be a substitute for detailed research or the exercise of professional judgment. Member firms of the global EY organisation cannot accept responsibility for loss to any person relying on this article.

include adding to, or revising, tax incentives. At the same time, disruptions to supply chains and economic activity are leading some developing countries to re-assess their approach to attracting inbound investors. As governments seek swift measures to advance economic recovery, commentary on the effectiveness and efficiency of incentives is more important than ever. This article provides practical guidance to developing countries on the promotion of economic growth through taxation.

Economic theory holds that development and growth are influenced by four main factors: human resources, natural resources, physical capital and technology, each of which impacts on productivity. "Productivity isn't everything, but in the long run it is almost everything. A country's ability to improve its standard of living over time depends almost entirely on its ability to raise its output per worker."[1]

While tax systems are primarily aimed at financing public expenditures, they can also "affect the decisions of households to save, supply labour and invest in human capital, the decisions of firms to produce, create jobs, invest and innovate, as well as the choice of savings channels and assets by investors"[2] — therefore taxes impact on economic growth and recovery.

In recent years, the literature regarding taxes and economic growth has expanded. The consensus is that taxes, particularly on corporate and individual income, harm economic growth. Nevertheless, there are several ways to use taxation as a tool to change behaviours in a way that leads to more economic growth for a given level of taxation.

This paper summarises:

- General trends in the taxation and growth economic literature;
- Current policy drivers in respect of tax incentive policy;
- Tax incentives used in practice;
- Measuring the impact of tax incentives; and
- Current constraints over tax incentive design, with a focus on the new constraints imposed by the Inclusive Framework (IF) proposals.

It concludes by suggesting a structured approach to implementing incentives for growth.

2. Background

2.1 Economic Literature in Respect of Taxes and Growth

The economic literature regarding corporate taxes and growth is informative. Generally speaking, several points are reported:

- Tax increases reduce growth, although it is important to evaluate taxes and spending together.
- Tax increases reduce investment more than consumption as components of Gross Domestic Product (GDP) (although both fall).
- The effect is heterogeneous, in that smaller firms are more impacted in their investment decisions than larger firms.
- Higher corporate tax rates of a country negatively affect decisions to direct investment in that country.

Increasingly, empirical work on the relationship between taxes and growth has used a "narrative approach", considering legislated tax policy changes that occurred for ideological or long-term reasons but not in response to economic forecasts. With this technique, Romer and Romer demonstrate the negative effect that an increase in personal and corporate income tax levels has on growth.[3] Arnold et al. draw similar conclusions in a more policy-based paper, which considers the implication of tax struc-

1 Paul Krugman (1994). *The Age of Diminishing Expectations*. New York: MIT Press.

2 OECD (2008). *Taxes and Economic Growth*, https://www.oecd.org/mena/competitiveness/41997578.pdf.

3 Romer Christina D. & Romer David H. (2010). The Macroeconomic Effects of Tax Changes: Estimates Based on a New Measure of Fiscal Shocks. 100 *American Economic Review* 3, pp. 763–801. While the paper finds that policy-motivated tax increases overall are associated with lower growth, it also finds evidence that tax increases motivated by reducing deficits are associated with faster growth (although these results are not statistically significant).

tures on long-run growth.[4] They use a panel of 21 Organisation for Economic Co-operation and Development (OECD) countries over 34 years to estimate the effect of tax structure on growth in the short and medium term. They also look at lower levels of aggregation by using data at an industry and firm level to estimate the effect of tax structure on investment and productivity growth, which the researchers consider to be the two main drivers of economic growth.

Arnold et al.'s key findings are that:

• Empirically, economic growth can be increased by gradually moving the tax base towards consumption and immovable property, as opposed to focusing on personal and corporate income.

• It is possible to rank tax instruments for growth (from least to most harmful as follows):

- Recurrent taxes on immovable property;
- Consumption taxes and other property taxes;
- Personal income taxes; and
- Corporate income taxes.

While such studies appear robust at an aggregate level, it is difficult to place full reliance on them for policy choices, given the need to allow for outside factors such as the economic cycle, tax type, country, the state of the economy, monetary policy, the time frame studied, how the revenue is used, or changes in the quantum and incidence of tax through planning. It is also unclear whether the growth impact would endure beyond the short run (say five to ten years). Nevertheless, in a review of literature from 2012-2021, Durante finds that all papers surveyed show tax cuts as having "positive effects on growth, although some papers note that the strength of this effect depends on which taxes are cut, for whom, and when."[5]

The literature also highlights the impact of corporate tax on investment location choices. For example, Arulampalam et al. demonstrate how the corporate tax rates of a host country and the tax system of the acquirer's country (territorial or worldwide) affect the merger and acquisition target choices of domestic and multinational enterprises.[6] Findings include:

• Host country tax rates have a negative effect on the probability of an acquisition in that country.

• Where the corporate tax rate of the target is lower than that of the acquirer's country, and when the acquirer's country operates a worldwide tax system that allows a credit for foreign tax paid, the corporate tax of the target country plays a much less significant role, or no role at all.

The tax policy changes that are most likely to increase growth in any given country will depend on its starting point, in terms of both its current tax system and the areas (such as employment, investment or productivity growth) in which its current economic performance is relatively poor. Nevertheless, the literature suggests that a revenue neutral growth-oriented tax reform would be likely to shift part of the revenue base from income taxes to less distortive taxes, such as taxes on residential property, wealth taxes and inheritance taxes. The scope for introducing and extending such taxes is often limited, with a greater revenue shift probably achievable into consumption taxes. Shifting the revenue base to consumption taxes may be an appropriate goal in both developed and developing countries, where the latter may not be able to rely on wealth taxes. More generally, the literature suggests that most taxes would benefit from a combination of base broadening and rate reduction.

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4 Jens Matthias Arnold, Bert Brys, Christopher Heady, et al. (2011). Tax Policy for Economic Recovery and Growth. 121 *The Economic Journal* 550, pp. F59–F80.

5 Alex Durante (2021). *Reviewing Recent Evidence of the Effect of Taxes on Economic Growth*, https://taxfoundation.org/reviewing-recent-evidence-effect-taxes-economic-growth/.

6 Arulampalam W., Devereux M. & Liberini F. (2017). Taxes and the Location of Targets WP 17/04. Oxford University Centre for Business Taxation.

2.2 Current Policy Drivers in Respect of Tax Incentive Policy

Personal income tax reforms in recent decades have largely sought to create a fiscal environment that encourages saving, investment, and entrepreneurship and provides increased work incentives.[7]

Corporate tax reforms have been driven by the desire to promote competition and avoid tax-induced distortions. In general terms, many tax reforms have included rate cuts and base broadening to improve the efficient utilisation of resources within a jurisdiction's economy, while at the same time maintaining tax revenues.

In the face of unprecedented demand and supply shocks stemming from the COVID-19 pandemic, many governments have provided tax relief packages and incentives to support struggling businesses and encourage private sector growth. Although incentives are widely used as policy instruments, empirical global evidence suggests that they are only effective in certain circumstances. Especially for developing countries, already struggling with revenue mobilisation, incentives create challenges and risks.

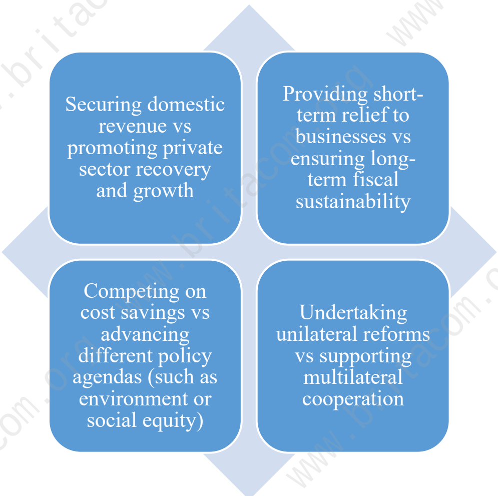

Figure 1. Four key policy dilemmas

In essence, the World Bank Group suggests that governments are currently dealing with four key policy dilemmas (see Figure 1).[8]

Writing for the IMF, Ruud de Mooij et al. (2020) noted how the pandemic has placed an emphasis on inclusion and supporting the most vulnerable in society.[9] They noted that this is likely to be maintained in the years following the pandemic. This has resulted in an additional problem for tax administrations — how can they balance an inclusive tax system with one that encourages growth?

3.Tax Incentives Used in Practice

Countries apply a diverse range of incentives. A precise assessment of all incentives used is not possible given current data availability. Nonetheless, the Global Tax Expenditures Database (GTED) provides extensive information on preferential tax treatments such as exemptions, deductions, credits, deferral and reduced tax rates that have been implemented by governments worldwide since 1990 to promote different policy goals.[10] The GTED classifies incentives across four dimensions: beneficiary, tax base, policy purpose and type of reduction.

Figure 2 shows tax incentives targeting businesses as a percentage of total tax incentives from 1990 to 2020.

United Nations Conference on Trade and Development (UNCTAD) has analysed the GTED database to summarise how tax incentives (called "tax expenditures" in the database)

7 OECD (2010). *Tax Policy Reform and Economic Growth*, https://doi.org/10.1787/9789264091085-en.

8 Hania Kronfol & Sebastian James (2021). *The Role of Investment Incentives in Economic Recovery and Growth*, https://thedocs.worldbank.org/en/doc/af946a92c3b992e1bcc8a49ff49cd474-0430012021/related/Tax-Incentives-Webinar-ppt-May-27-2021-PDF.pdf.

9 Ruud de Mooij, Ricardo Fenochietto, Shafik Hebous, et al. (2020). Tax Policy for Inclusive Growth after the Pandemic. IMF Fiscal Affairs.

10 https://gted.net/, accessed 5 October 2022. The GTED documents tax expenditure reporting by governments worldwide, using a common set of criteria and indicators. It covers 218 jurisdictions, 97 of which published at least some data on tax expenditures since 1990.

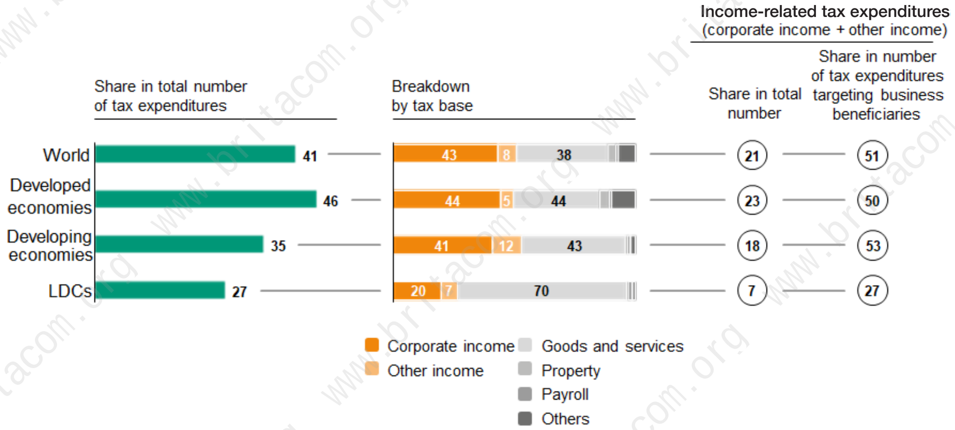

Figure 2. Tax expenditure provisions targeting business beneficiaries, 1990-2020 (percent)
Note: Number of tax expenditure provisions reported=16,900; LDCs=least developed countries.
Source: UNCTAD, based on the Government Tax Expenditure Database.

were used between 1990 and 2020.[11] Developed economies, developing economies and least developed countries (LDCs) all use tax expenditures, with 21% of global tax expenditure provisions reported by countries in the last 30 years targeting corporate income (as shown above). Of approximately 17,000 tax expenditures reported by the GTED database, 41% have a business beneficiary. Within this group, about half target income-based taxation with half covering other tax categories such as taxes on goods and services or on payroll. The relative share of tax expenditures targeting corporate income in the total number of tax expenditures does not differ substantially between developed and developing economies; however, LDCs do show a difference, with income-related tax expenditures amounting to less than 10% of the total number of tax expenditures reported by these economies.

3.1 Investment Tax Incentives

It is hard to prove that tax incentives influence investment decisions but their prevalence across the globe means they are often considered as part of the tool kit for countries wishing to attract foreign investment.

The duration of any investment incentive depends on the reason for introducing the incentive in the first place. COVID-19 saw companies delaying or suspending investment due to the unusual economic conditions during the pandemic period. In this case, short-term incentives, lasting one to three years, are seen as useful for boosting an economy as they accelerate investment.[12]

Kronfol and James note that between 2009 and 2015, out of 155 countries studied, 46% adopted new tax incentives or made existing incentives more generous. As of 2015, out of 107 developing countries, more than half were granting tax holidays or preferential corporate tax rates across sectors at the national level.[13] The prevalence of such incentives is such that they are worthy of in-depth analysis. Table 1 below, produced by the World Bank Group, shows five common types of tax incentives and compares their features.[14]

11 UNCTAD (2022). *World Investment Report 2022*, https://worldinvestmentreport.unctad.org/world-investment-report-2022/#key-messages.

12 Wen J-F. (2020). Temporary Investment Incentives. IMF Fiscal Affairs.

13 Hania Kronfol & Sebastian James (2021). *The Role of Investment Incentives in Economic Recovery and Growth*, https://thedocs.worldbank.org/en/doc/af946a92c3b992e1bcc8a49ff49cd474-0430012021/related/Tax-Incentives-Webinar-ppt-May-27-2021-PDF.pdf.

14 Bes M. & Alvarez-Estrada D. (2013). *Promoting Growth in the Caribbean: Tax Incentives in Theory and in Practice*, https://openknowledge.worldbank.org/handle/10986/16619.

Table 1: Five common types of tax incentives and their features

	Tax holiday	Preferential tax rate	Accelerated depreciation	Investment allowance	Investment tax credit
Revenue cost	Unbounded	Bounded	Bounded	Bounded	Bounded
Tax avoidance	Encourages transfer of funds from firms who are not exempted	Encourages transfer of funds from firms who are not exempted	Does not encourage tax avoidance	Encourages sale and purchase of assets to claim allowance	Encourages sale and purchase of assets to claim allowance
Transparency of revenue cost	Normally does not require tax filing	Requires tax filing	Requires tax filing	Requires tax filing	Requires tax filing
Resource allocation	Tends to attract short-run projects	Tends to attract short-run projects	Does not affect the life of assets. Tends to increase capital intensity	Tends to favour short-term assets	Tends to favour short-term assets
Administration costs	Significant tax administration costs to monitor tax avoidance from related but non-exempted firms	Significant tax administration costs to monitor tax avoidance from related but non-exempted firms	Some. Usually associated with carry forwards	Some	Some
Implementation costs	Medium to ensure project complies with goals	Medium to ensure project complies with goals	Initially to ensure investment is made	Initially to ensure investment is made	Initially to ensure investment is made

3.2 Special Economic Zones

A related tool to attract foreign direct investment (FDI) using tax measures is to introduce a special economic zone (SEZ). The number of SEZs has grown in recent years, especially in developing countries, with 5,383 SEZs in existence across 147 economies as of 2019.[15]

Table 2 shows the figures from the Bost and UNCTAD databases. The Bost database looks at traditional free zones only, whereas the figures from UNCTAD show all SEZs in place, with the free zone figures included as a sub-category.

The term SEZ can refer to a variety of zones including free trade zones, industrial parks, science and technology parks and free ports, but all share several defining features. SEZs cover specific geographic zones, offering benefits only to investors within this zone. They have their own customs duty area which is often free from all duties and subject to lower rates of other taxes. SEZs offer many benefits to host countries such as increased employment, upskilling of the labour force, export growth and an increase in government revenues — all of which help an economy to grow.[16]

Not all SEZs have been as successful as they

15 Bost F. (2019). *Special Economic Zones: Methodological Issues and Definition*, https://unctad.org/system/files/official-document/diaeia2019d2a7_en.pdf.

16 Zeng D. Z. (2015). *Global Experiences with Special Economic Zones: Focus on China and Africa*, https://openknowledge.worldbank.org/handle/10986/21854.

Table 2: Distribution of free zones and SEZs by major geographical area in 2019

	Number of free zones (Bost database)	Percentage of total	Number of SEZs (UNCTAD)	Percentage of total
Global	**2,296**	**100**	**5,383**	**100**
Developed economies	**295**	**12.9**	**374**	**7**
United States	191	8.30	262	4.70
Europe	85	3.70	105	2
Developing economies	**1,869**	**81.40**	**4,772**	**88.60**
Africa	215	9.40	237	4.40
Asia	1,196	52	4,046	75
Philippines	385	16.80	528	9.80
China	135	5.90	2,543	47.20
Malaysia	45	2	45	0.83
India	231	10	373	7
United Arab Emirates	47	2	47	0.90
Oceania	1	0.04	3	0.05
Latin America and the Caribbean	457	19.90	486	9
Colombia	101	4.40	101	
Dominican Republic	71	3.10	73	1.30
Transition economies	**132**	**5.70**	**237**	**4.40**
Russia	39	1.70	130	2.40

Note: This table includes single factory free zones but does not include free points.
Source: Bost F., 2019, University of Reims and UNCTAD, World Investment Report 2019.

could have been. A study by the World Bank Group found that African countries who introduced SEZs have not performed as well as their comparators in other continents. The World Bank Group has stated that this is due to the generally weak business environment that exists in such countries not being able to support such a zone.[17]

Tax incentives, including economic zones, cannot fully compensate for shortcomings in other economic areas. These will be discussed in more detail in the following section. Countries are most likely to benefit from SEZs after investing in the infrastructure, etc. that is needed to be an appealing investment destination. Additionally, any SEZ will need to be created with consideration given to the various constraints in place on incentives, which will also be discussed in more detail later in this article.

4. Factors Influencing the Investment Decision

In terms of investment location decisions, tax will generally not be the first consideration for the location of the investment. Companies will consider a wide range of "hygiene factors" before making an investment. Tax incentives will only become effective where there are no other major barriers to investment. A country will generally be an attractive investment loca-

17 Ibid.

tion for one of three reasons: access to natural resources, access to a particular market or the location of the country for production and exports. The location is typically then assessed using the criteria including[18]:

• Political stability;

• Physical, financial, legal, and institutional infrastructure;

• Effective, transparent and accountable public administration;

• Skill level of labour force and labour laws;

• Good dispute resolution mechanisms;

• Ability to repatriate profits;

• Language and culture; and

• Size and efficiency of factor and product markets.

The World Bank Group considered the importance of these factors and similar characteristics in 2018 (see Figure 3).

The assessment of the above factors will tend to favour developed economies or transition economies with appropriate infrastructure. Countries with any political instability will likely discourage investment and tax incentives cannot make up for any gaps in infrastructure. Tax considerations tend to become significant once hygiene factors are met and investors are weighing up otherwise closely comparable locations, or when considering how to structure and finance the investment.

Tax incentives alone are not sufficient to attract investment, and they need to be backed up by an established and transparent tax system. Maturity of tax laws is also important. Investors will want to know that the incentives will be administered properly, and the benefits will be available in practice.

The risk of a tax dispute and the associated resolution process will be factored into the investment decision. Tax disputes are often the result of inconsistent application of policy, a lack of understanding of local tax laws or frequent changes in policy.[19] Again, these issues are particularly prevalent in developing economies where

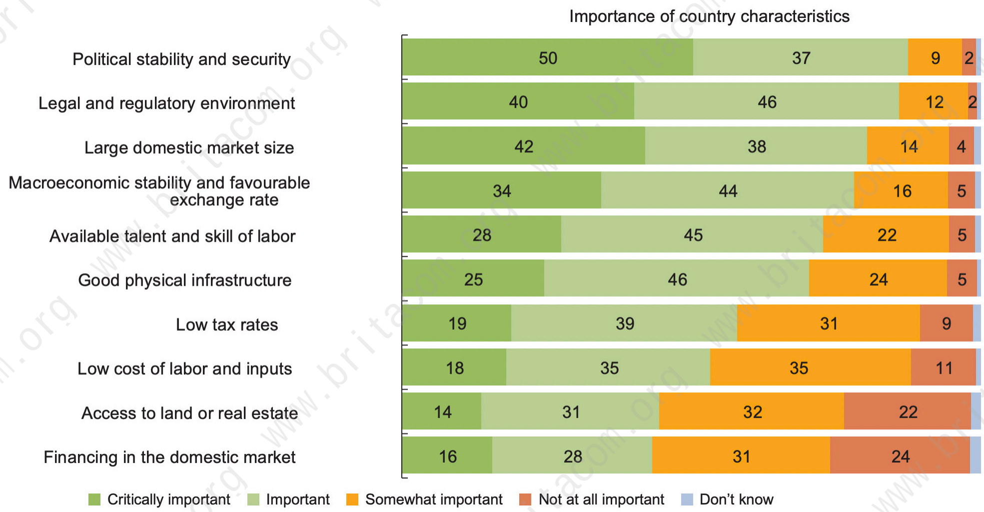

Figure 3. Factors affecting investment decisions (share of respondents: percent)

Note: Multinational corporation executives were asked how important these characteristics were in their decision to invest in developing countries.

Source: World Bank Group (2018). *Global Investment Competitiveness Report 2017/2018: Foreign Investor Perspectives and Policy Implications*, https://openknowledge.worldbank.org/handle/10986/28493.

18 UN & CIAT (2018). *Design and Assessment of Tax Incentives in Developing Countries*, https://www.un.org/esa/ffd/publications/design-and-assessment-of-tax-incentives-in-developing-countries.html.

19 BRITACOM (2021). *Expediting Tax Dispute Resolution: Wuzhen Action Plan (2019-2021) Final Report*, https://www.britacom.org/gkzljxz/Documents/202109/P020210927369402010465.pdf.

tax administrations can benefit from capacity building. Effective dispute resolution methods can put investors at ease, including administrative review by the tax administration and hearings at a specialised tax court. Initiatives such as the *Wuzhen Action Plan (2019-2021)*[20] can help to improve the dispute resolution mechanisms in countries and become more attractive from a tax perspective.

Given the importance of trust in a tax administration for investors, investment by the tax administration can also be made in public relations, education and training for administration employees. Investors generally seek to fully understand the tax processes of the country and do not appreciate surprises. Transparency must also be carried into enforcement; companies would rather know they could face frequent inspections and high penalties for non-compliance, provided the rules are clear, than be at the mercy of unknown processes.

This appetite for established and transparent tax governance is often a barrier for developing economies without effective tax administrations in attracting investment through tax incentives. Prior to implementing an effective incentive, investment in the tax administration body and processes will be required.[21]

5. Assessing Tax Incentives

From the government's point of view, instituting a tax incentive with a view to attracting investment can be compared to regulatory reform with the same objectives. Governments need to consider several points.

5.1 Costs of Tax Incentives

The government will lose tax revenue from projects which would have gone ahead without the incentives but are now able to take advantage of the tax savings. There is also likely to be lost revenue through use of the incentive scheme by businesses which were not the intended recipients. One way to minimise the lost revenue from an incentive is to impose targeted incentives that only apply to certain investments or investors (although note comments below regarding constraints over investment design).

There can be a significant cost associated with the setting up and enforcement of incentives. This will require resources to be redirected away from other public expenditure projects. Some incentives are also more difficult to monitor — a tax administration with limited resources has less capacity to audit a company claiming a tax holiday, even though this could encourage non-qualifying firms to take advantage of incentives knowing they are unlikely to be detected.[22]

5.2 Risks

Tax administrations need to design attractive investments incentives while also putting into place measures to combat unwanted tax arrangements. Anti-avoidance measures must be transparent if they are meant to avoid discouraging investment.[23]

5.3 Framework for Assessment

As mentioned in previous sections, not all tax incentives will be suitable for a country or for all sectors. For example, in designing or assessing incentive regimes for oil, gas and mining, governments will need to balance factors including[24]:

• The need to create sufficient incentives for private companies to invest;

• The division of risk between the investor

20 BRITACOM (2019). *Wuzhen Action Plan (2019-2021)*, https://www.britacom.org/sy/cbw/202003/P020220526579815030342.pdf.

21 Bogovac J. (2015). The Paradox of Tax Incentives in Developing Countries, in: Radvan M. (ed.). *System of Financial Law: Sistem of Tax Law: Conference Proceedings*.

22 UN & CIAT (2018). *Design and Assessment of Tax Incentives in Developing Countries*, https://www.un.org/esa/ffd/publications/design-and-assessment-of-tax-incentives-in-developing-countries.html.

23 Ibid.

24 United Nations (2017). United Nations Handbook on Selected Issues for Taxation of the Extractive Industries by Developing Countries, to which the author contributed.

and the state;

• Compensation for the state for the loss of resources, regardless of the profitability of a given operation; and

• The extent to which the regime taxes economic rents.

The United Nations has developed this theme into a conceptual framework.[25] It finds that consensus conclusions regarding tax incentives are that:

• In terms of governance, best practice is for tax incentives to be prescribed in law, transparent and monitored.

• To be effective, tax incentives should be introduced for a purpose seeking to changing behaviour in a particular way. The objective should be considered carefully, for example, to attract new investment, create employment or develop skills.

• To be efficient, a tax incentive should achieve its policy objective at the minimum social costs.

• Incentives should be designed for ease of administration, including clear rules regarding qualifying activities or expenditures.

The United Nations, OECD, International Monetary Fund (IMF) and World Bank Group have collaborated on a framework against which low-income countries can assess possible incentives.[26] The framework is designed to identify the most useful incentives and is made up of five techniques:

(i) Cost-benefit analysis

This cost-benefit analysis aims to capture the direct and indirect effects of tax incentives. The direct effects include the impact of incentives on jobs and wages, while indirect effects include the displacement of labour and capital, and productivity spill-overs. It is the job of government to estimate whether the positives outweigh the negatives.

(ii) Tax expenditure assessment

This technique is a means to quantify the revenue foregone by making changes to tax legislation. It involves creating a list of the planned changes with a clear description and objective for each before estimating the revenue foregone from each measure. Additional analysis can then supplement the results.

This allows governments to understand the potential costs of various changes, allowing them to choose the least costly incentive.

(iii) Corporate tax micro simulation models

This assessment will give a hypothetical impact of the measure on firms based on the data received in previous tax returns. This is useful for establishing the direct impact on firms — how much extra money they will have to invest. It can be expensive to carry out and requires significant resources.

(iv) Effective tax rate models

This method helps to create an understanding of how, and to what extent, proposed tax measures impact investment decisions. Two kinds of forward-looking effective tax rates (ETRs) are calculated as part of this assessment: marginal tax rates will show how tax will impact the rate of return on investment while the average ETR will show the present value of the tax payable on the return on investment. ETRs are often used as a measure of the competitiveness of a tax system and thus allow a jurisdiction to compare itself with its neighbours. Figure 4 is a diagram detailing the ETR data for jurisdictions in the Asia-Pacific region.[27]

The ETR calculations are often used by governments, think tanks and international organisations to analyse how tax policy impacts investment.

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25 United Nations (2020). "Update of the Handbook on Selected Issues for Taxation of the Extractive Industries by Developing Countries: Chapter XX: Tax Incentives", as drafted by the author.

26 IMF, OECD, UN & World Bank (2015). *Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment*, https://www.oecd.org/tax/options-for-low-income-countries-effective-and-efficient-use-of-tax-incentives-for-investment.htm.

27 Wiedermann V. & Finke K. (2015). Taxing Investments in the Asia-Pacific Region: the Importance of Cross-border Taxation and Tax Incentives. ZEW Discussion Papers 15-014.

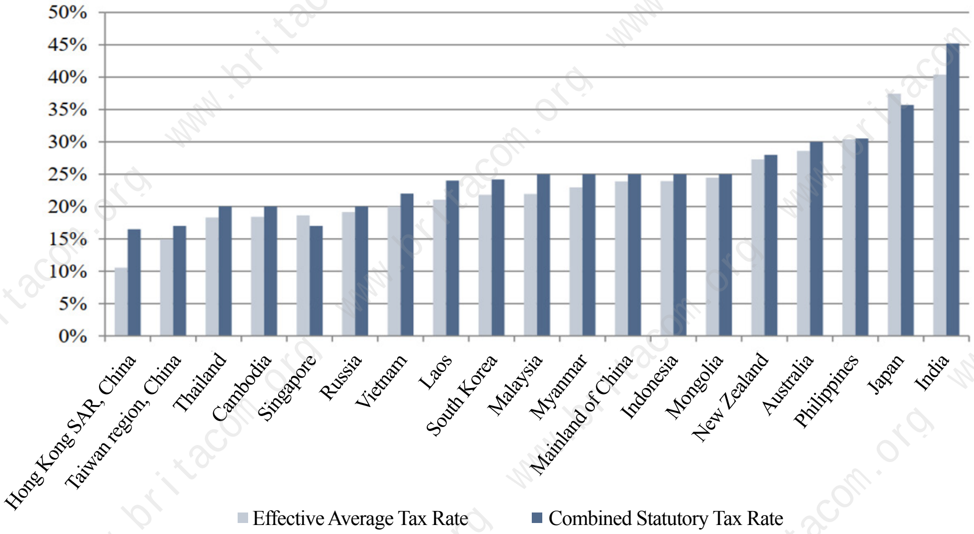

Figure 4. Comparison of EATRs and statutory tax rates of Asia-Pacific jurisdictions

(v) Diagnostic assessment of governance

As previously mentioned, transparency and good administration are key to encouraging trust in the tax incentives and obtaining investment. There are pre-designed assessments which governments can use to assess themselves.

• The OECD's ten principles to promote better management and administration so as to improve transparency and consistency.[28]

• Benchmarking investment incentives — a World Bank Group template to assess the tax incentives in four dimensions, namely rule of law, transparency, efficient administration and incentive reviews.

6. Constraints over Tax Incentive Design

Historically, countries' approaches to keeping their tax system competitive have been to lower rates. This can be seen by the consistent decrease in corporation tax rates across the globe in the last few decades.[29] In recent years, with many governments having concern regarding potentially harmful tax competition, the range of constraints over incentive design has increased, with the OECD/G20 Inclusive Framework (IF) Pillar Two proposal adding to an already crowded field. Various constraints are imposed by the OECD Forum on Harmful Tax Practices (FHTP), the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum), and the European Union (EU) Code of Conduct Group on Business Taxation (CoCG).

6.1 OECD FHTP Constraints

The FHTP monitors the Base Erosion and Profit Shifting (BEPS) Action 5, which represents one of the four minimum standards that IF members have agreed to respect. Action 5 is focused on addressing "harmful tax practices" by which jurisdictions seek to compete to attract investment by providing preferential tax regimes.

28 The OECD's principles were developed as the starting point in an international effort to promote the management and administration of tax incentives for investment in a transparent and consistent manner. OECD. *Principles to Enhance the Transparency and Governance of Tax Incentives for Investment in Developing Countries*, https://www.oecd.org/tax/tax-global/transparency-and-governance-principles.pdf.

29 Owens J. & Ndubai J. W. (2021). Tax Competition: Understanding History's Influence on the New Normal. 103 *Tax Notes International*.

The focus of the OECD is on mobile activities: the FHTP conducts assessments on preferential regimes, being regimes where the treatment of the regime differs in a favourable way from the conditions applicable under the general regime. Such preferential treatment could result from a difference in the rate, but also from a difference in the base or another favourable treatment.

Of particular concern in such reviews by the FHTP are:

- The presence of "ring fencing" whereby a tax measure is not available to the general taxpayer population (i.e., the domestic market) but only to those whom the jurisdiction is seeking to attract;
- Regimes which provide benefits without requiring sufficient substance (in particular, for Intellectual Property regimes);
- Any lack of transparency as to how the regimes are applied; and
- Any lack of monitoring, supervision and enforcement of the above.

This intense scrutiny is intended to reduce the attractiveness to jurisdictions of using such tax measures to attract (mobile) foreign direct investment, and hence to reduce the supply of such regimes.

6.2 Global Forum Constraints

The Global Forum focuses on Exchange of Information on Requests (EOIR) and Automatic Exchange of Information (AEOI) between tax authorities. The Global Forum carries out peer reviews and rates the compliance of its 165 members.

6.3 European Union Code of Conduct Group on Business Taxation

The European Union operates the CoCG which reviews the tax systems of both EU Member States and third countries. The criteria used by the CoCG for screening jurisdictions are based on:

- Tax transparency;
- Fair taxation; and
- The implementation of BEPS measures.

The CoCG also provides specific rules in relation to economic development zones. The "Guidance on Tax Privileges Related to Special Economic Zones" sets out the parameters that need to be met for an economic zone regime to be considered not harmful by the CoCG.[30] This requires that conditions are met in the following areas:

- Economic substance;
- Link to real economic activity;
- Lack of applicability to highly mobile activity;
- Regular audit; and
- Defined terms and conditions.

6.4 Potential Impact of Pillar Two

A Global Minimum Tax (or GloBE) has the potential to limit the attractiveness of incentives, where a company within scope (over the threshold) has profits that are then exposed to a "top-up" tax by another government. To attract investment in an environment where there is a Global Minimum Tax, each different segment or type of investor needs to be considered to understand the nature of incentives that might be offered and whether there is merit in offering them. Incentives that result in temporary timing differences, for example, tax incentives that provide for immediate expensing of expenditure on tangible assets, and which are targeted to the cost recovery of tangible assets are unaffected by the Global Minimum Tax. For companies below the global turnover threshold (EUR750 million p.a.), permanent incentives will continue to be attractive.

Table 3 below summarises an overall assessment of the impact of Pillar Two on the main categories of tax incentives typically adopted to attract FDI, focusing on in-scope incentives.[31]

30 General Secretariat of the Council (2017). *Agreed Guidance by the Code of Conduct Group (Business Taxation) on Tax Privileges Related to Special Economic Zones*, https://data.consilium.europa.eu/doc/document/ST-5814-2018-REV-6/en/pdf.

31 Table 3 draws on analysis from: UNCTAD and Lazarov I., B. Liotti, J. Ndubai, et al. (2022). The Treatment of Tax Incentives under Pillar Two. WU GTPC Working Paper, SSRN Working Paper.

Table 3: Summary of Pillar Two impact on tax incentives for those above the threshold

Incentive type	Pillar Two impact	Comment
Rates		
Exempt/zero	High	Will lead to ETR below 15%, resulting in potential top-up tax
Below 15%	High	Likely to lead ETR below 15% and to top-up tax, to varying extent
Above 15%	Low	Generally, effective rates to a level above 15% will not be affected. Combined with other features of an SEZ, ETR could be less than 15%. Still considerable complexity
Deductions		
Deductible expenses	Moderate	Some tax exclusions, deductions or tax accounting conventions that are common among IF members are deductible from GloBE income, but less common deductions may not be taken into account and could lead to ETR below 15%
Accelerated depreciation and immediate expensing	Low	Deferred tax adjustments are likely to address ETR timing differences
Loss carry-forward	Low	Deferred tax adjustments are likely to address ETR timing differences
Exemptions		
Tax holidays	High	Will lead to ETR below 15%, resulting in potential top-up tax
Specific exemptions	Moderate	Exemptions granted to specific sectors, entities, or locations (other than out-of-scope situations) are likely to result in top-up tax. Exemptions applying to out-of-scope situations such as SMEs, excluded entities or excluded income are not affected
Participation exemptions	Low	Dividends received under participation exemptions are excluded from the GloBE tax base
Other incentives on income-related taxes		
Patent boxes	Moderate	Could bring ETR below 15%, depending on regime
Tax credits	Moderate	Could lead to ETR below 15% if either credit is refundable within four years, or reduces covered tax expenses (if not)
Capital gain incentives	Moderate	Could bring ETR below 15%, depending on regime
Withholding tax incentives	Low	Taxation of outbound passive income by source country is not included in the GloBE ETR calculation

Pillar Two will change the incentive environment and may reduce the need for countries to use corporate income tax incentives to attract investments, thus meaning countries no longer have to choose between using tax policy to become attractive investment locations or mobilise revenues. The OECD's intention is that by implementing the GloBE rules, jurisdictions will have additional revenue to improve their investment environments.[32] This is intended to

32 OECD (2022). *Tax Incentives and the Global Minimum Corporate Tax: Reconsidering Tax Incentives after the Globe Rules*, https://www.oecd.org/tax/tax-incentives-and-the-global-minimum-corporate-tax-25d30b96-en.htm.

be of particular benefit to developing countries where a lack of infrastructure is a barrier to investment.

7. Conclusions

Tax incentives alone are not enough to attract foreign direct investment, especially in developing economies. Investment decisions are strongly influenced by political and economic stability, physical infrastructure, and access to markets. The impact across regions and sectors will vary.

The availability of sophisticated data, analysed in real time, gives a better chance of designing and administering a smart, targeted incentive than ever before.

The arguments in favour of tax incentives for growth are subtle — it is not as clear-cut as "tax incentives = good for business". Tax incentives can attract new investors which would not have invested without favourable treatment. Carefully designed and targeted incentives may help correct market failures and advance government development goals. The more targeted the incentive, the more likely it is to reach its stated goal. Tax incentives, however, carry risks, including their use by immobile local firms and dead weight (investors which would have invested in any case), distortions of capital allocation, increased complexity, administrative difficulty, and reduced transparency around effective tax rates. They can also cost substantial amounts in foregone revenue. These drawbacks will need to be traded off against the potential economic advantages of being able to combine raising high capital income taxes while remaining competitive for mobile activity.

Designing and implementing incentives for growth therefore requires a structured approach:

A. Define policy objectives

a. Does the incentive address specific and measurable policy goals?

b. Does it have a clear intervention logic to address a clear market failure/obstacle?

c. Have alternative regulatory and fiscal instruments been considered, to ensure that tax is the best policy alternative?

B. Target eligibility criteria

a. Are the eligibility criteria tied to the specific policy goal?

b. Do the criteria target investors whose behaviour is likely to change?

c. Will the incentive enable spill-overs into the wider economy, or will the benefit be completely captured by the inbound investor?

d. Are the eligibility criteria designed to minimise distortions?

C. Confirm that incentive does not contravene international standards, for example:

a. Incentive requires sufficient economic substance and links to economic activity,

b. No "ring fencing" whereby a tax measure is not available to the general taxpayer population (i.e., the domestic market) but only to those whom the jurisdiction is seeking to attract,

c. Sufficient transparency as to how the regimes are applied, and

d. Sufficient monitoring, supervision and enforcement.

D. Ensure value for money

a. Is the incentive profit- or cost/performance-based?

b. Do the benefits outweigh the costs?

E. Set clear exit policies

a. Are there effective safeguards in place to prevent access if the incentive is misused?

b. Is the incentive time-limited?

Growth enhancing tax policies can contribute to the challenges confronting countries beyond the COVID-19 crisis. A return to "business as usual" would be a missed opportunity. For any given country, the optimal approach will depend on a wide range of country-specific factors, including current levels and structures of taxation and spending, the quality of the country's institutional settings, and its national and regional development goals.

Raising Tax Certainty: Experience in Hong Kong SAR, China

Tsui Chung-Leung, Steven

Tsui Chung-Leung, Steven
Chief Assessor
Tax Treaty
Inland Revenue Department
Hong Kong SAR
the People's Republic of China

Abstract: An effective mechanism for dispute prevention and resolution is important to both tax administrations and taxpayers in achieving tax certainty. The Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong) has implemented frontend dispute prevention and backend dispute resolution mechanisms, including advance ruling, advance pricing arrangement (APA) and mutual agreement procedure (MAP) systems. This article explains in detail the requirements and procedures and shares the practical experience relating to advance ruling, APA and MAP in Hong Kong.

Keywords: Tax certainty; Dispute prevention and resolution; Advance ruling; Advance pricing arrangement; Mutual agreement procedure

1. Foreword

Globalisation and advanced technology facilitate the movement of goods, services and people between different borders. Due to different tax rules in different jurisdictions, the rapid growth of cross-border trade and investment has inevitably increased international tax disputes. Tax certainty is always an important component of investment decisions for taxpayers. Providing and enhancing tax certainty across all possible areas of dispute brings benefits for taxpayers and tax administrations alike and is key to promoting investment, jobs and growth.

Tax administrations play an important role in achieving tax certainty and avoiding tax disputes. Preventing disputes and resolving disputes are equally important to every tax administration. The Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong) is committed to implementing an efficient and effective system for preventing and resolving tax disputes. On the upfront side, the Inland Revenue Department (IRD) of Hong Kong has established the tax dispute prevention mechanisms in the Inland Revenue Ordinance (IRO), including advance ruling system and advance pricing arrangement (APA) regime, to prevent and reduce tax disputes. Hong Kong considers advance ruling and APA effective tools for taxpayers to mitigate tax risk and achieve tax certainty. As a backend solution, in addition to the traditional objection and appeal channels, Hong Kong has put in place mutual agreement procedure (MAP) to resolve international disputes. This article discusses the requirements as well as practical experience relating to advance ruling, APA and MAP systems in Hong Kong.

2. Advance Ruling

2.1 Advance Ruling in Hong Kong

The statutory advance ruling system was introduced in Hong Kong on 1 April 1998. One of its objectives is to provide the person who applies for a ruling with a degree of certainty about the tax treatments for specified arrangement based on the current tax legislation. Apart from providing certainty to taxpayers, advance ruling system also promotes consistency in the application of the IRO, minimises tax disputes, fosters trust relationship between taxpayers and the IRD, and encourages compliance with the IRO.

2.2 Scope of Advance Ruling

In Hong Kong, a person may apply to the IRD for a ruling on how a provision of the IRO applies to the person or the arrangement specified in the application.[1] It must be stressed that the IRD will only give a ruling for a seriously contemplated arrangement but not a hypothetical or speculative one. A ruling is not to be made if the issue relates to: the imposition or remission of a penalty: the correctness of a return or other information supplied by a person; the prosecution of a person; the recovery of a debt owing by a person; or the computation of income or loss under the transfer pricing rules.

The IRD may decline or refuse to make a ruling under certain circumstances: the application requires the IRD to determine or establish any question of fact; the IRD considers that the correctness of the ruling would depend on the making of assumptions, whether in respect of a future event or any other matter; the matter on which the ruling is sought is subject to an objection or appeal, whether in relation to the applicant or any other person; the matter on which the ruling is sought is the subject of a tax return which has been or is due to be lodged under the IRO; the IRD considers that the arrangement in relation to which the ruling is sought is not seriously contemplated by the applicant; the application is frivolous or vexatious; the IRD is undertaking an audit on how any provision of the IRO applies to the applicant, or to an arrangement similar to the one which is the subject of the application; the IRD considers that the applicant has not provided sufficient information in relation to the application; or the IRD considers that it would be unreasonable to make a ruling in view of the resources constraints. In the case of declining and refusing to make a ruling, the IRD will notify the applicant in writing of its decision and the reasons therefor.

2.3 Application for Advance Ruling

An application for an advance ruling should be made on a specified application form together with supporting documents. Full particulars must be provided to the IRD before an advance ruling can be given to the applicant. The IRO specifies the information that should be contained in an advance ruling application. Briefly stated, in an application, the applicant must: identify the person that the ruling applies; provide all relevant facts and documents relating to the arrangement in respect of which the ruling is sought; state the provision of the IRO in respect of which the ruling is sought; state the proposition of law which is relevant to the issues raised in the application; state the assumptions made in respect of the arrangement; and provide any other information relevant to the application. A checklist and details of the information required are set out in Departmental Interpretation and Practice Notes No. 31 (revised in April 2020).[2]

Generally, the IRD will endeavour to respond within six weeks from the date of receipt

1 Section 88A and Schedule 10 of the IRO, Chapter 112, Laws of Hong Kong, https://www.elegislation.gov.hk/hk/cap112?xpid=ID_1438402585275_001.

2 IRD (2020). *Departmental Interpretation and Practice Notes No. 31*, https://www.ird.gov.hk/eng/pdf/dipn31.pdf.

of the application, provided that the applicant has furnished all the relevant information. In the ruling, the IRD will state the identity of the person, the provision of the IRO and the arrangement to which the ruling applies; the period for which the ruling applies; and any material assumptions about future events or other matters made by the IRD.

2.4 Effects of an Advance Ruling

If the IRD has made a ruling to a person on the application of any provision of the IRO to an arrangement, the ruling should be applied to the arrangement during the period specified in the ruling provided that the existence of the ruling has been disclosed in the tax return of the person. A ruling is given subject to the condition that the arrangement will be implemented in the way stated in the application and the ruling. A ruling shall not apply to a person in relation to an arrangement if: it is materially different from the arrangement identified in the ruling; there is a material omission or misrepresentation in, or in connection with, the application for the ruling; or any assumption made by the IRD about a future event or any other matter that is stated in the ruling is incorrect.

Depending on the facts and circumstances of the case, the IRD may at any time withdraw a ruling by a written notice, stating the reasons for the withdrawal. If a ruling is withdrawn before the arrangement in question is entered into, the ruling shall cease to apply immediately. However, if the ruling is withdrawn after the relevant arrangement has been entered into, the ruling shall continue to apply in relation to the arrangement for the remainder of the period specified in the ruling provided that the taxpayer has fully disclosed the existence of the ruling in the tax return.

2.5 Publication of Advance Rulings

To promote transparency and consistency in the application of the provisions of the IRO, some rulings which are considered to be of general interest have been published on the website of the IRD in redacted form.[3] To preserve the confidentiality of the applicant and entity covered by the ruling, all information that may enable identification of the applicant will be removed from the redacted version. Rulings will be published for general reference only. The published rulings are non-binding and provide no protection to any persons other than the applicant.

2.6 Snapshot of Advance Rulings in Hong Kong

In the first few years of implementation of the advance ruling system in Hong Kong, it was witnessed a noticeable increase in the number of applications for advance ruling. It reached a record high of 90 applications in the year 2003/04. The number of applications has decreased in recent years. Most of the applications are related to profits tax matters.

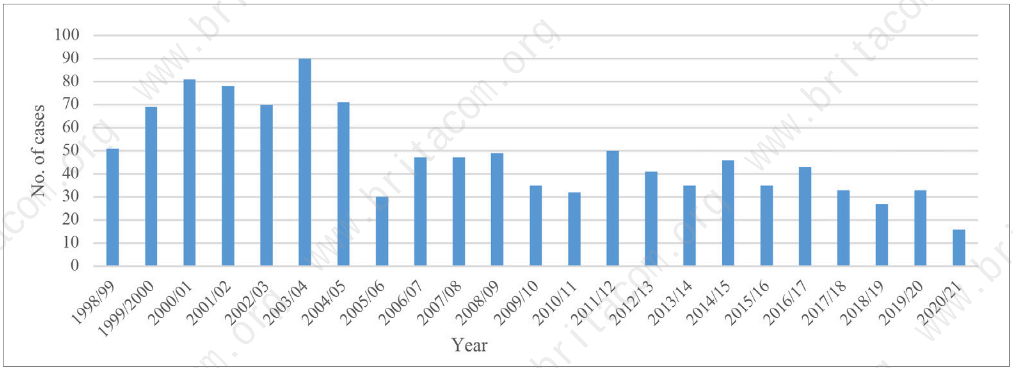

Figure 1. Number of advance ruling cases
Source: http://www.ird.gov.hk.

3 IRD. https://www.ird.gov.hk/eng/ppr/arc.htm.

3. APA

3.1 APA in Hong Kong

In an ever-changing global economy, transfer pricing is one of the most important tax issues for multinational enterprises (MNEs) and tax administration. Nowadays, APA is commonly used as a risk management tool for transfer pricing. An APA is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time. This process gives MNEs the opportunity to reach agreement with the tax administration on the method of applying the arm's length principle to transactions and arrangements between associated persons so that transfer pricing issue can be more efficiently dealt with in advance and thus avoiding the transfer pricing disputes at a later stage. APAs concluded bilaterally or multilaterally with double taxation arrangement (DTA) partners provide an increased level of certainty in Hong Kong and the jurisdictions concerned, proactively prevent transfer pricing disputes and lessen the likelihood of double taxation.

In Hong Kong, there are three types of APA, i.e. unilateral, bilateral and multilateral APA. A unilateral APA is an arrangement between the IRD and a person concerning the transfer pricing of controlled transactions with an associated person and does not involve the agreement with the competent authority of a foreign jurisdiction. A bilateral APA is an arrangement between the competent authorities of Hong Kong and a jurisdiction which is a territory outside Hong Kong with which a DTA has been made (DTA partner) concerning the transfer pricing of controlled transactions. A bilateral APA is made under the MAP Article of the relevant DTA. A multilateral APA strictly involves multiple and complementary bilateral APAs and is an arrangement between the competent authorities of Hong Kong and two or more DTA partners concerning the transfer pricing of controlled transactions.

The IRD rolled out the APA programme in 2012 by resorting to the general administrative power of the IRO to undertake APA. Upon codification of the international transfer pricing rules into the IRO in July 2018, a statutory APA regime[4] was introduced and put in place to provide a legal basis for the processing of APAs. Statutory provisions are also introduced for dealing with non-compliance and provision of incorrect information concerning APA.

3.2 Scope of APA

Due to resource constraints, the IRD would only consider bilateral or multilateral APA applications in the past. In order to provide certainty for transactions related to jurisdictions with which Hong Kong has no DTA or that have no APA process, now the IRD is also willing to accept unilateral APA application.

The IRD may refuse to make an APA if any person, who is involved in the proposed APA and has income or loss assessed or computed for the purposes of Hong Kong tax (other than the applicant), fails or refuses to join the application. In such a case, the IRD will give the applicant a written notice stating its decision and the reasons for the refusal.

In general, an APA will cover a period of three to five years.

3.3 The APA Process

To process the application in a more efficient and effective way, the APA process in Hong Kong has been streamlined from five stages to three stages with effect from July 2020. A summary of the current three-stage APA process is as follows:

3.3.1 Stage one: Early engagement

A person can request an APA by submitting a request for APA early engagement (APA request) to the IRD at least six months before the

4 Sections 50AAP to 50AAW and Schedule 17H of the IRO, Chapter 112, Laws of Hong Kong, https://www.elegislation.gov.hk/hk/cap112?xpid=ID_1532314603876_001.

proposed commencement date. Upon receipt of the APA request, an APA team will be formed to process the APA request. The APA team will conduct a robust review of the APA request and have preliminary discussions with the person making the APA request to explore avenues for the appropriate treatment of the covered controlled transactions and collateral issues. Having considered all information contained in the APA request, their own research and the details provided during the preliminary discussions, where appropriate, the IRD will invite the person making the APA request to submit a formal APA application. The person making the APA request will normally be required to pay a deposit before the APA application is entertained. Details and procedures for applying for an APA are set out in Departmental Interpretation and Practice Notes No. 48 (revised in July 2020).[5]

3.3.2 Stage two: APA application

In this stage, the APA team will analyse critically and evaluate the APA application, including all documentation and comparability analysis. Where necessary, the APA team will make further enquiries and interview key personnel of the applicant or the associated persons. The APA team will develop Hong Kong's position and negotiate with the applicant (for unilateral APA) or DTA partners (for bilateral or multilateral APA) with a view to reaching agreement. Where agreement is reached, the relevant parties will enter into an APA. The applicant is normally required to pay a fee before signing the APA.

3.3.3 Stage three: Monitoring and compliance

After concluding an APA, the person in respect of whom an APA is made is required to make necessary disclosure of the APA in the profits tax return and submit to the IRD an annual compliance report demonstrating compliance with the terms of the APA. The person in respect of whom an APA is made is also required to retain all the records and data for a period of not less than seven years after the end of the APA period.

In general, the IRD will specify in a concluded APA: the name of the applicant to which the APA applies; the controlled transactions and period covered by the APA; the methodology as agreed for determining the income or loss of the applicant; the critical assumptions on which the agreed methodology is based; the applicant's obligations under the APA; and any other terms as agreed between the IRD and the applicant.

If appropriate, the IRD may consider seeking to rollback the methodology agreed in the APA into the prior years.

3.4 Timeframe

The target timeframe for processing an APA is six months for the early engagement stage; and further 18 months for the APA application stage. It is expected that a longer time is required for complex cases.

Table 1: Snapshot of bilateral APA requests in Hong Kong

Trade	retail distribution, wholesaling, provision of services, use of intellectual property, manufacturing, research and development, global trading
DTA partners involved	Mainland of China, Italy, Japan, Korea, Malaysia, the Netherlands, Thailand, and the United Kingdom
Transfer pricing methodologies	comparable uncontrolled price method, transactional net margin method (TNMM)-full cost mark up, TNMM-operating margin, profit split
Period of bilateral APA proposed	3 to 5 years with rollback

5 IRD. *Departmental Interpretation and Practice Notes No. 48*, https://www.ird.gov.hk/eng/pdf/dipn48.pdf.

3.5 Snapshot of APA in Hong Kong

The first bilateral APA, which was about a trading arrangement, was concluded in June 2014 while the first unilateral APA in Hong Kong, which related to royalty and service fee arrangements, was concluded in January 2019. Over the years, Hong Kong has concluded a couple of unilateral and bilateral APA cases. It is expected that there will be a rising demand for APAs, particularly for high-valued transactions within large multinational enterprises.

4. MAP

4.1 Concurrent Avenues for International Tax Disputes Resolution

In Hong Kong, a taxpayer aggrieved by an assessment made under the IRO, including transfer pricing disputes, may object to the assessment under the provisions of the IRO. The assessor will consider the merits of the objection and seek agreement with the taxpayer to settle the objection. If an agreement cannot be reached, the objection will be submitted to the Commissioner of Inland Revenue (the Commissioner) for determination. Taxpayers are provided with the rights to lodge an appeal to the Board of Review (the Board), an independent tribunal, against the determination of the Commissioner. If either the taxpayer or the Commissioner is dissatisfied with a decision of the Board, the aggrieved party may pursue the case to the Court of First Instance, Court of Appeal and Court of Final Appeal.

On international dimension, if a taxpayer considers that the tax he has to pay is not in accordance with the provisions of the relevant DTA, he may present a case for MAP regardless of the domestic remedies provided under the IRO. The Commissioner will consider concurrently a case presented by a taxpayer under the MAP Article and an objection lodged by the taxpayer under the IRO.

Where the taxpayer accepts the competent authority agreement reached for an issue covered by his MAP request and his objection lodged for the issue remains undetermined, the taxpayer's acceptance of the competent authority agreement will be regarded as a settlement between the taxpayer and the Commissioner under the provision of the IRO. However, if the taxpayer does not accept the agreement reached by the competent authorities, the Hong Kong competent authority will close the case without implementing any agreement. The Commissioner will proceed to determine the taxpayer's objection and follow the appeal mechanism under the provisions of the IRO.

4.2 MAP in Hong Kong

The MAP Article in the DTAs enables a taxpayer to initiate the procedure where it is considered that the actions of the competent authority of one or both of the jurisdictions concerned result or will result in taxation not in accordance with the provisions of a DTA. A MAP request should be made within the time limit from the first notification of the actions giving rise to taxation not in accordance with the provisions of the DTA.

MAP is a process which enables the competent authorities to interact with the intention to resolve disputes regarding the application of the DTA. The competent authorities are obliged to use their best endeavours to reach an agreement with a view to avoiding taxation which is not in accordance with the DTA.

All of Hong Kong's DTAs contain the MAP Article which enables the competent authorities of Hong Kong and DTA partners to resolve any disputes on the interpretation and application of the provisions of the DTAs by mutual agreement.[6] Some DTAs also allow taxpayers to refer any issues unresolved via MAP for arbitration.

Hong Kong provides access to MAP in cases involving transfer pricing between associated enterprises as well as cases for non-transfer pricing issues. The Hong Kong competent authority aims to resolve a MAP case (including the implementation of any MAP solution) within 24 months from receipt of the request.

Details of the rules, guidelines and procedures on access to and use of the MAP are pub-

6 IRD. *Comprehensive Double Taxation Agreement Concluded,* https://www.ird.gov.hk/eng/tax/dta_inc.htm.

lished in Departmental Interpretation and Practice Notes No. 45 and MAP Guidance, which are available at the website of the IRD.[7]

4.3 The MAP Process

In Hong Kong, there are two stages for the MAP. Stage one involves the taxpayer and the competent authority of the DTA jurisdiction to which the MAP request is made. Stage two involves the endeavours of the competent authorities of both DTA jurisdictions to resolve the case.

In stage one, a Hong Kong taxpayer should usually make a MAP request by sending to the Hong Kong competent authority the completed application form[8] together with all supporting documents and information. If the MAP request is considered justified and the issue involved can be resolved on a unilateral basis, the Hong Kong competent authority may grant relief, under the provisions of the DTA, without the need to enter into bilateral discussion with the competent authority of the DTA partner.

However, if the case cannot be resolved unilaterally, stage two commences. The Hong Kong competent authority will be in contact with the competent authority of the DTA partner and both competent authorities will negotiate and use their best endeavours to resolve the case by mutual agreement.

4.4 Types of Disputes Initiated Under MAP

The MAP Profile[9] and MAP statistics[10] of Hong Kong are available at the OECD's website.

As published in the MAP statistics at the OECD's website, the inventory of Hong Kong's MAP cases is relatively small. Over the years, Hong Kong has endeavoured to resolve the MAP cases unilaterally or bilaterally with DTA partners.

Regarding the MAP requests involving transfer pricing issues, the issues in dispute were related to the arm's length price of royalties, service fees, commission, sales undercharged or purchased overstated by the overseas associated persons, etc. Regarding the MAP requests involving non-transfer pricing issues, the issues in dispute were mainly related to the withholding tax rate on dividends, resident status of the taxpayer and employment income doubly assessed, etc.

4.5 Handling of MAP Cases

The MAP function is performed by the Tax Treaty Section of the IRD. In order to process the MAP requests in a more objective manner, the Tax Treaty Section is independent from the assessing and investigation units of the IRD.

5. Concluding Remarks

This paper aims to share Hong Kong's practical experiences in the area of dispute prevention and resolution.

Rapid technological changes and globalisation have further brought in complexity in the economic, business and regulatory environments, leading to tax uncertainty and increasing tax disputes. One of the fundamental goals of the BRITACOM is to remove tax barriers to trade and investment. International tax disputes may impede the growth of trades and investments. An effective mechanism for dispute prevention and resolution plays an important role for both tax administrations and taxpayers and mutual cooperation between tax administrations is an indispensable element of the process.

In addition, transfer pricing is becoming increasingly complex and is one of the most significant global tax issues encountered by tax administrations. Capacity building, compliance risk management, use of data analytical tools, and coordination between tax administrations are all necessary and seamlessly interwoven together if transfer pricing issues are to be successfully tackled.

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7 IRD. *Mutual Agreement Procedure*, https://www.ird.gov.hk/eng/tax/dta_map.htm.

8 IRD. *Mutual Agreement Procedure*, https://www.ird.gov.hk/eng/pdf/ir1454e.pdf.

9 OECD (2020). *Mutual Agreement Procedure Statistics, OECD. Hong Kong Dispute ResolutionProfile*, https://www.oecd.org/tax/dispute/hong-kong-dispute-resolution-profile.pdf.

10 OECD (2020). *Mutual Agreement Procedure Statistics*, https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2020-per-jurisdiction-inventory.htm.

Raising Tax Certainty in Singapore

International Tax and Relations Division, IRAS

Abstract: Tax certainty is key for both businesses and governments to optimise investments and economic progress. This article shares the experience of the Inland Revenue Authority of Singapore and the approaches taken to provide a more certain tax environment for taxpayers.

Keywords: Tax certainty; Mutual Agreement Procedure; Advance Pricing Arrangement; Dispute prevention and resolution mechanisms; BRITACOM

INLAND REVENUE AUTHORITY OF SINGAPORE

International Tax and Relations Division
IRAS

1. Introduction

Today, businesses operate in a globalised environment, with numerous cross-border transactions and activities. As business models evolved and international tax policies develop, tax administrations may review tax policies or amend existing tax rules that could introduce uncertainties to businesses.

Businesses accord high importance to tax certainty. Any lack of clarity about tax consequences leads to concerns about potential double taxation, as contrasted with a stable operating environment where tax businesses can obtain easy access to tax certainty. The latter would facilitate business decisions about whether to invest or expand operations in that jurisdiction. This ultimately impacts economic investments in a jurisdiction.

As a small and open economy with no natural resources, it is especially important for Singapore to ensure that its tax system remains fair and transparent to ensure that businesses continue to grow and invest in Singapore. This is key to Singapore's tax policy administration and the Inland Revenue Authority of Singapore (IRAS) has taken efforts to create an environment providing tax certainty to businesses both from domestic and international tax perspective.

2. Singapore's Dispute Prevention and Resolution Mechanisms in the Domestic Context

From a domestic tax perspective, IRAS strives to minimise ambiguities in the interpretation of tax rules and facilitate taxpayer compliance by clarifying tax rules and publishing clear technical positions on the IRAS website and by way of detailed electronic Tax Guides (e-Tax Guides). IRAS also conducts seminars or workshops under its taxpayer education and engages in regular dialogues with the business community. Through these platforms, taxpayers and tax professionals can raise technical or compliance issues for discussion with IRAS and obtain better understanding or clarity on tax treatment.

Arising from taxpayers' feedback or questions on the interpretation or application of tax rules, IRAS may also initiate a review of the tax policy and rule, sometimes via a process of co-creating the development of new tax policy or rules with taxpayers. IRAS' regular consultations present opportunities and platforms for IRAS to better understand the concerns faced by businesses and to engage taxpayers on the possibility of changing or adapting current rules or introducing new rules that can sufficiently address the issues faced by businesses. In addition, in respect of revised or new rules that need to be introduced via legislative amendments to the Singapore Income Tax Act, a public consultation would be held to obtain the feedback from the broader taxpayer and tax professional community. The feedback provided can also offer another opportunity for IRAS to consider refining the proposed legislative changes. These avenues allowing for feedback and engagement with taxpayers enable IRAS to co-create rules with taxpayers which take into account their feedback in the design, ensuring greater clarity of tax rules and thereby helping to promote tax certainty.

As large corporations tend to face more complex tax issues, IRAS engages them through the Enhanced Taxpayer Relationship (ETR) programme. Under this programme, a large corporation can discuss and seek early clarity from IRAS concerning the potential tax consequences of significant business events being contemplated, even prior to the filing of its tax return. The ETR programme allows IRAS to build a collaborative relationship with businesses and offers businesses the avenue to obtain early tax certainty.

IRAS also offers the Advance Ruling System for Income Tax and Goods and Services Tax (GST). Businesses which wish to obtain upfront tax certainty on their specific business arrangement can apply to IRAS for an Advance Ruling and IRAS will provide its interpretation of how a specific tax provision(s) would apply to the proposed arrangement. Such a ruling is binding on the Comptroller of Income Tax or Comptroller of GST as applicable.

In 2022, IRAS introduced the Tax Governance Framework (TGF), and Tax Risk Management and Control Framework for Corporate Income Tax (CTRM). This is in addition to the existing Assisted Compliance Assurance Programme (ACAP) for Goods and Services Tax which was first introduced in 2011. These are voluntary compliance initiatives that taxpayers can apply for to demonstrate that they have good tax governance policy and practices, as well as a round and robust tax risks management framework. Taxpayers, who are assessed by IRAS to meet the standards of good governance and tax risks control under these initiatives, would be able to enjoy benefits such as waiver of penalties for voluntary disclosure of past errors.

3. Singapore's Dispute Prevention and Resolution Mechanisms in the International Context

Apart from our domestic initiatives, IRAS strives to ensure that there are effective mechanisms in place to help taxpayers prevent and resolve international tax disputes. This is especially important to give taxpayers the confidence to engage in cross-border activities between Singapore and other jurisdictions.

Double taxation impedes the economic development of jurisdiction and causes tax uncertainties for businesses with cross-border activities. Singapore actively pursues Avoidance of Double Taxation Agreements (DTAs) with foreign jurisdictions to facilitate cross-border activities. DTAs are also renegotiated to ensure that they remain relevant.

Currently, Singapore has a network of

around 100 DTAs.[1] Taxpayers engaged in cross-border activities can enjoy better certainty on tax treatment for their activities and benefit from elimination of double taxation. Where a Singapore resident taxpayer believes that there is taxation imposed by IRAS or a foreign tax authority that is not in accordance with the provisions of the relevant DTA, the taxpayer can request for IRAS to resolve the issue with the foreign tax authority through the Mutual Agreement Procedure (MAP).

MAP is a dispute resolution facility provided under the MAP article in Singapore's DTAs. All the DTAs provide for MAP to resolve instances of disputes. The MAP article generally follows that of the Organisation for Economic Cooperation and Development (OECD) Model Tax Convention.

MAP is available to:[2]

(a) Taxpayers who are Singaporean tax residents; and

(b) Taxpayers who are not Singaporean tax residents but have a branch in Singapore.

However, such applications are to be made by the taxpayers in the jurisdictions in which they are tax residents and with which Singapore has a DTA.

Taxpayers should only initiate a MAP when the actions of one or both of the Contracting States result or will result in taxation not in accordance with the provisions of the relevant DTA. MAP should be initiated within the time limits specified (usually three years) in the MAP article of the relevant DTA.

Upon acceptance of the MAP, IRAS will engage the relevant foreign authorities to conclude the MAP and endeavour to close every case in a prompt, efficient and effective manner. The MAP negotiation is between the competent authorities and taxpayers do not participate in or attend as observers at the negotiations unless they are called upon to make clarification.

In IRAS, MAP cases relating to transfer pricing issues are handled by the Transfer Pricing and Dispute Resolution Branch. Presently, the Branch is headed by one Tax Director who is also a competent authority with 9 officers organised into two teams, and a Principal Tax Specialist. MAP cases relating to non-transfer pricing issues are handled by the Tax Treaty team in the International Tax and Relations — Policy Branch. The team is headed by a Tax Director who is also a competent authority and comprises 5 officers. Both branches come under the International Tax Affairs and Relations Division, headed by an Assistant Commissioner who is also a competent authority.

A summary of Singapore's statistics of MAP cases for the calendar years 2019 to 2021 is shown in Table 1 and Table 2.

Table 1: Transfer pricing MAP cases

	2019	2020	2021
Balance brought forward	18	18	23
Received	12	17	18
Closed	12	12	4
Balance	18	23	37
Average time taken[3]	21.52 months	17.07 months	23.31 months

Table 2: Non-transfer pricing MAP cases

	2019	2020	2021
Balance brought forward	15	16	18
Received	6	5	5
Closed	5	3	5
Balance	16	18	18
Average time taken[4]	20.17 months	16.52 months	19.84 months

1 A copy of each Singapore's DTA can be found on IRAS' website (https://www.iras.gov.sg/taxes/international-tax).

2 Singapore will notify the other DTA partner of the receipt of the MAP application.

3 A longer time was taken to resolve cases started before 1 January 2016 (before the tracking requirements under the FTA-MAP forum).

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Information and guidance on the MAP process is available to taxpayers on IRAS' website.[5]

Singapore has adopted the mandatory binding arbitration provision under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS). This provision will be included in Singapore's DTAs if our respective DTA partners also choose to adopt the provision.

Mandatory binding arbitration provides an alternative dispute resolution mechanism to taxpayers if the competent authorities are unable to reach agreement or unable to do so in a timely manner under a MAP. Under mandatory binding arbitration, competent authorities are required to submit unresolved issues in a MAP case to an independent and impartial arbitration panel. The decision reached by the arbitration panel is binding on the competent authorities and thus resolves issues that can otherwise prevent agreement in deadlocked MAP cases.

Under Singapore's DTAs, a Singapore resident taxpayer may also choose to avoid transfer pricing disputes by applying for an Advance Pricing Arrangement (APA) for its related party transactions for future years.

APA is a dispute prevention facility provided under the MAP article in Singapore's DTAs and domestic law. It is an arrangement between IRAS and the taxpayer or the relevant foreign competent authority to agree in advance a set of criteria to ascertain the transfer prices of their taxpayers' related party transactions for a specific period of time. It provides taxpayers with certainty on their transfer pricing to avoid double taxation. Similar to transfer pricing MAPs, APAs are handled by the Transfer Pricing and Dispute Resolution Branch in IRAS.

A summary of Singapore's statistics of APA cases for the calendar years from 2019 to 2021 is shown in Table 3. The majority of APA cases that IRAS deals with are bilateral APA cases.

Table 3: APA cases

	2019	2020	2021
Balance brought forward	37	44	53
Received	20	18	38
Closed	13	9	13
Balance	44	53	78
Average time taken	24.56 months	33.79 months	28.26 months

There are three types of APAs available to taxpayers: unilateral, bilateral and multilateral APAs. IRAS generally accepts an APA request to cover three to five future financial years (i.e. covered period). IRAS also generally accepts taxpayers' request to extend the APA to two prior financial years (i.e. roll-back years). Taxpayers are required to observe the filing process provided in the e-Tax Guide "Transfer Pricing Guidelines". This includes initiating a pre-filing meeting at least nine months before the first day of the APA covered period.

IRAS participates in various international forums. Singapore is a member of the OECD Forum on Tax Administration — Mutual Agreement Procedures (FTA-MAP forum). Under the FTA-MAP forum, jurisdictions are required to implement the minimum standard with respect to resolution of treaty-related disputes and be subject to peer reviews on their dispute resolution mechanisms. This includes ensuring that an effective MAP mechanism is in place and that jurisdictions expeditiously resolve MAP disputes within an average timeframe of 24 months. Singapore has completed both Stage 1 and Stage 2 peer reviews and was assessed to meet the minimum standards in December 2017 and March 2020 respectively.

5 For details on MAP relating to transfer pricing, please refer to the e-Tax Guide "Transfer Pricing Guidelines". For MAPs relating to non-transfer pricing matters, please refer to the e-Tax Guide "Avoidance of Double Taxation Agreements" (DTAs). The e-Tax Guides are separately available on IRAS' website (https://www.iras.gov.sg/quick-links/e-tax-guides?pg=1).

In addition to the FTA-MAP forum, IRAS actively participates in and contributes to the FTA Tax Certainty Focus Groups relating to APA best practices, multilateral APAs/MAPs and benchmarking. Under these Focus Groups, IRAS contributes its view and learns from the experience of other jurisdictions, and shapes the guidance eventually developed to provide tax certainty for taxpayers.

IRAS is a member of the Study Group on Asian Tax Administration and Research (SGATAR) and is also an observer in the Belt and Road Initiative Tax Administration Cooperation Mechanism (BRITACOM) and participates in its Raising Tax Certainty Task Force. Through these forums and work groups, IRAS also exchanges views and learns from other jurisdictions to provide tax certainty for taxpayers.

In its bid to provide multinational enterprise groups operating in Singapore with increased tax certainty, IRAS participates in the International Compliance Assurance Programme (ICAP) developed by the OECD from 2021. Under the ICAP, IRAS works with other participating tax administrations to reach a mutual understanding of the tax risks present in the activities and transactions carried out by the multinational enterprise group. This provides an efficient and coordinated approach to multilateral tax certainty for both the multinational enterprise group and tax administrations.

4. Challenges Faced

While IRAS has introduced numerous initiatives and mechanisms to provide tax certainty to businesses, IRAS recognises that the tax landscape is constantly evolving. As tax administrations around the world improve their capacity in dealing with transfer pricing, more transfer pricing disputes would correspondingly arise. With the potential changes to international tax rules under the Two-Pillar solution developed by the Inclusive Framework under the OECD/G20 BEPS Project, there would be an even greater need for tax certainty to enable businesses to navigate and find stability. To ensure that Singapore's tax certainty mechanisms continue to remain effective and efficient, IRAS will continue to actively participate in international tax discussions to shape new rules and keep up to date on international tax developments.

As business models evolve and become more complex, taxpayers have also increased expectations in obtaining tax certainty on their operations from tax administrations. IRAS ensures that its officers continually build up their capabilities through training. IRAS also engages in regular dialogues with taxpayers to stay relevant so as to meet the needs of taxpayers.

5. Conclusion

IRAS accords priority to delivering on high levels of tax certainty to businesses. IRAS will continue its efforts to ensure that its dispute prevention and resolution mechanisms remain effective and efficient in providing tax certainty to businesses.

In the face of changing and ever-evolving international tax rules, it is important for all tax administrations to build up both its technical and administrative capabilities to deal with increasingly complex international tax issues and growing levels of disputes to provide tax certainty to their taxpayers. To this end, we believe that tax administrations should continue to engage and share best practices on tax certainty mechanisms through various forums, including the BRITACOM.

Raising Tax Certainty in Cross-Border Tax Disputes Through a Body of Experts

Stef van Weeghel and Błażej Kuźniacki

Stef van Weeghel
Professor of International Tax Law
University of Amsterdam
Global Tax Policy Leader
PwC
Chair of Board of Trustees
IBFD

Błażej Kuźniacki
Senior Manager
PwC Global Tax Policy
International Tax Services
PwC Netherlands

Abstract: In this article, we draw attention to raising tax certainty in cross-border tax disputes through a body of experts (BoE). Establishing and developing of a BoE on a non-legally binding basis to help prevent and resolve cross-border tax disputes aims to facilitate harmony in the dynamically evolving international tax environment. This, hopefully, elevates Confucius' everyday wisdom of "harmony is precious" to the global tax arena.

Keywords: Tax certainty; Dispute resolution; Body of experts; Policy goal

1. Ensuring Tax Certainty as a Win-Win Situation to Taxpayers and Tax Authorities

On a very fundamental level, the principle of "no taxation without representation" arises out of the rule of law in the area of taxation. In light of this principle, tax provisions have to be clear, precise, accessible and reasonably intelligible to all users, as well as being amenable to dispute resolution in public courts. Tax provisions must also be at least subject to express and clear legal safeguards to protect taxpayer rights, and civil servants will have to be shorn of any discretionary powers related to tax provisions that may lead to arbitrary decisions.[1] This all reflects the core of the principle of legal certainty in tax law, usually known as tax certainty.[2]

1 J. Hattingh (2017). The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?. 71 *Bulletin for International Taxation*, sec. 2, with reference to the late Lord Bingham's articulation of the tenants of the rule of law as depicted in T. Bingham (2010). *The Rule of Law*. Penguin.

2 It is therefore of no surprise that tax certainty is one of the fundamental rights and principles in the broad ranging Confédération Fiscally Européenne (CFE) Model Taxpayer Charter, which the CFE published in conjunction with two other international organizations, Asia Oceania Tax Consultants Association (AOTCA) and the Society of Trust and Estate Practitioners (STEP), https://taxadviserseurope.org/project/taxpayers-rights-the-model-taxpayer-charter/.

In essence, tax certainty protects the expectations of taxpayers regarding their rights and obligations under tax law by restricting discretion of tax authorities to determine a taxpayer's tax liability arbitrarily.[3] Accordingly, tax certainty or its lack principally manifests in three pivotal areas of state powers: the creation of tax law (legislative power), the application of tax law (executive power) and solving disputes stemming from the creation and the application of tax law (judicial power). They are all intertwined and thus influence each other in respect of tax certainty. For example, extremely vague tax rules leaving ample discretion to tax authorities trigger considerable concerns for tax certainty insofar as they may be applied by the tax authorities in an arbitrary way, which in turn may lead to very complex and protracted tax disputes. Concerns to tax certainty also arise out of non-legal factors, such as attempts of taxpayers to avoid taxation by artificial structures, an increasing complexity of modern commercial transactions and the growth of the digital economy.[4]

Consequently, guaranteeing tax certainty requires examining a variety of legal and non-legal factors in a particular context. Taking into account other important tax policy goals such as fairness, economic efficiency and raising revenue is also of vital importance to achieve a well functioning tax system.[5] It is an arduous, balancing task for every country. Its appropriate fulfilment may be very rewarding for both countries (increasing attractiveness of the tax system for foreign investors)[6] and taxpayers (decreasing risk of their investments),[7] resulting in a win-win situation. Indeed, ensuring tax certainty is widely recognized as bringing "benefits for taxpayers and tax administrations alike and is key in promoting investment, jobs and growth".[8]

2. Reasons to Focus on Raising Tax Certainty in Cross-Border Tax Disputes

This article focuses on one of the most important and most challenging aspects of tax certainty globally — raising tax certainty in cross-border tax disputes. Its importance stems from the interconnected nature of tax certainty and dispute resolution.[9] As noted by the IMF and the OECD:

Effective domestic dispute resolution regimes are essential to enhance tax certainty for both taxpayers and tax authorities. In the absence of an effective mechanism for settling disputes, taxpayers' trust in the fairness of the tax system will be eroded, jeopardizing the foundation of a modern tax system based on self-assessment. The tax authority, for its part, must have the confidence that when disputes with taxpayers arise, a mechanism is in place to settle such disputes effectively so that it can move forward with its core task of administering the tax sys-

3 The literature on tax certainty indicates that it entails awareness, reliability and calculability for taxpayers. H. Ávila (2016). The Concept of Tax-Law Certainty, in H. Ávila (ed.), *Certainty in Law*. Springer International Publishing, pp. 195-196. *See* more on that topic: L. Fuller (1977). *The Morality of Law*. Yale University Press, pp. 124-125; H.Gribnau (2013). Equality, Legal Certainty and Tax Legislation in the Netherlands. Fundamental Legal Principles as Checks on Legislative Power: A Case Study. 9 *Utrecht Law Review* 2, pp. 52-74.

4 B. J. Arnold (2021). Some Thoughts on Tax Certainty. 2 *Belt and Road Initiative Tax Journal* 1, pp. 98.

5 Ibid, pp. 92.

6 E. Robert. *Conference on "Tax certainty" (France)*, Report from Eric Robert, IBFD Research Associate.

7 For international trade and investment and location decisions of businesses, tax certainty is considered as a key factor for both tax authorities and taxpayers, having a pivotal impact on foreign direct investments (FDI). International Monetary Fund (IMF)/OECD, *Tax Certainty*, IMF/OECD Report for the G20 Finance Ministers (March 2017), pp. 25-28, https://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf.

8 OECD (2021). *Tax Certainty Day*, www.oecd.org/tax/administration/oecd-tax-certainty-day.htm.

9 M. Markham (2022). Action 14 of the BEPS Project: Taking the Pulse of Tax Certainty and Determining the Effectiveness of the Peer Review Process Five Years On. *Bulletin for International Taxation* 2, pp. 96.

tem. An effective dispute resolution mechanism is also essential for ensuring the integrity of the tax system itself, as it can provide an important feedback loop to tax policymakers and tax administrators as to the resilience of the tax system and its ongoing ability to meet its objective.[10]

Indeed, raising tax certainty in cross-border tax disputes is important for every country in order to initiate a virtuous circle between foreign taxpayers (investors) and local tax authorities with a positive spillover effect on foreign direct investment (FDI). However, it is also very challenging because such disputes are most complex and thus difficult to solve. They usually arise from divergent interpretations and application of domestic tax law of various countries and of international and regional tax and investment treaties. Moreover, international tax avoidance has never been so intensively addressed by inter- and supra-national fora such as the OECD and the G20, and then the EU and the UN following that suit, as during the last decade, leading to a rapid increase of domestic and treaty-based anti-tax avoidance specific and general rules.[11] Application of such rules is prone to cross-border disputes.

We need to add to the matrix of the above-mentioned rules, the OECD's Pillars One & Two[12] and the EU Commission's ambitions to tackle shell entities and foreign subsidies[13] — legal proposals having a big potential to trigger cross-border tax disputes. On the top of all this, the global economy is currently experiencing disruption and challenges to an unprecedented degree,[14] including the post-pandemic high inflation, drop in stock markets, a global energy crisis and war. In such reality, the tax and investment related risks are becoming very tangible, not least because this prompts tax authorities across the world to be vigilant in levying taxes in respect of the income generated by cross-border businesses and investments.

Considering all relevant legal and non-legal factors, we are currently witnessing developments that may lead to cross-border tax disputes on an unprecedented scale and complexity. Therefore, raising tax certainty in this area deserves special attention of tax policymakers and tax executives.

3. Looking for a Novel Solution to Raise Tax Certainty in Cross-Border Tax Disputes

Tax policymakers could consider re-focusing from a linear thinking and attempts to fixing current cross-border dispute settlement mechanisms in favor of a lateral thinking that may lead to a novel and feasible solution. The main reason to spend less energy to the former is ongoing inefficiency and partial inadequacy of currently existing legal tools designed to resolve cross-border tax disputes.

Although mutual agreement procedures (MAPs) set out in tax treaties appear to be the most important way to resolve cross-border tax disputes, they are by no means satisfactory. For example, some believed that MAPs, which have a purely administrative nature, are "operating within an entirely non-transparent framework that seems like a relic of the past in which tax authorities exercised absolute power and taxpayers hardly had any rights".[15] Moreover, some

10 *Supra*, IMF/OECD Report on Tax Certainty, n. 7, pp. 47.

11 OECD (2013). Addressing Base Erosion and Profit Shifting, G20 Los Cabos Communique, 18-19 June 2012, para. 48; S. Fung (2017). The Questionable Legitimacy of the OECD/G20 BEPS Project. 10 *Erasmus Law Review*, pp. 76.

12 OECD/G20 (2021), *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 8 October 2021*, https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm.

13 European Commission, *Laying Down Rules to Prevent the Misuse of Shell Entities for Tax Purposes and Amending Directive 2011/16/EU*, COM (2021) 565 final (22 Dec. 2021); European Commission (2022). *Foreign Subsidies*, https://competition-policy.ec.europa.eu/international/foreign-subsidies_en.

14 *Supra* Markham n. 9, pp. 96.

15 P. Pistone. *General Report*, in M. Lang et al. (eds.). *The Impact of Bilateral Investment Treaties on Taxation*. IBFD, sec. 1.8.2.

tax practitioners criticized them for "being inefficient and nontransparent and because they may lead to decisions that are not based on legal principles".[16] Similar comments can be made relating to arbitration clauses under tax treaties insofar as they "are based on the inter-administrative logic of mutual agreement procedures and give no comprehensive procedural rights to the taxpayer concerned".[17]

Furthermore, although the investor-State dispute settlement (ISDS) mechanism included in international investment agreements (IIAs) has proved to ensure a neutral and internationalized forum to resolve cross-border investment disputes, including tax-related disputes,[18] it recently "faces a new and existential risk".[19] Some countries and regions, e.g. Brazil, India, South Africa and the European Union (EU), have been the driving forces behind a strong opposition against an application of ISDS in general.[20]

What then can be an appropriate solution to enhance solving cross-border tax disputes? In our view, raising tax certainty in cross-border tax disputes requires a legal solution which ensures that such disputes will be resolved or even prevented through the solid reliance on sophisticated tax expertise, especially with respect to international and comparative tax law.[21] Accordingly, we propose to establish an international body of experts with three core competencies: (i) assisting domestic tax authorities in issuing tax rulings in cross-border tax cases; (ii) acting as mediators between taxpayers (foreign investors) and tax authorities (local governments); and (iii) issuing expert opinions in cross-border tax and tax-related investment disputes.[22] In the next section, we briefly draft an outline of that idea for a closer consideration by potential stakeholders.

4. Raising Tax Certainty in Cross-Border Tax Disputes Through a Body of Experts with Three Competencies

4.1 Guardians of the International Body of Experts and the Approach to Its Establishment

Globally, establishing an international body of experts (BoE) with three competencies could be initiated by the Platform for Collaboration on Tax, which is a joint effort launched in April 2016 by the IMF, the OECD, the United Nations (UN) and the World Bank Group (WBG).[23] Perhaps a BoE could be also established regionally, for example under the guardianship of the Belt and Road Initiative Tax Administration Cooperation Mechanism (BRITACOM).[24] It would be in accordance with the purpose of the BRITACOM, which is

16 A. E. Gildemeister. *Chapter 12: Germany*, in M. Lang et al. (eds.), *supra* n.15, sec. 12.8.

17 Ibid.

18 T. W. Wälde & A. Kolo (2008). Coverage of Taxation under Modern Investment Treaties, in P. T. Muchlinski, F. Ortino & Ch. Schreuer (eds). *The Oxford Handbook of International Investment Law*, Oxford University Press; J. Kubicová (2017). BITs and Taxes. 19 *Derivatives & Financial Instruments* 5.

19 C. McLachlan (2019). The Assault on International Adjudication and the Limits of Withdrawal. 68 *International and Comparative Law Quarterly* 3, pp. 499-500.

20 UNCTAD (2021). *International Investment Agreements and Their Implications for Tax Measures: What Tax Policymakers Need to Know*, pp. 8.

21 Cf. *supra* Arnold n. 4, pp. 103.

22 For a similar idea to establish a permanent body of experts via a new multilateral convention for purposes of consultations in treaty interpretation and transfer pricing matters *see* S. van Weeghel (2021). Have the OECD Model and the UN Model Served Their Purpose? Are They Still Fit for Purpose? *Bulletin for International Taxation* 11/12, pp. 592.

23 OECD. *Platform for Collaboration on Tax,* https://www.oecd.org/ctp/platform-for-collaboration-on-tax.htm.

24 The BRITACOM consists of the Council, the Secretariat, the Belt and Road Initiative Tax Administration Cooperation Forum (BRITACOF), and the Belt and Road Initiative Tax Administration Capacity Enhancement Group (BRITACEG), https://www.britacom.org/jzgk/britacom/.

"to contribute to building a growth-friendly tax environment through cooperation and sharing of best practices in following rule of law, raising tax certainty, expediting tax dispute resolution, improving taxpayer service, and enhancing tax capacity building."[25]

In either case, it would be sufficient and more flexible to establish a BoE based on a non-legally binding document among countries involved, e.g. a memorandum of understanding, rather than a multilateral treaty. Despite the lack of legally binding force of the foundational documentation establishing a BoE (soft law), it may have practical effects in shaping global and regional tax governance.[26] For example, the OECD Model, the UN Model, G20 summit resolutions and peer review mechanisms are all examples of non-legally binding documentation with a significant practical impact on establishing and functioning global and regional cross-border tax provisions and their interpretation.

Some of the advantages of a non-legally binding approach are of particular relevance to the discussed proposal. It:

(i) is more suitable to experiment when compared with legally binding foundational acts;

(ii) can help countries regarding the fear of losing their decision-making sovereignty to support the new initiative;

(iii) can cope with diversity, and better adapt to the unique conditions of different countries; and

(iv) encourages more countries to participate in the process of law making (if needed).[27]

However, countries may decide at any time to switch from the establishment and functioning of a BoE based on a non-legally binding documentation to a legally binding multilateral treaty. This could be prompted by the need to ensure that a BoE shall be taken seriously by an international community.[28]

4.2 Possible Scope of the Competencies and Their Importance

The BoE shall focus only on cross-border

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25 BRITACOM (2019). *Article 3 of the Memorandum of Understanding on the Establishment of the Belt and Road Initiative Tax Administration Cooperation Mechanism*, Wuzhen (China), 18-20 April 2019, https://www.aotca.org/wp-content/uploads/2019/05/Memorandum-of-Understanding-on-BRITACOM.pdf?.

26 Cf. F. Snyder (1994). Soft Law and Institutional Practice in the European Community, in S. Martin (ed.), *The Construction of Europe: Essays in Honour of Emile Noel*. Kluwer Academic Publisher, pp. 198; C. Xiaojing (2015). Soft Law in Global Tax Governance. 27 *Peking University Law Journal* 5, pp. 1290.

27 J. Chaisse & X. Ji (2018). "Soft Law" in International Law-Making — How Soft International Taxation Law is Reshaping International Economic Governance. 13 *Asian Journal of WTO and International Health Law and Policy* 2, pp. 477-478.

28 Cf. A. Aust (2007). *Modern Treaty Law and Practice*. Cambridge University Press, pp. 47.

aspects of interpretation and application of the tax laws of concerned states and their tax and investment treaties. The precise scope of competencies may be decided by involved states with tax certainty in cross-border tax disputes in mind. To this end, they may get inspired by an International Tax Certainty Board (*College Internationale Fiscale Zekerheid van de Belastingdienst*), as established in the Netherlands on 1 July 2019 by a Decree of the Dutch State Secretary of Finance of 19 June 2019.[29]

The BoE competencies could encompass: (i) qualification of hybrid financing structures; (ii) existence of a permanent establishment; (iii) allocation of assets and risks to a permanent establishment; (iv) application of the principal purpose test (PPT), the main purpose test and limitation on benefits (LOB) clauses; (v) application of corporate tie-breaker rules; and (vi) establishing Advance Pricing Agreements (APAs).[30] The competencies of the BoE could also regard an application of domestic GAARs and anti-abuse doctrines to tax treaty related matters. Last but not least, the appointed experts could be competent to reflect on an alleged violations of investment protection standards under IIAs in tax-related ISDS cases.

In all three competencies, the BoE activities will not lead to direct and legally binding consequences for the parties involved. That is to say, the tax authorities will not be legally compelled to follow the advice of the BoE in issuing tax rulings in cross-border tax cases. Likewise, expert opinions in international tax-related disputes (purely tax disputes and investment treaty tax-related disputes) will not be legally binding for tax authorities and taxpayers.

Consequently, although the BoE's opinions and advice will not be legally binding, they could be influential due to the composition of

29 Besluit van 19 juni 2019, nr. 2019/13003. An International Tax Certainty Board (Dutch: *College Internationale Fiscale Zekerheid van de Belastingdienst*) is a 'body' within the Dutch tax authorities. This Board is responsible for the central coordination of the preliminary consultations to obtain advance certainty in the form of rulings with international aspects in order to:(i) guarantee the unity of policy and implementation; (ii) monitor the quality of the relevant settlement agreements (correct application of laws and regulations, case law and policy); and (iii) ensure proper compliance with procedural rules. Before a ruling with international aspects is issued, this ruling is to be submitted by the first examiner to the International Tax Certainty Board for approval. An interested party can request prior consultation to obtain certainty in advance in the form of an international tax ruling in respect of international aspects that relate to the application of the Dutch corporate income tax Act or the Dutch dividend tax Act and the application of bilateral tax treaties and arrangements to prevent double taxation on income and capital, as far as these taxes are concerned.

30 R. Slimmen, M. Verhoeven & J. Rutten (2019). *Implementation Renewed Dutch Ruling Practice*, https://www.quanteraglobal.com/blogs/implementation-renewed-dutch-ruling-practice/?fbclid=IwAR2qeAAUqvHrrU7cS9rSZsnnp01d1vPRN2jkAZ_PNpfkDWMXBahV0ORBFpQ.

that body with highly regarded international tax law experts and the depth and persuasiveness of legal reasoning.[31] The party opposing the view of the BoE would carry the burden of counter-proving the arguments and conclusions of that body before or during a dispute in a particular case. Ignoring the BoE's opinion, or failing to persuasively counter-argue with it, would work against the concerned party.

The specific rules governing the BoE, such as the number, appointment, qualification and role of members of a BoE could to some extent get inspiration from existing international dispute settlement rules,[32] such as the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes,[33] and the United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules,[34] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[35]

The attractiveness of the BoE would possibly be increased if the BoE's rules reflect the principle of party autonomy, widely applied in the international investment arbitration.[36] This would allow the disputing parties appoint their own experts or mediators (one expert or mediator by each party) from the pool of experts selected to be eligible for the BoE. The two experts or mediators appointed by the parties would then select the chair person of the BoE. This also means that the BoE could typically function on an ad hoc basis rather than on a permanent basis, which would allow to flexibly compose the BoE bespoke to a particular dispute.

Remembering that the overarching purpose of the BoE would be to ensure certainty in cross-border tax disputes, it is also wise to consider the tax avoidance carve-out under the Dutch International Tax Certainty Board's scope of competencies. In order to avoid facilitating international tax avoidance, certainty in the form of the BoE's advice, opinions or mediation would not be provided if the sole or the main purpose of the structure or transaction is to avoid domestic or foreign taxes.[37] Indeed, the principle of legal certainty does not seem to equally protect taxpayers actively seeking to abusively avoid taxation and the taxpayers who in the course of ordinary day-to-day business or investment practices benefit from tax advantages in compliance with the tax law.[38] In order to ensure that the burden of uncertainty will be borne only by taxpayers involved in abusive tax avoidance, the BoE will be competent to issue an opinion whether a given cross-border structure or transaction constitutes abusive tax avoidance. This aims to eliminate situations in which taxpayers suffer from uncertainty in cross-border commercial transactions in which tax minimization is considered only as one of the many drivers of their cross-border activities.[39]

31 C. Xiaojing & C. Jingxian (2022). Building a Belt and Road International Tax Dispute Prevention and Resolution Mechanism. *Bulletin for International Taxation* 4, pp. 181.

32 Ibid.

33 WTO (1996). *Understanding on Rules and Procedures Governing the Settlement of Disputes*, http://www.wto.org/english/tratop_e/ dispu_e/rc_e.htm.

34 UNCITRAL. *Conciliation Rules*, https://uncitral.un.org/en/ texts/mediation/contractualtexts/conciliation.

35 ICSID. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, https://icsid.worldbank. org/resources/rules-and-regulations/convention/overview.

36 L. Mistelis (2020). Efficiency. What Else? Efficiency as the Emerging Defining Value of International Arbitration: Between Systems Theories and Party Autonomy, in T. Schultz & F. Ortino (eds.). *The Oxford Handbook of International Arbitration*. Oxford University Press, pp. 349-376.

37 Slimmen, Verhoeven & Rutten. *supra* n. 31.

38 J. Freedman (2004). Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle. *British Tax Review*, pp. 356; F. Zimmer. In Defence of General Anti-Avoidance Rules. *Bulletin for International Taxation* 4, sec. 5.

39 Cf. Arnold *supra* n. 4, pp. 99.

4.3 Tax Certainty as a Leading Interpretative Principle in Cross-Border Tax Disputes via the Principle of Systemic Integration

Tax certainty in cross-border tax disputes could not only be the overarching purpose of the BoE, but also one of the leading interpretative principles guiding the experts in their interpretation. Indeed, the importance of legal (tax) certainty for interpretation of tax law (domestic and tax treaty) in cross-border cases has been emphasized by courts from various countries.

For example, the majority of judges of the Supreme Court of Canada (SCC) in the opening statement to its recent judgement in *Alta Energy* case of 26 November 2021 stated that:

The principles of predictability, certainty, and fairness and respect for the right of taxpayers to legitimate tax minimization are the bedrock of tax law. In the context of international tax treaties, respect for negotiated bargains between contracting states is fundamental to ensure tax certainty and predictability and to uphold the principle of *pacta sunt servanda*, pursuant to which parties to a treaty must keep their sides of the bargain.[40]

Similarly, the Supreme Court of India in judgement of 2 March 2021 in *Engineering Analysis Centre of Excellence Private Ltd* said that "persons who pay TDS (tax deductible at source) and/or assessees in the nations governed by a DTAA (the Double Taxation Avoidance Agreement) have a right to know exactly where they stand in respect of the treaty provisions that govern them".[41]

Legal certainty also plays an important role in case law of international tribunals in tax-related investment disputes. For example, in recent seminal decision in the *Cairn v India* case, the *Cairn* Tribunal observed that the principle of legal certainty (and its corollaries, stability and predictability) provides significant guidance when determining whether retroactive taxation is compatible with the fair and equitable treatment (FET) standard provided at Article 3(2) of the BIT. As the Rule of Law Checklist of the Venice Commission makes clear, one of the essential elements of the principle of legal certainty is precisely that "people must be informed in advance of the consequences of their behaviour" and that laws should "enable legal subjects to regulate their conduct in conformity with it".[42]

In our view, the use of legal certainty as one of the key guiding principles of interpretation of tax law in cross-border tax cases is well justified. In the words of international arbitration tribunals, legal certainty facilitates a balanced interpretation, which "takes into account both the State's sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities and the necessity to protect foreign investment and its continuing flow".[43] In that regard, the principle of legal certainty could be useful in order to justify a given course of action by weighting different values against each other before a conclusion can be reached as to whether an action followed the principle of legal certainty to a sufficient degree.[44] For example, the

40 *Canada v. Alta Energy Luxembourg SARL*, (2021 SCC 49), para 1.

41 *Engineering Analysis Centre of Excellence Private Ltd vs the Commissioner of Income Tax*, (LL 2021 SC 124), para. 159.

42 *Cairn Energy PlcCairn UK Holdings Limited v Republic of India*, UNCITRAL, PCA Case No. 2016-7, Award (21 December 2020), para. 1757.

43 *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, Decision on Jurisdiction (27 April 2006), para. 70; *BP America Production Company and others v Argentine Republic*, ICSID Case No ARB/04/8, Decision on Preliminary Objections (27 July 2006), para. 99. Cf. *Cairn supra* n. 45, para 1789. See also B. Stern (2020). Investment Arbitration and State Sovereignty. 35 *ICSID Rev–Foreign Investment Law Journal*, pp. 448.

44 Principles have the main characteristics different to rules. Both principles and rules constitute legal norms, but only rules are explicit and applicable in an all-or-nothing fashion under certain conditions, whereas principles have a dimension of weight or importance. That is to say, principles operate according to a pattern of 'less... or more...' and thus are gradable, unlike rules, which operate at a binary 'either... or' level. R. Alexy (2000). On the Structure of Legal Principles. 3 *Ratio Juris*, pp. 294, 297; J.R. Toubes Muniz (1997). Legal Principles and Legal Theory. *Ratio Juris* 3, pp. 267, 270-271.

principle of legal certainty has a significant impact on the interpretation of legal norms, including in cases concerning tax planning and tax avoidance.[45] Because the principle of legal certainty is not absolute, it will apply differently in different circumstances. A good example of that characteristic of the principle of legal certainty regards tax avoidance. As noted by us in section 4.2 above, the principle of legal certainty does not seem to apply equally to taxpayers trying to abusively avoid taxation and the taxpayers who legitimately plan their business and investment to obtain tax in compliance with the purpose of tax law.

The principle of legal certainty may also fit to interpretation of tax treaties, as regulated by rules and principles of interpretation under the Vienna Convention on the Law of Treaties (VCLT).[46] Notably, Article 31(3)(C) of the VCLT says that together with the context of the tax treaty (one of the primary means of interpretation of treaties), "any relevant rules of international law applicable in the relations between the parties" shall be taken into account. Article 31(3)(C) of the VCLT constitutes the principle of systemic integration which seeks to avoid a "fragmentation" of international law caused by diverging interpretations within its specialized sub-regimes,[47] e.g. international tax law.[48] Thus rules and principles of the VCLT support an interpretation and application of tax treaties in accordance with the principle of systemic integration, which, in turn, partly and implicitly refers to the principle of legal certainty.[49]

Therefore, the tax certainty has international legal and interpretative value in cross-border tax cases. Its proper application by the BoE may contribute to a global coordinated policy approach, thereby affecting harmonious functioning of the international tax system.

5. Special Relevance to the Belt and Road Initiative (BRI) Jurisdictions

In this final section, instead of typical conclusions, we have decided to provide the three reasons why raising tax certainty in cross-border tax disputes through the BoE is of special relevance to the Belt and Road Initiative (BRI) jurisdictions.

First, by March 2022, the number of jurisdictions that have joined the BRI by signing a Memorandum of Understanding (MoU) with China[50] was 147.[51] These jurisdictions are spread across all continents: 43 jurisdictions are in Sub-Saharan Africa; 35 jurisdictions are

45 A. Zalasiński (2007). Proportionality of Anti-Avoidance and Anti-Abuse Measures in the ECJ's Direct Tax Case Law. 35 *Intertax*, pp. 311.

46 Opened for signature on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331.

47 ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission Finalized by M. Koskenniemi, (13 Apr. 2006) A/CN.4/L.682, para. 413; C. McLachlan (2005). The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention. 54 *The International & Comparative Law Quarterly* 2, pp. 280.

48 R. Danon, D. Gutmann, G. Maisto & A. Martín Jiménez (2022), The OECD/G20 Global Minimum Tax and Dispute Resolution: A Workable Solution Based on Article 25(3) of the OECD Model, the Principle of Reciprocity and the GloBE Model Rules, *World Tax Journal* 3, sec. 2.4.

49 Cf. R. J. Danon & S. Wuschka (2021). International Investment Agreements and the International Tax System: The Potential of Complementarity and Harmonious Interpretation. 75 *Bulletin for International Taxation*, pp. 697; S. W. Schill (2010). International Investment Law and Comparative Public Law – An Introduction, in S. W. Schill (ed.). *International Investment Law and Comparative Public Law*. Oxford University Press, pp. 154.

50 S*upra* n. 26.

51 According to the official website of the Belt and Road Initiative (www.yidaiyilu.gov.cn) and the research underpinning, the publication is available at: https://greenfdc.org/countries-of-the-belt-and-road-initiative-bri/.

in Europe & Central Asia (including 18 jurisdictions of the European Union (EU) that are part of the BRI); 25 BRI jurisdictions are in East Asia & Pacific; 20 BRI jurisdictions are in Latin America & Caribbean; 18 BRI jurisdictions in Middle East & North Africa; and 6 jurisdictions are in South East Asia. In that regard, it is of relevance to point to some of the findings of the 2018 IMF and the OECD Report "Update on Tax Certainty". It says, *inter alia*, that "tax uncertainty appears to have a more frequent impact on investment decisions in Africa, Latin America and Caribbean (LAC) than in the OECD" and that "inconsistencies or conflicts on interpretations of international tax and lack of expertise in tax administration on aspects in international tax were of higher priority across all three regions in comparison to the OECD".[52] Since the majority of the BRI jurisdictions belong to the group of developing jurisdictions and many of them are from Africa and LAC, it is clear that they have the biggest needs for international tax expertise according to the above-mentioned analysis of the IMF and the OECD. If so, raising tax certainty in cross-border tax disputes through the BoE meets the needs of the BRI jurisdictions very well.

Second, the BRITACOM is established based on the MoU, which is not legally binding and does not create any legal rights or obligations.[53] The documents produced by BRITACOM (e.g. statements and action plans) are therefore not legally binding. Thus, the way of the establishment and functioning of the BRITACOM corroborates with that of the BoE, which is meant to be based and function in accordance with non-legally binding documentation.[54] This implies that the BoE neatly suits the logic of the BRITACOM to ensure that the participating jurisdictions do not lose their decision-making sovereignty and may together cope with diversity of unique conditions of different BRI jurisdictions via flexible solutions.

Third, mediation between taxpayers (foreign investors) and tax authorities (local governments) is one of the three core competencies of the BoE. This is in line with the longstanding Chinese tradition to prevent or resolve disputes in the most possible amicable way, thereby reflecting the pursuit of the value of social harmony.[55] This tradition is still widely respected by Chinese courts[56] and the legislator.[57] Considering the coordination function of the BRITACOM, the BoE's core competence to prevent or resolve cross-border tax disputes via mediation is likely to be welcomed.

We hope that the idea presented in this article about establishing and developing a BoE may contribute to preventing and solving cross-border tax disputes and to facilitating precious harmony in the dynamically evolving international tax environment. This, hopefully, elevates the Confucius' everyday wisdom of "harmony is precious"[58] to global tax arena.

52 IMF/OECD (2018). *Report for the G20 Finance Ministers and Central Bank Governors: "Update on Tax Certainty"*, https://www.oecd.org/tax/tax-policy/tax-certainty-update-oecd-imf-report-g20-finance-ministers-july-2018.pdf.

53 Art. 36 of MoU.

54 S*upra* sec. 4.1.

55 Xiaojing & Jingxian. *supra* 31, pp. 180. *See* more in H. Xusheng & X. Xinhua (2020). A Study of Chinese Mediation Tradition: A Cultural Perspective*, Henanshengzhengfaguanliganbuxueyuanxuebao*, pp. 20.

56 G. Wang (2017). The Belt and Road Initiative in Quest for A Dispute Resolution Mechanism. 25 *Asia Pacific Law Review* 1, pp. 1.

57 Many Chinese laws, e.g. the Civil Litigation Law, Administrative Litigation Law, and Arbitration Law, have included mediation as one of the methods to resolve disputes.

58 S. Jie (2021). *Harmony is Precious – Confucian Social Management still Applied Today in His Birthplace Jining*, https://www.globaltimes.cn/page/202112/1243860.shtml.

Implications of the Interaction of Trade and Tax Rules (Part Two)

Hafiz Choudhury, Peter Hann and Daniel A. Witt

Hafiz Choudhury
Principal
The M Group, Inc

Peter Hann
Senior Consultant
The M Group, Inc

Daniel A. Witt
President
ITIC

(Continued from the last issue)

4. The Role of Double Taxation Treaties

4.1 Advantages of Tax Treaties for Developing Countries

Tax treaties are important because they can help to eliminate double taxation, facilitate cooperation and exchange of information between tax administrations, and set out a tax dispute resolution mechanism. Double taxation is an obstacle to inward investment and by concluding tax treaties with the main trading partners developing countries can reduce the risk of double taxation and boost investment.

Stability and certainty of tax treatment are important to investors, and double tax treaties can offer stability to investors in a number of ways. Investors can rely on the provisions of the treaty, which vary less frequently than domestic tax law provisions. A treaty may also reassure investors that the developing country will adhere to international standards on issues such as transfer pricing and permanent establishments.[5] Treaties generally also contain a non-discrimination article

5 Sebastien Leduc & Geerten Michielse. *Are Tax Treaties Worth It for Developing Economies?*

which can provide reassurance for potential investors.

4.2 Problems with Tax Treaties for Developing Countries

A problem faced by developing countries is that they often enter negotiations on an uneven playing field, with potential treaty partners that have more economic strength and more experience at tax treaty negotiation. This disadvantage can be partly offset by commitment of more resources if available, capacity building within the tax administration and assistance from regional and international organisations. Increased capacity development work by the United Nations, through the Financing for Development Office, Department of Economic and Social Affairs in particular,[6] and more generally by assistance programmes is helping to address this issue.

Double taxation treaties can create a better climate for investors by reducing source jurisdiction taxation, clarifying the allocation of taxing rights and reducing withholding tax rates on various categories of income such as dividends, interest, royalties or technical services. Withholding taxes are a relatively convenient method of collecting tax from foreign companies without incurring high administrative costs. They are thus a suitable mechanism for jurisdictions with scarce resources, and this source of tax revenue should not be easily negotiated away.

There is a concern that developing countries tend to give away too much in tax treaties, which is seen as part of a wider problem that developing countries have given too many broad tax exemptions to foreign investors through their domestic tax laws. This has often been seen as resulting in a race to the bottom in tax rates and special regimes but without enough monitoring by those countries of the effect on foreign investment.[7] The availability of low tax rates and special regimes is thought to allow companies the opportunity to engage in profit shifting and other tax avoidance arrangements. These arrangements can include the possibility of treaty shopping by multinationals that place an intermediary company in a low tax jurisdiction or regional investment hub to take advantage of treaty provisions.

Incentives can have a favourable effect on investment if they are carefully designed and targeted. They need to be designed in a way that can benefit those investors that might otherwise decide to go elsewhere. The effectiveness of incentives in increasing investment may be difficult to measure, but some degree of measuring and monitoring of incentives is possible. Monitoring and review of the effects of incentives can highlight areas where incentives need to be adapted to changing conditions and can indicate areas where they are not effective and should be removed.

The costs and benefits of tax concessions in treaties therefore need to be weighed carefully and constantly monitored to ensure that they are reaching the required objectives and are still providing value for money. The costs of a tax treaty include the costs and time spent negotiating the treaty, the costs associated with administration of claims made by taxpayers for the various benefits under the treaty, and the costs of monitoring the benefit of the provisions as economic conditions change.

Developing countries should note that similar benefits may be achieved by incorporating some basic principles into domestic tax law, such as a harmonised definition of permanent establishments that is consistent with treaty principles. These domestic law provisions must set adequate thresholds and scope that leave room to offer further concessions to treaty partners in negotiations, e.g., in return for better withholding tax rates or thresholds.

In removing any wasteful tax incentives, countries should consider the potential effect of investment treaty provisions. If the dispute res-

6 UN. *Tax Treaties,* https://www.un.org/development/desa/financing/capacity-development/topics/tax-treaties.

7 Park Junhyung, Bedi Sukhmani, Abbas S. M. Ali, et al. (2021). A Partial Race to the Bottom: Corporate Tax Developments in Emerging and Developing Economies. IMF Working Paper No. 2012/028.

olution provisions in an investment treaty are wide enough, an investor could invoke them to compensate for any change in the amount of tax levied, such as the removal of a tax incentive.[8]

4.3 Future of Tax Treaties

Double tax treaties should continue to play a part in the investment strategy of developing countries. It is argued, however, that countries should establish appropriate mechanisms to weigh the costs and benefits of each prospective treaty before it is negotiated. Although the provisions of a treaty apply to both contracting states, it does not mean that the taxing rights given up by each state are equivalent. If a capital importing country agrees to lower withholding tax rates in a bilateral treaty, it is potentially giving up much more taxable income than its treaty partner, so the costs and benefits of such concession must be considered. A developing country may conclude that a consistent, relatively low withholding tax rate in its domestic law is a more effective incentive for foreign investment than greater concessions in tax treaties.

After a treaty has entered into force, the main provisions of the treaty should be regularly monitored, including those on permanent establishment, business profits, withholding tax and capital gains. A double tax treaty is worthwhile only if its benefits outweigh its costs, and this can only be determined by adequate measurement of those benefits and costs.

On 8 October 2021, 136 member jurisdictions of the OECD/G20 Inclusive Framework signed the two-pillar agreement on taxation of the digital economy, which could lead to change to bilateral tax treaties. This provides for a new nexus under Pillar 1 of the proposals that will result in some profits of large multinationals being allocated to market jurisdictions even where there is no permanent establishment. This could affect tax treaty articles on permanent establishment and business profits. Pillar 1 will also include binding dispute mechanism provisions that could affect the arrangements for the mutual agreement procedure.

The multilateral instrument[9] for including tax treaty related BEPS provisions into tax treaties has shown that treaties can be updated quickly without the time and expense of entering into fresh negotiations with each trading partner. A similar multilateral mechanism could be established to implement aspects of the global minimum tax agreed under Pillar 2.[10] This could enable jurisdctions to update their treaties where this may be necessary as a result of the implementation of the OECD agreement. Articles that could be reviewed include those relating to permanent establishment, business profits, elimination of double taxation and the mutual agreement procedure. Developing countries in particular may need to review their provisions on dividends, interest and royalties to make sure that taxing rights are optimal under global minimum tax rules. They may also consider tax sparing provisions to protect the incentive value of tax exemptions offered to investors, in cases where the home jurisdiction can top up the tax to the level of the global minimum tax.

Another measure affecting treaties would be the subject to tax rule (STTR). As part of the arrangements for imposing a global minimum tax on large multinationals, the STTR is being designed as a treaty-based rule. This specifically targets risks to source jurisdictions from profit shifting structures where cross-border intragroup payments take advantage of low nominal tax rates in the residence jurisdiction of the payee.

8 Note E/C/2019/CRP.14 on the Interaction of Tax, Trade and Investment Agreements, UNDESA, 2019

9 OECD. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*, https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm.

10 OECD (2021). *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm.

Where the source jurisdiction has ceded taxing rights over certain categories of income in a tax treaty, it would be able to impose a top-up tax to the agreed minimum rate if the relevant income is not taxed, or is taxed at below the minimum rate, in the other jurisdiction. The STTR targets cross-border arrangements for related party payments exploiting provisions of a tax treaty to shift profits from source jurisdictions to jurisdictions with no or low rates of nominal taxation. Source jurisdictions would therefore be able to protect their tax base.

The STTR would apply to categories of payment with more risk of base erosion, including interest, royalties and other payments that could be used for profit shifting as they relate to mobile capital, assets or risk. Other payments could include franchise fees, insurance and reinsurance premiums, guarantee or brokerage fees, rent and marketing or agency fees. There are also concerns that gains are shifted into the residence jurisdiction as a way of avoiding taxation in the source jurisdiction.

The STTR is to be implemented through a separate standalone treaty provision. It would apply to relevant payments between connected persons that are above a specified materiality threshold. The rule would be activated when the payments are subject to an adjusted nominal rate in the residence jurisdiction of the payee that is below the agreed minimum rate of 9%, after taking relevant deductions into account. The source jurisdiction would be permitted to tax the gross amount of the payment up to the minimum amount, by imposing a withholding tax on the payment equivalent to the difference between the adjusted nominal tax rate and the agreed minimum rate.

Some jurisdictions are considering the introduction of a domestic minimum tax to ensure that a proportion of any "top-up" amount under the global minimum tax will accrue to the domestic jurisdiction rather than be allocated to the jurisdiction of the ultimate parent company or another jurisdiction. The Belt and Road jurisdictions could consider this possibility, to ensure that they take a fair amount of tax from large multinationals carrying out BRI projects on their territory. The tax should be designed in a way that does not deter investors.

5. Coordination of Tax Treaties and Trade Agreements

5.1 DTTs and Investment Protection Agreements

Under the provisions of a bilateral investment treaty (BIT), foreign investors are entitled to the better of national treatment or MFN treatment, with a few specified exceptions. Foreign companies are therefore entitled to be treated as favourably as their local competitors and other foreign companies, although many BITs guarantee national and MFN treatment only after an investment has been made.

A BIT can increase certainty for investors by placing limits on the expropriation of investments and allowing foreign investors to claim compensation. Expropriation can only be carried out in line with the standards of international law, which require it to be for a public purpose, carried out in a non-discriminatory manner under due process of law and accompanied by payment of adequate compensation. The expropriation for this purpose is defined to include any measures that deprive the investor of the economic value of its investment. Thus, in some situations, arbitrary taxation could be treated by a tribunal as indirect expropriation, and investors sometimes challenge the taxation measures under the arbitration provisions of trade and investment agreements on these grounds.[11]

Under a BIT, there can be broad guarantees that investors will be treated in line with international law. Host jurisdictions may promise fair and equitable treatment for investments; and they can pledge not to engage in arbitrary

11 Note E/C/2019/CRP.14 on the Interaction of Tax, Trade and Investment Agreements, UNDESA, 2019.

or discriminatory decision making. Under the provisions of a BIT, foreign investors may transfer funds into and out of the host jurisdiction without delay at a market rate of exchange. In addition, investors can have the right to submit an investment dispute with the host jurisdiction to international arbitration. Disputes under a BIT are governed by the terms of the relevant investment treaty and international law, not necessarily by the law specified in the investment contract. Therefore, BITs and double tax treaties may cover the same ground on certain issues, including non-discrimination and the dispute resolution procedures.

Compared with the scope of a tax treaty, an investment treaty may apply to a wider group of investors. The definitions of investments or investors could affect the tax position where, for example, indirect investors have protection under an investment treaty, but the relevant tax treaty restricts certain benefits to direct investments. The provisions of an investment treaty on fair and equitable treatment may be interpreted widely by investment panels and could therefore become relevant in any tax related dispute.[12]

5.2 Treatment of Services

The trade laws within a jurisdiction may place limits on the number of foreign suppliers that can be used in a project or may require local participation. There may also be regulations to protect the public, such as licenses, which can be a barrier to trading in certain types of services. Such licensing can apply to financial institutions or to practising certain professions, where only local qualifications may be recognised, and there could also be requirements in relation to the nationality of directors. Other requirements such as data standards may be applied to services.

International or regional trade agreements can allow some standardisation of such requirements and allow foreign service providers some certainty that if the requirements of one of the signatory jurisdictions are satisfied then the national requirements of the other parties to the agreement will also be fulfilled.

Services are not normally subject to customs duties, except in certain cases where the services are closely linked to a supply of goods. For indirect tax purposes, services may be linked to items that are regarded as a "carrier medium". Imported computer software could be regarded as either a supply of goods or a supply of services, and in the case of software that uses a "carrier medium", the supply could be classified as goods or services depending on the type of software. Generally, a supply of software items that are available to, and usable by all customers independently after they have been installed may be treated similarly to a supply of goods, while specific, tailored software is much more likely to be treated as a supply of services for VAT purposes. In the case of other services, rules on the place of supply of services can be complex. For direct taxes, service providers will need to examine the local laws in relation to taxation of services, and if there is an applicable double tax treaty, they may need to study the definition of a "services PE" in the treaty.

The UN Committee of Experts on International Cooperation in Tax Matters has approved a new Article 12B, relating to income from automated digital services, for inclusion in the UN Model Tax Convention. Article 12B gives to the source state the right to tax the income from automated digital services in the place where the income arises. The maximum tax rate applicable is to be determined by negotiation between the contracting states. Under paragraph 3 of the Article, the beneficial owner of the income would have the right to be taxed on qualified net profits from automated digital services at the domestic rate of tax in the source state. For this purpose, the definition of qualified profits is 30% of the amount resulting from applying the taxpayer's profitability ratio to the gross annual revenue from automated digital services in the source state. The definition of automated digital services for this purpose includes services provided through the internet

12 Note E/C/2019/CRP.14 on the Interaction of Tax, Trade and Investment Agreements, UNDESA, 2019.

or electronic networks with minimal human involvement of service provider.

6. Tax and Trade Dispute Resolution

6.1 Trade Disputes

It is inevitable that disputes will arise in the course of international trade. The WTO has an important role in resolving cross-border trade disputes. A matter is brought to the WTO when a member state considers that another member has acted in violation of a commitment made as part of its membership of the WTO. Under the dispute settlement system, there are clear rules that set out the timetable for completing a case. A first ruling is made by a panel and then confirmed or rejected by the full membership of the WTO. An appeal against a ruling is possible on a point of law.

Under a bilateral investment protection treaty there may be a cooling off period in a dispute to allow the parties to the dispute to reach a settlement. The parties may have a choice of where to go for dispute resolution. The treaty may give the right to go to international arbitration. There would generally be a panel consisting of three arbitrators, each of the parties to the dispute may nominate one. This tribunal works out the timetable and detailed procedure, allowing for written arguments, evidence and an oral hearing.

Once constituted, the tribunal will set the timetable and details for the process, including the submission of written arguments and evidence, as well as the oral hearing. Rules along the lines of those laid down by the International Centre for Settlement of Investment Disputes (ICSID) or the UN Commission on International Trade Law (UNCITRAL) may be set out in a treaty. The result of the tribunal hearing would be an arbitral award that could be enforced in one of the states that is party to the relevant convention, for example the ICSID convention.

The UNCITRAL Arbitration Rules also set out procedures for the conduct of arbitral proceedings, covering all aspects of the arbitration process. They provide a model arbitration clause, outline rules for the appointment of arbitrators and the conduct of proceedings, and set out rules for giving effect to the arbitration award.

6.2 Advance Pricing Agreements

An advance pricing agreement (APA) is concluded by a business and a tax authority (or more than one tax authority) to establish in advance the pricing of certain specified related party transactions. This is done primarily to achieve certainty and to avoid tax disputes. The taxpayer and tax administration agree on a transfer pricing method that will be used to compute the arm's length price for the transactions into the future.

The taxpayer can rely on the tax treatment specified in the agreement provided that the terms of the agreement are adhered to, and the critical assumptions remain valid. The term and scope are set out in the agreement, together with issues such as the possibility of roll-back to previous years with open tax returns. Taxpayers would normally be required to complete an annual compliance report confirming the continued application of the critical assumptions underlying the agreement and the taxpayer's continued compliance with the provisions of the APA.

APAs can be an important tool in transfer pricing risk management and some companies are using them as a tool in dispute resolution, where there is an ongoing transfer pricing dispute and the conclusion of an APA could offer the chance of rolling back the APA to prior years that are still open. Even if a dispute in a previous year has been resolved, the conclusion of an APA can help to avoid similar disputes on the same issue in future periods.

7. Exchange of Information

7.1 Bilateral Treaties

Double tax treaties generally contain a provision on the exchange of information, based on either Article 26 of the OECD Model or Article 26 of the UN Model. The UN Model provides for information to be exchanged that would be helpful in preventing avoidance or evasion of tax and the contracting states are required to develop appropriate methods and techniques to fulfil information requests.

Developing countries have difficulty in putting in place adequate bilateral tax treaty arrangements, firstly because they often do not have sufficient bargaining power to insist on the arrangements they need, and secondly because they often do not have sufficient resources within the tax administration to establish effective mechanisms to enable them to make use of the article on exchange of information.

Bilateral Tax Information Exchange Agreements (TIEAs) contain more details on exchange of information. Model agreements have been issued by the OECD and by CIAT,[13] however, developing countries may still be disadvantaged by their lack of bargaining power when concluding bilateral agreements. Jurisdictions aiming to exchange information may have internal restrictions in the form of regulations or requirements that slow down or obstruct the process of information exchange, such as notification requirements, and the tax administration needs to have enough resources to use the agreement to its advantage.

In view of the difficulties involved in bilateral agreements for the exchange of information, developing countries might prefer to sign and implement multilateral agreements among regional groupings. This could save administrative time and resources, but investors may prefer the multilateral agreement to contain options for customising the provisions taking into account a jurisdiction's particular circumstances. Investors may look for higher levels of protection when there are particular types of risk, such as political risk.

7.2 Multilateral Provisions

The most wide-ranging multilateral convention on the exchange of tax information is the Convention on Mutual Assistance in Tax Matters.[14] The agreement provides for exchange of information on request, automatic exchange of information and spontaneous exchange of information, in addition to assistance in recovery of taxes and the possibility of simultaneous tax audits.

Although a number of developing countries are already signatories to the Convention, others have not yet joined it. Joining the Convention would represent an important step for those countries in increasing the access to tax information.

In December 2020, the Global Forum on Transparency and Exchange of Information for Tax Purposes together with the African Tax Administration Forum (ATAF) produced a toolkit[15] on establishing an effective exchange of information function within the tax administration or finance ministry. The toolkit looks at the required resources for the unit, and the different levels of information gathering, and examines the interactions required between the exchange of information function and the rest of the tax administration and other government departments.

8. Recommendations for Tax Administrations in Developing Countries

8.1 Advantages of More Coordination

Owing to mismatches between tax and in-

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13 CIAT. *Model Agreement on the Exchange of Tax Information,* https://www.ciat.org/Biblioteca/DocumentosTecnicos/Ingles/1999_model_agreement_tax_information_ciat.pdf.

14 OECD. *Convention on Mutual Administrative Assistance in Tax Matters*, https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm.

15 OECD. *Global Forum Secretariat and African Tax Administration Forum Deliver New Toolkit to Help Countries Set up and Run Effective Exchange of Information Units*, https://www.oecd.org/ctp/exchange-of-tax-information/global-forum-secretariat-and-african-tax-administration-forum-deliver-new-toolkit-to-help-countries-set-up-and-run-effective-exchange-of-information-units.htm.

vestment agreements, investors may gain certain advantages. For example, where the relevant tax and investment agreements both have separate dispute resolution provisions, it may be possible for investors to choose the most favourable provisions from their points of view, where tax issues are concerned. This may improve the investment climate from the point of view of the investor but is a consequence of the lack of co-ordination between investment and tax treaties, which may create problems for the tax administration.

Both investors and tax administrations would benefit from more certainty in the treatment of the investment and tax position. It is therefore in the interests of all stakeholders to align the provisions of tax and investment agreements more clearly. In addition, better coordination between government departments or within the tax and customs administrations could help to identify taxpayers who are engaging in profit shifting or other forms of tax avoidance.

8.2 Measures for Tax Administrations to Implement in the Short Term

8.2.1 Greater exchange of information between BRI tax administrations

Exchange of information between tax administrations is important in the context of the BRI, where projects may be taking place across borders and the tax administration in a particular jurisdiction needs to know more about the cross-border transactions of a multinational. The most effective way for developing countries to improve exchange of information is to sign up to multilateral agreements, and in particular the Convention on Mutual Administration Assistance in Tax Matters. Jurisdictions can ensure that the resources are available to efficiently operate the exchange of information function. The toolkit on establishing an effective exchange of information function can be used as a reference for setting up the function and developing its operations.

8.2.2 Greater coordination between customs, indirect tax and direct tax authorities within jurisdictions

A taxpayer importing goods from a related party may be interested in establishing a low price for the transaction, to reduce the customs duty payable, and this could also lead to lower VAT or excise tax. For direct tax purposes, the importer may prefer to establish a higher price for the transaction to increase the deductible costs in the importing country and lower the taxable profit. This potential conflict between the price or valuation for customs purposes and the transfer price for direct tax purposes means that there may be discrepancies in the price used for customs purposes compared with the price established for direct tax purposes.

If a jurisdiction does not use customs information in checking prices or valuations for direct and indirect tax purposes, taxpayers may be able to take advantage of the situation to manipulate cross-border prices and valuations in order to reduce their tax and customs duties. The customs and transfer pricing functions within a jurisdiction should collaborate and exchange information to ensure that the pricing of import transactions is consistent across the different taxes. Both functions could carry out risk-based compliance audits that would involve comparison of transfer pricing and customs documentation.

In some jurisdictions, the tax and customs authorities are completely independent bodies,

while in others, they are integrated into one organisation. In both cases, however, there is a need for more communication and exchange of information between the two functions, for purposes such as cross-border valuation for customs and indirect purposes or for comparison of prices and valuations for customs and transfer pricing.

8.2.3 Comparison of transfer pricing documentation with customs documentation

In the context of coordination between customs and direct tax functions, the comparison of customs and transfer pricing documentation can be established on a routine basis. Although there will be differences in the documentation owing to the different purposes of the two sets of documentation and different treatment of intangibles and services, comparison of the documents may indicate the possibility of transfer mispricing or attempts to artificially reduce the customs valuation.

8.2.4 Improved targeting of tax incentives

Developing countries have often too easily given away tax relief in the form of tax holidays and other incentives to foreign investors, leading to losses of tax revenue without necessarily affecting investment behaviour. Developing countries should abandon these wide-ranging tax exemptions and instead focus on targeted tax or non-tax relief that can have a real effect on investment behaviour. Any tax relief should be monitored regularly to ensure that it is still having the intended effect and that it is worthwhile to continue the relief. The different incentives should be coordinated and overseen by one part of government so that inefficient tax and non-tax incentives don't accumulate, which deplete government resources without increasing investment.

8.3 Measures for Tax Administrations to Implement in the Longer Term

8.3.1 Regional double tax agreements

Countries/regions with common interests could consider the possibility of regional tax agreements that take into account the specific requirements of projects in developing countries. An example of such a Convention is the Nordic Multilateral Tax Treaty concluded by Denmark, the Faroe Islands, Finland, Iceland, Norway and Sweden.

8.3.2 More harmonisation of customs and tax regulations

Countries/regions could introduce regulations to ensure that an upward adjustment to transfer prices is also reflected in valuations for customs duties and indirect taxes collected at the border. Correspondingly, a downward adjustment to transfer prices could result in a reimbursement of some customs duties. Year-end adjustments for transfer pricing purposes could be reflected in revised customs valuations.

Closer coordination of transfer pricing and customs would also help taxpayers to reduce the compliance costs in relation to cross-border transactions. In view of the compliance costs of putting together transfer pricing documentation, it would help taxpayers if much of the same documentation could also be used for customs purposes. The customs authorities could also find the detailed transfer pricing information useful if it is adapted to provide additional information to assist customs valuation.

8.3.3 Coordination of the structure of tax incentives to avoid harmful competition

Developing countries, including those involved in the Belt and Road Initiative, offer tax incentives as a way to compete with other jurisdictions in the region for investment. This can set off a race to the bottom as greater incentives are made available for foreign investors. As a result, jurisdictions feel pressure to offer greater incentives, and in doing so, they deprive themselves of much-needed tax revenue.

The jurisdictions in a region could increase their tax cooperation on this issue and reach an agreement on limiting this harmful tax competition, thus continuing to receive adequate tax revenue from foreign enterprises. This cooperation could also cover non-tax incentives such as subsidies that may also be used to attract investment.

(The end)

Peter A. Barnes
Senior Fellow
Duke Center for International Development
Duke University

Pillar One and Pillar Two: The Well-Intentioned (But Unfortunate) Pursuit of Perfection

Peter A. Barnes

Editor's Note: Peter Barnes offers a critique of the OECD's Pillars One and Two proposals; he lauds the OECD's goals but expresses concern that the proposals depend on unrealistic assumptions. David Rosenbloom, in a companion commentary, goes further and says the proposals are too complex to work in today's international tax environment. Both authors[1] believe the OECD's goal of increasing source jurisdiction taxation can be achieved in other simpler ways.

For 300 years, the principle known as "the revenue rule" sharply limited collaboration among nations with respect to tax. In the seminal 1729 court decision of Attorney General v. Lutwydge, the United Kingdom courts refused to enforce a bond for Scottish tobacco duties. Five decades later, in 1775, the well-regarded Lord Mansfield said in the case of Holman v. Johnson that "no country ever takes notice of the revenue laws of another."

The revenue rule continued to dominate tax jurisprudence among sovereign

1 Mr. Rosenbloom is a partner and Mr. Barnes is of counsel to the law firm of Caplin & Drysdale, Chartered.

nations until very recently. Courts in numerous countries (the United States, Canada, India, Sweden and more) followed the revenue rule and refused to allow their courts and laws to be used to enforce the tax rules of another country.

But then came OECD/G20 Base Erosion and Profit Shifting (BEPS) Project. And Pillar One. And Pillar Two.

Progress takes many forms, and a centuries-old principle that each nation will adopt, apply and enforce its tax rules without regard for (or help from) other nations is certainly outdated. Tax treaties are strong evidence that cooperation and coordination among and between nations is essential in promoting the welfare of all jurisdictions.

But just as political movements can move too far in one direction, before swinging back toward a stable center, so too can tax movements. And the effort to ensure a "fair and stable" international tax order through Pillars One and Two is a powerful example of the desire for international cooperation moving too far in the direction of ambitious collaboration.

The motivations for Pillar One and Pillar Two are sensible, even laudable:

• Providing for additional source jurisdiction tax revenue, particularly from businesses that can engage in large-scale operations in market jurisdictions without triggering the traditional tax nexus that would subject the taxpayers to net-basis income taxation in the market jurisdictions (Pillar One).

• Encouraging global cooperation among jurisdictions to avoid the dreaded "race to the bottom" in which taxpayers are given reduced tax burdens and jurisdictions are left with insufficient revenues to address public needs (Pillar Two).

In their eagerness to address these two concerns — legitimate, important concerns — tax professionals have fashioned the two Pillars that completely turn the long-standing revenue rule on its head. Pillar One throws out national tax rules completely and fashions an entirely new, entirely global, system of tax calculation (based on financial accounting rules) and parcels the revenue to almost all of a taxpayer's market jurisdictions. Pillar Two requires jurisdictions to cooperate intensely, on a taxpayer-by-taxpayer, jurisdiction-by-jurisdiction basis to ensure that not one item of income is taxed at less than 15%.

This pursuit of perfection is well-intentioned, but, in my view, misguided. Grand ambitions can be valuable. But grand ambitions often mean that modest successes are viewed not as progress, but as failures, because the grand ambition is not realized. And grand ambitions can crash and burn.

There is much that can be achieved with respect to the goals of the Pillars project. We believe real progress can be made in finding new ways to increase revenues for source jurisdictions. We believe real progress can be made in reducing the collective action problem in which each jurisdiction reduces its tax rates to become more competitive, with no overall gain to competitiveness, public finance or the global economy.

But by erecting the complex schemes of Pillars One and Two, and setting the bar so high for success, the OECD and participating jurisdictions create a standard that is not likely to be met. That result jeopardizes the real progress that is potentially achievable.

What can be also noted is that this focus on international cooperation in tax ignores identical concerns with respect to domestic tax rules. With the long-standing revenue rule demolished under the Pillars, not only will jurisdictions assist each other in enforcing their tax goals, but a complex web of work-arounds and penalties are erected among nations that do not exist even within nations. In the United States (the US), for example, Pillar Two rules would ensure that a taxpayer cannot arbitrage the tax rules of, say, Bermuda and France, while completely ignoring any arbitrage between New York and Florida.

There may be political advantages in tackling tax challenges outside a country's borders, rather than within the nation, but the irony cannot be overlooked.

This article identifies four unrealistic elements of the two Pillars and suggests alternatives that are more likely to achieve the goals intended.

1. Financial Accounting

Both Pillar One and Pillar Two rely on income as determined under the financial accounting statements of taxpayers, not accounts computed under the tax accounting rules that apply in either the home jurisdiction or the market jurisdiction. For Pillar One, the amount of income that will be redistributed for taxation in the market jurisdictions is derived solely from a taxpayer's financial statements. For Pillar Two, the calculation whether income is subject to a 15% tax rate will likewise be based on financial accounting.

The potential problems are significant.

The OECD's decision to use financial accounting statements — usually, but not always, determined under Generally Accepted Accounting Principles (GAAP, the US) or International Financial Reporting Standards (IFRS, the rest of the world) — is not surprising. The OECD is seeking to find a common denominator for these important calculations. Tax accounting rules vary significantly among jurisdictions. Depreciation schedules, bad debt rules, inventory accounting, and many other tax accounting rules differ from jurisdiction to jurisdiction.

In seeking to find a common denominator, however, the OECD missed the mark. The differences between GAAP and IFRS are well-known, but there is not even a single IFRS standard; each jurisdiction can (and does) adopt special rules in applying IFRS. There simply is no common denominator for the calculation of a company's income.

Further, the purpose of financial accounting is different from the purpose of tax accounting. Financial reporting is intended to give investors a clear picture of a company's financial status; companies have flexibility in how they portray their business, at least within limits. For financial reporting, guesstimates are expected. The rules for tax reporting are much more rigorous and intended to determine a single number — the annual tax liability for the entity.

What can go wrong when the Pillars use financial reporting to determine tax liabilities? Plenty.

First, and most importantly, there is a risk that taxpayers will skew their financial reporting — in legitimate ways, by for instance adopting different depreciation practices — if the results yield a lower tax liability. The United States had exactly this experience when tax rules that applied between 1987 and 1989 used financial accounting income to determine tax liabilities for certain corporations. Tax economists conducted studies that demonstrated taxpayers changed their financial accounting practices; accounting professionals and investors worried that financial statements were less reliable and less useful.[2] The US eliminated the tax rule after three years.

Second, taxpayers with comparable financial profiles will pay different amounts of tax, depending on which jurisdiction they are in and therefore what financial accounting rules apply. It is silly to believe that two multinationals with more than EUR20 billion in revenue (the group to which Pillar One applies) could have identical financial profiles; that will not happen. The important point is that a US company following GAAP and a German company following IFRS (as adopted by Germany, which is different from IFRS as applied in, say, Japan) will pay different amounts of tax, solely because of accounting rules. Is that logical? Is that fair?

Third, the use of financial accounting statements ignores the reason why tax accounting rules are different from financial accounting rules. Here are two examples (although many, many other examples are available).

- Financial accounting does not require a company to deduct from its income the amount that an employee earns from exercising stock

2 For a comprehensive review of the economic literature and the difficulties of using financial statement information to compute tax liabilities, see Mindy Herzfeld (2020). Taxing Book Profits: New Proposals and 40 Years of Critiques. 73 *National Tax Journal* 4.

options in the company. The rule has been long debated (and sometimes criticized). The decision is based, in simple terms, on the assumption that the stock option represents a dilution of value for the other shareholders (because more shares are issued) and not a cost to the company. For tax purposes, however, stock option gain is deductible to the company, because the gain is taxable to the recipient and failure to allow a tax deduction would result in double taxation.

A company subject to Pillar One may owe tax on financial statement income that is not reduced by stock option gain earned by its employees, even though the employees will pay tax on the gain. This is double taxation on the same income.

• Jurisdictions often allow taxpayers to take accelerated depreciation for tax purposes on purchases of capital equipment. This rule is intended to encourage capital investment. But the taxpayer's financial statement income will reflect depreciation of that same expense over a period of years. Imposing tax calculated under financial statement principles undermines the purpose of the tax incentive.

The OECD has stated that it will allow taxpayers to make some adjustments to their financial statement income before applying the Pillar One and Pillar Two rules. Those adjustments will be controversial, both for what is allowed and what is not allowed. And there is likely to be continued pressure to make more and more adjustments to financial statement income before applying the tax rules.

One further challenge must be mentioned: restatements of financial reporting. Although companies and their auditors try to get the financial results stated correctly the first time, mistakes are made. So, companies with some regularity are required to restate their financial results for prior years. The restatements sometimes are for a single year, and sometimes cover a period of years. How will restatements be handled under the Pillars? If the restatement results in additional tax being due in a prior year, perhaps compliance is not too difficult. But, if the restatement reduces a company's tax liability, claiming a refund will be difficult or impossible.

Is there an alternative to using financial statement income? Yes, although it requires accepting less-than-perfection and less-than-uniformity across the globe.

For Pillar Two, the determination of whether income is subject to a 15% tax rate could be made based on income determined by the local jurisdiction tax accounting rules. This effectively looks at the nominal tax rate applied by each jurisdiction. That's not perfect, but it works. Alternatively, the determination of whether income is subject to a 15% tax rate (and therefore whether a top-up tax should be applied by the home jurisdiction of the parent entity) could be determined based on the tax accounting rules of the parent's home jurisdiction. This is the approach adopted by the United States for its so-called Global Intangible Low-Taxed Income (GILTI) tax, the only widespread top-up tax that exists today.

For Pillar One, as we have written elsewhere, the current approach could be abandoned in favor of permitting either digital services taxes (and their kin), or a value-added tax (VAT) on the appropriate services.[3] We know that applying digital services taxes is anathema to some tax professionals (and our own government), but the reason for the resistance is not clear to us. We also recognize that Pillar One is no longer focused solely on digital companies (however that group is defined), but gross-basis digital services taxes and VATs could subject the income of all of the Pillar One companies to increased taxation in market jurisdictions.

Ideally, the OECD and jurisdictions working with the OECD on the two Pillars projects would harmonize the digital services taxes, at least with respect to determining the base (while allowing each jurisdiction to set its own rate). But even if digital services taxes are not

3 Barnes Peter & Rosenbloom David (2020). Digital Services Taxes: How Did We Get into This Mess?. 97 *Tax Notes International* 12, pp. 1255.

harmonized, companies can administer the rules without undue challenge. Companies already comply with VAT rules that use different rates and different tax bases in every jurisdiction. And most multinationals sell in the United States, with 50 separate sets of state tax rules.

One recurring objection to gross-basis digital services taxes is that gross-basis taxes are never as fair or equitable as net-basis income taxes. True. But the international tax system routinely accepts gross-basis taxes when calculation of a net-basis tax would be difficult.[4]

Furthermore, in comparing the merits of the current Pillar One proposal versus digital services taxes, one feature has generally been overlooked: Pillar One would apply to a tiny percentage of the companies that would be subject to digital services taxes. It is estimated that approximately 100 companies globally would be subject to Pillar One. Depending on the design of the digital services taxes, there would be many multiples of that number of taxpayers responsible for charging and collecting the tax. Indeed, one of the concerns about whether jurisdictions will accept the Pillar One proposal is that jurisdictions would be required to give up digital services taxes that apply to many companies for tax receipts from only a few very large companies.

Good tax policy generally favors taxes that apply at a low rate to a broad base of income and taxpayers. That principle suggests that it would be wise to substitute gross-basis taxes for the current Pillar One proposal.

2. Information Exchange

Information exchange is a cornerstone of international tax enforcement. Tax treaties provide for information exchange and many jurisdictions have tax information exchange agreements (TIEAs) with additional jurisdictions when there is no tax treaty.

Furthermore, information exchange has improved in recent years, with the adoption by many jurisdictions of the Common Reporting Standard and, of course, the use of computers. The days are gone (although only recently gone) when boxes of tax information on paper were shipped from jurisdiction to jurisdiction, only to end up unopened and unused in a storeroom of the recipient tax administration.

Nonetheless, information exchange remains a very weak link in the international tax world. Time delays in sharing information can be quite long; even with the Common Reporting Standard, information does not necessarily move seamlessly from one jurisdiction to another jurisdiction, and then get matched quickly and correctly to the right taxpayer.

The Pillars will put new pressure on information exchange — or alternatively, jurisdictions must just accept without question (or audit) whatever revenue comes into their coffers.

Take Pillar One as an example.

A large company's financial statements are generally public, although a few privately held companies will fall within the scope of Pillar One. Will France, to take an example, just trust the reporting of a large US multinational company? There are two elements that will be opaque to France: the financial accounting behind the numbers, and the allocation of the total income to France as a market jurisdiction.

Similarly, for Pillar Two, jurisdictions will be required to trust other jurisdictions as they apply their top-up tax rules. European jurisdictions have long stressed the importance of their "national champions" among businesses; will other jurisdictions trust the European jurisdictions to apply close scrutiny to the taxes paid by their national champions on income earned in other jurisdictions?

The OECD understands this concern, of course. And the OECD has repeatedly stressed that transparency is essential in creating trust among jurisdictions and taxpayers for administration of the Pillars. Taxpayers will be expected to prepare a global tax return with information sufficient to administer the two Pillars. But will jurisdictions defer to each other (or the home

4 Examples: premium excise taxes on insurance premiums paid cross-border; income from international transportation.

jurisdiction of the taxpayer's parent corporation) to rigorously review the materials provided and ensure their accuracy? And, not to be cynical, but will jurisdictions rigorously review the materials of their own jurisdiction's taxpayers, when tax administration resources are limited and the review will primarily result in tax revenue being paid to other jurisdictions? It is hard to imagine that reviewing a home jurisdiction taxpayer for compliance with Pillar One will be a priority for many tax administrations.

3. Tax Treaties

We explain above our doubts about Pillar One. But, let us focus on the most severe challenge that we see: the need for unanimity — or near unanimity — from the jurisdictions of the world in order to succeed. There is likely to be a long, extended period of negotiation in order to implement the Pillars, especially Pillar One, followed by a long period of litigation within individual jurisdictions. During all that time, the "stability" in the international tax system that is a key goal of the Pillars initiative will be lacking.

Pillar One requires an entirely new basis for tax nexus and taxation, overturning the century-old rules on tax nexus through physical presence or agents. But tax treaties still remain, more than 4,000 bilateral agreements that contribute to the smooth operation of the international tax system. What happens if one or more jurisdictions refuse to forgo the benefits of existing tax treaties and their nexus rules, in favor of the market-based nexus rule of Pillar One? What happens if one of those jurisdictions is the United States? Or simply another jurisdiction (or two) with a large economy?

Pillar One assumes that jurisdictions will agree to the proposal and sign on to a new multilateral convention that implements Pillar One as domestic law. Many jurisdictions will do so, of course, numbering perhaps 100 or more. But each jurisdiction's domestic laws regarding treaty obligations must be followed. We already have seen how difficult it is for some jurisdictions to adopt the Multilateral Convention that implements the initial BEPS proposals, even when jurisdictions want to agree.

This is not the article in which to speculate whether the United States will adopt Pillar One. But it is reasonable to assume that at least a few jurisdictions with significant economies will balk. Domestic politics will interfere with adoption and implementation. Some jurisdictions may believe the elements of the proposal should be changed, notwithstanding the firm assertion by the OECD that further amendments will not be made.[5]

So, what lies ahead? Tax treaties remain in place. If a company that is potentially subject to Pillar One chooses to resist, and its home jurisdiction has not adopted Pillar One, the company can simply refuse to reallocate income to market jurisdictions and rely on the existing tax treaties, where those treaties exist. A long period of chaos will ensue. Jurisdictions that adopted Pillar One may retaliate against the taxpayer, or the home jurisdiction of the taxpayer. Trade sanctions are likely. The home jurisdiction may put pressure on the taxpayer to refuse to comply with Pillar One; in particular, the home jurisdiction could refuse to grant a foreign tax credit (or a "surrender") for any taxes paid.

This scenario is not unlikely, and it is quite unhealthy. The Pillar One proposal creates a self-contained, internally consistent system, but only if every jurisdiction and every taxpayer agrees. To use a stock market catchphrase: the proposal is "priced for perfection". We would prefer a proposal that provides a larger margin for safety.

4. Amount B Safe Harbors

Pillar One consists of two parts: Part A that reallocates a portion of income from about 100 highly profitable and high revenue companies to the market jurisdictions in which they op-

5 The decision to reallocate 25% of profits in excess of a 10% return seems most vulnerable, since some countries have already objected that the 25% share is too low.

erate, and Part B, which establishes safe harbor amounts for distribution and marketing operations.

Safe harbors for transfer pricing are the Loch Ness monster of tax: everyone looks for one, but it is not certain that successful safe harbors exist in the real world. The goal of safe harbors is worthy. A proper safe harbor — say, an agreement that a company earning "cost plus 5 percent" on its operations will be in compliance with transfer pricing rules — is extremely valuable. The safe harbor gives the taxpayer certainty that its pricing will be respected; the safe harbor ensures that a government will receive reasonable tax revenue, without the burden of lengthy audits.

But the practical issues are immense. Governments worry that taxpayers will abuse a safe harbor regime and claim the safe harbor rate when the taxpayer's operations are really more complex (and should be more highly remunerated) than the level of operation for which the safe harbor was designed. Taxpayers worry that the safe harbor rate is entirely too high, based on the taxpayer's own experience, or that the government will challenge the taxpayer's qualification for the safe harbor.

These concerns are not idle. Governments that issue safe harbors (most notably, India) often set the rates far above the profit level that most taxpayers achieve. Audits challenging a taxpayer's qualification for the safe harbor are frequent.

Nonetheless, if the OECD could achieve consensus on safe harbor rates for routine marketing and distribution activities, that would be a very valuable contribution. Once again, it appears that the OECD's ambitious goals are unlikely to succeed.

Here's the rub. Transfer pricing is plagued by two, unsolvable challenges:

• Economic data on "comparable" companies and transactions is impossible to find. Developing countries correctly note that there are not enough comparables available to do a thorough data analysis. Furthermore, the data is always lagging; for transfer pricing in the year 2022, for instance, the best available data is from 2019 and 2020, when economic conditions were quite different from this year.

• In addition, it is impossible to know — *really* know! — whether the comparable companies selected for the data analysis are truly comparable to the tested taxpayer. Information about the comparable companies is always limited, even if the economist performing the analysis reaches for information outside the database. The fact that two companies are engaged in activities under the same Standard Industrial

Classification (SIC) code does not mean they are comparable in the risks they take, the intellectual property they own and the profits they should earn.

There is no corrective for these challenges. And that is fine. Indeed, the beauty and joy of transfer pricing work is built on the challenges of gathering information, digging deeply into the facts, and trying to construct a true and meaningful transfer pricing analysis notwithstanding these limitations.

In the face of this reality, the most useful decision by the OECD would be to concede that fully accurate safe harbors are impossible to find. So, the OECD could assert that rough justice is the best course and a broad, simple safe harbor would be established. For example, the safe harbor could state that marketing and distribution operations should report net income equal to 4% of sales (or 3%; or, if governments insist, 5%). The safe harbor would be open to all taxpayers, with the promise of very few, if any, audits. The same peer pressure that is being applied to jurisdictions to adopt Pillar One and Pillar Two could be applied to encourage jurisdictions to adopt this simplified safe harbor for marketing and distribution.

Instead, it looks like the OECD will seek to establish multiple safe harbors broken down by region and industry, using the insufficient data (see above) that exists. All of the problems that plague taxpayers and governments with respect to today's safe harbor regimes will continue under the Pillar One proposal; the only difference is that the OECD (or some other group) will run the calculations.

At the time this article is written, little is known about the Amount B procedure, except that the OECD has stated that it will provide multiple safe harbors. On the one hand, that is the "correct" answer, since industries and regions do experience differences in profitability with respect to marketing and distribution. But breaking down safe harbor profit levels into multiple categories — when the limitations on data can never be overcome — suggests a precision in the exercise that is illusory.

Furthermore, the economic stakes are not worth the controversy. Suppose a taxpayer sells USD50 million of goods in Country A. The safe harbor rate on marketing and distribution is 4%, for a net income of USD2 million. The local tax rate is 25%, for a tax of USD500,000. Suppose the Pillar One rules establish multiple safe harbor rates and the taxpayer is subject to a higher, 6% rate (which would be very high for a marketing and sales business); the additional tax is USD250,000. However, that higher payment will be offset by reduced income reported and taxed elsewhere, making the actual cost (or profit) to the taxpayer a small fraction of the marginal USD250,000. Is the illusory precision that multiple safe harbor rates provide worth the continuing friction between taxpayers and governments?

The safe harbor exercise under Amount B represents a major opportunity for the OECD and tax administrations to truly simplify transfer pricing for marketing and sales businesses. The gain, however, requires a willingness to live with a single standard (again, perhaps net income equal to 4% of sales) that is admittedly a compromise and not precisely correct. By seeking a more perfect answer — with separate safe harbors by business and by region — the Amount B proposal will invite controversy and challenges that could be avoided if taxpayers and tax administrators were presented with an attractive option of rough justice.

5. Conclusion

The OECD team that leads the Pillar One and Pillar Two initiatives is staffed with superb, well-intentioned tax professionals. But worryingly, the current proposals work well in a laboratory but will not work in the real world.

The daily fare of international tax includes lots of data gaps, inconsistent information exchange, tax treaties with all their strengths and weaknesses, and taxpayers that do not always comply. The goals that are sought in the Pillars initiative are worthy and important. We want to celebrate success toward those goals. The current proposals risk that, by reaching for perfection, a more modest and achievable success will be lost.

Commentary

H. David Rosenbloom

Peter Barnes and I, longtime skeptics of the Pillars, set out to prepare a joint essay on the subject. When I received a draft from Peter, however, I realized that the bases for our skepticism were not entirely aligned. Peter faults the OECD for allowing the perfect to displace the good with the result that these complex proposals may "work well in a laboratory but … not work in the real world." I agree with that sentiment but the problems with the Pillars seem to me to derive from a deeper source than the pursuit of perfection.

In fact, I have no fundamental objection to pursuing perfection. After all (with apologies to Browning), if a man's reach does not exceed his grasp, what's a heaven for? Nor am I troubled by the aim of providing market jurisdictions a larger tax take than they can presently claim. A worldwide minimum tax strikes me as, in essence, a good idea. So whence derives my skepticism?

I think the Pillars project is founded on a misapprehension of the current state of international cooperation in tax matters. Regardless of what high-level political representatives around the world may say about the intention of their jurisdictions to cooperate, I do not believe that in real and concrete situations such cooperation exists. It would indeed be a welcome development if there truly were some degree of common understanding in tax matters, but more than fifty years in this field convinces me that in matters of taxation, as in so many other matters, we inhabit a world of independent, highly nationalistic states. Information exchange, even (and perhaps especially) by jurisdictions that loudly proclaim its desirability, is grudging at best. The United States, a country I know well and one that is generally transparent in regard to its tax laws and policies, is at its murkiest when it turns to information exchange. When do we provide information? How much time does a decision require in any given case? What are the standards for accepting or denying requests for information from other jurisdictions?

H. David Rosenbloom
Professor and Director
International Tax Program
New York University
School of Law

The Pillars are built on the notion that tax information can and will flow swiftly and freely among jurisdictions so that the various inter-dependent rules in the Pillars can operate in an efficient manner. Furthermore, it is assumed that there will exist an efficacious means of resolving disputes, in line with the spirit that animates the OECD's description of the Pillars.

I am sorry. The world is a long way from that state of affairs and the OECD cannot make it so.

Furthermore, I am not persuaded that the advent of digitalization requires the jettison of one hundred years of experience with established rules of international income taxation. For reasons I find elusive, there is a prevailing assumption that a digitalized economy calls for abandonment of the well-worn, relatively workable rules of the road. I understand, of course, that jurisdictions whose citizens pay large sums for digitalized product that does not require a traditional nexus within their borders yearn to reap revenue from such businesses. That much is clear and, perhaps, justified. But I would keep the established rules intact and not seek to develop hothouse and untried alternatives. Market jurisdictions are, and always have been, free to impose new taxes on digital services offered to their citizens. That is what a value-added tax would entail. I see no good reason why the circumstances call for a dramatic abandonment of prevailing income tax principles.

Finally, the Pillars are complicated and susceptible to differing interpretations in different jurisdictions. The international tax rules do not appear to be in need of additional complexity. If anything — and here is perhaps where I rejoin Peter — what is needed is movement toward taxation on the basis of rough justice. At the end of the day, any tax system seeks to meet three, not necessarily coterminous, goals: to promote economic efficiency by interfering as little as possible with economic choices that would be made in a world without taxation; to be fair, or more accurately to appear to be fair, because compliance is difficult when tax laws are seen to operate unfairly; and to be simple, so that the rules can be understood by taxpayers and administered by tax authorities. I am not sure the Pillars satisfy any of these goals but, for me, the greatest of them is simplicity. It is not possible to speak of the Pillars and simplicity in the same sentence.

International Corporate Taxation at a Crossroads

Sol Picciotto

Sol Picciotto
Emeritus Professor
Lancaster University
(UK)

Abstract: Transnational corporations (TNCs) act as unitary firms in an increasingly globalised economy, but taxes on their profits are levied by national states. Hence, international tax rules have from the start been riven by contradictory approaches: either to determine the taxable profits attributable to each separate constituent entity of the TNC in their jurisdiction by comparing them with independent firms conducting a similar business, or to tax an appropriate share of the TNC's global profits apportioned by factors reflecting its activities within the jurisdiction. The separate entity principle became dominant, especially with the adoption of the OECD Transfer Pricing Guidelines in 1995, but it gave a perverse incentive to TNCs to devise tax avoidance strategies, based on attributing high levels of profit to entities in countries where they would be taxed at low rates. The project on base erosion and profit shifting (BEPS) was mandated by the G20 to reform these rules so that TNCs could be taxed where their activities occur, signaling a return to the unitary principle. The latest proposals now adopt the principle of unitary taxation of TNCs, together with technical standards for formulary apportionment, but only as an overlay on top of existing rules based on the incompatible independent entity principle. A stable foundation for international tax depends on resolving this dilemma and agreeing a fair and balanced allocation of rights to tax TNCs' profits based on their real activities in each jurisdiction.

Keywords: Transnational corporations; Unitary taxation; Formulary apportionment; Separate entity principle; Arm's length principle

1. Introduction: Between Two Paradigms

After an unprecedented ten-year international effort to reform the international tax system, it remains caught between two divergent approaches to the taxation of the profits of transnational corporations (TNCs). From a political economy perspective, TNCs operate in an increasingly globalised economy, as unitary enterprises under central direction and control.[1] However, taxes are levied by

1 They consist of a number, sometimes hundreds, of legally separate companies (and sometimes other entities such as partnerships), all under the ultimate ownership of a parent in the TNC's home country, which is usually where the enterprise originated, its top management is based, and often its main market is located; hence the term transnational is more accurate than multinational.

national states. This poses the central question of international taxation: how to coordinate the taxation of TNC profits among the states where they do business. Although states are sovereign in formal political terms, their powers of economic regulation are constrained by the pressures of the world economy. So, international tax policies have resulted from the interactions between national governments and TNCs, both being powerful transnational political and economic actors. They have also been moulded by perceptions about the effects of such policies not only on tax revenues, but importantly also on international investment flows.

TNCs, particularly those based in the USA, expanded rapidly especially from the 1950s, strengthening their competitive advantages by exploiting tax and regulatory differences between countries. This drove the creation of the offshore system of tax and financial secrecy havens, which grew exponentially especially after financial liberalisation in the 1980s. The first inter-governmental response was the initiative to combat "harmful tax practices" through the Organisation for Economic Co-operation and Development (OECD) in 1998. This resulted in relatively weak measures, which only stemmed the losses for OECD members,[2] while the problems worsened for developing countries, and international tax rules became even more dysfunctional. The financial crisis of 2009 produced a stronger response from the G20 leaders, who mandated the OECD-led project on base erosion and profit shifting (BEPS) to reform international tax rules so that TNCs should be taxed "where activities occur and value is created".

As soon became clear, this requires a rethinking of the basic concepts of international tax. This article begins by surveying the tangled history and contested interpretations of these basic concepts. It shows that international tax rules have been riven by contradictory approaches to taxing TNCs: either to determine the taxable profits attributable to each affiliate of the TNC within their jurisdiction by comparing them with independent entities, or to tax an appropriate share of the TNC's global profits apportioned by factors reflecting its activities within the jurisdiction. It then shows how TNCs exploited these contested rules to reduce their tax liabilities, particularly with the growth of the intangible economy. Finally, it outlines the current reform proposals, which now adopt the principle of unitary taxation of TNCs, together with technical standards for formulary apportionment, but only as an overlay on top of existing rules based on the incompatible independent entity principle. It concludes that a more stable basis is needed for a shift to the new paradigm, and to finally resolve the long-standing conflict between the two incompatible approaches to taxation of TNCs.

2. The Emergence of International Tax Rules

The international institutional framework emerged a century ago, when international capital flows mainly consisted of portfolio investment, in which the providers of finance have no direct control over the business activities. In this context the dominant view was that the investor's jurisdiction of residence should have the primary right to tax the "passive" returns (interest, dividends), while the "active" income or profits of an enterprise should be taxed in the jurisdiction where the business activities took place. However, there was already also some foreign direct investment, with TNCs controlling business activities in several jurisdictions, either through locally incorporated subsidiaries or branches.

For this active business income, the model convention negotiated through the League of Nations in 1928 gave a right to tax to each jurisdiction where an "undertaking" had a "permanent establishment" (PE). If there were PEs in both jurisdictions, each could tax the "portion

2 Avi-Yonah R. S. (2009). The OECD Harmful Tax Competition Report: A Retrospective after a Decade. 34 *Brooklyn Journal of International Law*, pp. 783-795.

of income produced in its territory". The terms "undertaking" and PE were deliberately left undefined, to achieve consensus.[3] The concept of an "undertaking" could refer to the TNC as a whole, and the term PE could include a subsidiary. This would disregard the formal legal personality of a subsidiary, allowing states to treat a corporate group as a single economic enterprise, and tax its PEs (including subsidiaries) on a share of the global profits reflecting its activities within the jurisdiction.[4] However, the methodology for apportionment was left to be agreed between the jurisdictions concerned.

The issue of how to allocate TNC profits was investigated for the League's Fiscal Committee by Mitchell B. Carroll, through a survey of 28 jurisdictions. Carroll's General Report found that tax administrations generally began by examining the accounts of the members of the TNC group within their jurisdiction, but they had powers under national law to adjust those accounts as necessary. This reflected the understanding that the TNC's activities were interdependent, so that it could be hard to disentangle the contribution each made to the total profits; and also, since TNCs were centrally coordinated, profits could be "diverted". Carroll found that there were two divergent perspectives:

"That the local establishments should be taxed on the basis of separate accounts and treated in so far as possible as if they were independent enterprises."

That the enterprise is an organic unity and consequently the tax should be assessed on that part of the enterprise's total net income (computed in accordance with the law of the taxing country) which corresponds to the relative economic importance of the local establishment.[5]

In practice two methods were used: "fractional apportionment", and "empirical methods", although no country used only one.[6] The first entailed allocation of the TNC's total net profit (or loss), from either all its business or from interrelated activities, by applying factors reflecting its activities in each country. The second would check the profit (or loss) declared in the accounts of the specific entity, by comparing it with standalone firms in a similar line of business. Carroll favoured this independent entity approach, and pointed out that international agreement on fractional apportionment would require "firstly, an agreement as to total net income, and, secondly, agreement as to the economic importance of the establishment in each country".[7]

Divergence over the jurisdiction to tax profits from international business has been sharpest between countries that are mainly host countries for TNCs (capital-importing), and those which are their home countries (capital-exporting). It became evident in the so-called Mexico and London drafts of the League of Nations model.[8] There were some differences between them on defining a PE, but more importantly the Mexico draft did not limit taxation of business income to the profits attributable to a PE. It included a provision that income from any business or gainful activity "shall be taxable only in the State where the business or activity is carried out", unless there were only "isolated or occasional transactions". This was omitted from the London draft.[9]

The shaping of international tax rules has

3 Jogarajan Sunita (2018). *Double Taxation and the League of Nations*. Cambridge University Press, pp. 246.

4 Langbein S. I. (1986). The Unitary Method and the Myth of Arm's Length. 30 *Tax Notes*, 625-681, pp. 631.

5 Carroll Mitchell B. (1933). *Taxation of Foreign and National Enterprises. Volume 4: Methods of Allocating Taxable Income.* C.425(a) M.217(a). II.A. Geneva: League of Nations, pp. 187. https://adc.library.usyd.edu.au/view?docId=law/xml-main-texts/cartaxa.xml.

6 Carroll (1933), pp. 46.

7 Carroll (1933), pp. 189.

8 Fiscal Committee (1946). *London and Mexico Model Tax Conventions, Commentary and Text.* C.88.M.88.II.A. Geneva: League of Nations.

9 Ibid., pp. 13-14, 60.

given priority of taxing rights to TNC home countries since the dominant role in formulating a model treaty was taken up in the post-war period by the OECD, through its Committee for Fiscal Affairs (CFA). The OECD fostered the progressive liberalisation of capital flows, and its work on international tax rules aimed to facilitate investment by TNCs. Hence, the OECD model convention, ever since the first version of 1963, has restricted the sovereign rights of states to tax income from activities within their jurisdiction conducted by non-residents. Its provisions generally restrict source taxation, reinforced by a catch-all prohibition of any taxation by the source country not otherwise permitted in the treaty (Article 21).

Tax treaties have remained ambivalent about the allocation of rights to tax the business income of TNCs. They recognise the distinctive nature of corporate groups in Article 9 on "associated enterprises", which allows states to adjust the accounts of such entities to prevent any shifting of profits due to their being under common management and control; but the article specifies that this must be done by comparing their profits with those of independent enterprises. However, the term "enterprise" remains unclear: Article 3 defines it as "the carrying on of any business", but also specifies that an "enterprise of a contracting state" means an "enterprise carried on by a resident of a contracting state". Under Article 7 the business profits of an "enterprise of a contracting state" are taxable only by that state (i.e. the state of residence), unless it has a PE in the other state; and in the OECD model a PE is defined in physical terms as a "fixed place of business" (Article 5.1), usually for 12 months.

However, in 1963 (and until 2010) the OECD model also included Article 7(4), allowing a PE to be taxed "on the basis of an apportionment of the total profits of the enterprise to its various parts". Here, "enterprise" can be understood to mean the "business" of the corporate group as a whole, allowing apportionment of the global profits among all the countries where there is a PE. Furthermore, a subsidiary may also be treated as a PE, if it is considered to act as an "agent" of the parent, which is accepted in many countries.[10] Article 7 also included a version of the "independent entity" principle (Article 7.2), and Article 7(4) stated that apportionment should be "in accordance with the principles contained in this Article". Hence, apportionment could be considered compatible with the independent entity principle. However, as TNCs increasingly designed complex group structures exploiting the formal legal separate personality of corporate entities, the OECD hardened its interpretation of independent entity principle, and omitted Article 7(4) from its model, as discussed in the next section.

In contrast, the UN Tax Committee attempted to find compromises between the preferences of home and host countries of TNCs.[11] The conflict between the two perspectives was particularly acute for services, for which a majority of members, especially those from developing countries, favoured taxation at source.[12] The UN model tax convention that was finally published in 1980 gave a much wider scope for source taxation than the OECD's model, although it did not go as far as this majority wished.[13] This was particularly evident in its

10 Le Gall J. P. (2007). Can a Subsidiary Be a Permanent Establishment of Its Foreign Parent? Commentary on Article 5, Par. 7 of the OECD Model Tax Convention. 60 *Tax Law Review*, pp. 179-214, and Avi-Yonah R. S. & Pouga Tinhaga, Z. (2014). Unitary Taxation and International Tax Rules. ICTD Working Paper 26.

11 Set up in 1967 as the UN Group of Experts on International Tax, and now the UN Committee of Experts on International Tax, its primary role has been to adapt the OECD model convention to make it more suitable for use by developing countries.

12 Surrey Stanley S (1978). The UN Group of Experts and the Guidelines for Tax Treaties Between Developed and Developing Countries. 19 *Harvard International Law Journal*, 1-220, pp. 8-14.

13 Picciotto S. (2021). The Contested Shaping of International Tax Rules: The Growth of Services and the Revival of Fractional Apportionment. ICTD Working Paper 124, pp. 14.

broader definition of a PE, especially in relation to services, which included a "services PE", with a potentially very wide scope.[14]

The UN model also allowed apportionment under Article 7(4), and has been retained. Since it was also in the pre-2010 OECD model, it is included in around two-thirds of current in-force treaties, while some 28% of these treaties contain both this and the Services PE provision of the UN model.[15] Hence, a high proportion of all existing treaties allow a fractional apportionment method to be used to calculate the net profits of a PE, and a significant number provides that this method can be applied to the furnishing of services with no need for a "fixed base". However, no agreed methodology has ever been developed for apportionment.[16] When providers of professional services began to expand internationally, the models allowed withholding taxes on payments for "independent personal services", but this was dropped from the OECD model in 2000, so that even income from these services could only be taxed if done through a PE and as business income. However, it was retained in the UN model, which in 2017 added Article 12A, allowing a withholding tax also on payments for a wide range of technical services, in line with measures already adopted by many countries.

3. The OECD Obsession with "Arm's Length"

The gap between the two model conventions has widened, as the OECD has adopted an increasingly extreme interpretation of the independent entity approach, described as the "arm's length principle". This was formalised in 1995 with the OECD Transfer Pricing Guidelines (TPGs). These rely on ad hoc and inherently subjective evaluations of the "facts and circumstances" of each affiliate within the MNE corporate group, and the illusory search for comparable independent firms, focusing on the pricing of transactions.

The five methods approved in the TPGs are all described as "transactional", although only one, the Comparable Uncontrolled Price method, focuses on transaction prices, the remainder are concerned with the level of profit. Furthermore, the "profit split" method essentially entails apportionment of aggregate profits, based on suitable "allocation keys". However, little attempt has been made to refine this method, which has been discouraged and rarely used in practice. The most frequently used has been the Transactional Net Margin Method (TNMM), which is generally favoured by the vast army of advisers on transfer pricing who have become specialists in its technical complexities. However, the TNMM produces only a range of supposedly acceptable prices and, as recent research has shown, the spread is so wide that the method is ineffective.[17]

The OECD then went further, and tried to extend to PEs the transactional approach adopted for separately incorporated affiliates in

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14 This covers "the furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the country for a period or periods aggregating more than six months within any 12-month period". The six-month requirement was included as a compromise, and it has remained a point of contestation whether it refers to the period over which the services are furnished, or the physical presence of personnel: see Picciotto (2021) fn 13 above.

15 These data are based on an analysis using the IBFD database in May 2020 conducted as a TradeLab project by students at the Graduate Institute of Geneva (Edgard Carneiro Vieira, Boris Ohanyan, and Natalia Mouzoula), and I am grateful to them for the study. This study involved rigorous sifting and manual evaluation of the search results, to produce both more accurate quantitative data, and the significant qualitative findings discussed in this paper (see also Picciotto (2021) fn 13 above). Of the 3,181 identified treaties in force with an English language version, 2,161 included Article 7(4), and 905 included both Article 7(4) and the "services PE" provision in Article 5.3.b of the UN model.

16 The UN Committee has not provided its own guidance on Article 7(4); the commentary to the UN model has simply reproduced some paragraphs from the pre-2008 OECD model commentary.

17 Durst Michael C (2022). It's Time to Reform Transfer Pricing Benchmarking.106 *Tax Notes International*, pp. 1271-8.

Article 9, by adopting the "authorised OECD approach" (AOA) to the application of a revised Article 7 in its model in 2010. This pushed the fiction of "independent entity" to absurdity, since PEs are not legally separate entities, so they cannot conclude contracts, and are not required or normally expected to produce separate financial accounts.[18] The changes to Article 7 also entailed omitting the provision for apportionment in paragraph 4, which was regarded as incompatible with this new interpretation.[19]

The principle that all affiliates in a TNC corporate group should be treated as if they were independent is a legal fiction, clearly far removed from the business and economic reality. Viewed from a political economy perspective, it provided a highly dysfunctional basis to regulate international taxation, because it created perverse incentives. It encouraged TNCs to develop corporate structures that enabled them to attribute disproportionately high levels of profit to affiliates in low-tax countries and, conversely, low levels in high-tax countries.

Such tax avoidance strategies mainly exploited the concept of residence of legal entities, particularly corporations. It is harder to avoid taxation at source, because it focuses on where the activities generating the income occur, which can be defined in relation to state territory in terms of quantifiable physical factors (employees, physical assets, and customers). The criteria for corporate residence are harder to define in terms of such a link; attempts by some countries to do so have been easily circumvented, while others have deliberately designed their laws to attract the formation of legal entities by non-residents. Indeed, from the 1920s countries such as Luxembourg, Switzerland and Lichtenstein began to offer facilities for the formation of "holding companies", to own assets as intermediaries, enabling both wealthy individuals and TNCs to avoid tax and other regulatory requirements in both host and home countries.[20] This was backed by strong laws to enforce banking and commercial confidentiality, to create the secretive system of tax havens and offshore finance.

4. The Globalised Intangible Economy and Tax Avoidance

Exploitation of tax and regulatory avoidance by TNCs has accompanied major economic transformations, which can be described as the shift to a globalised intangible economy.

A central element was the great expansion of the system of offshore finance and tax avoidance, starting in the 1950s. This began with the major expansion of foreign direct investment, predominantly by US-based TNCs. This growth was funded mainly from the retained earnings of their foreign affiliates, avoiding tax as well as controls on capital by being held "offshore". Payments of fees, royalties and interest are generally deductible from the business profits of the payers, which are often related entities with the TNC corporate group, causing major tax losses to host countries. Channeled through conduit companies to escape source withholding taxes, the income could also benefit from deferral of tax in the TNC's home countries. The US government in 1962 attempted to counter this by taxing TNCs' foreign earnings through rules on Controlled Foreign Corporations (CFCs), but the legislation was watered down to apply only to "passive" income in low-tax countries. Similar measures subsequently enacted in a number of other OECD countries also had limited effects, as TNCs lobbied to ensure that the provi-

18 Kobetsky Michael (2011). *International Taxation of Permanent Establishments: Principles and Policy.* Cambridge University Press, pp. 285-6.

19 This was agreed in 2008 after seven years' work, and included in the 2010 revision of the OECD model.

20 Farquet Christophe (2017). *La Défense Du Paradis Fiscal Suisse Avant la Seconde Guerre Mondiale: Une Histoire Internationale.* Neuchatel: Alphil, pp. 233-4; Farquet C. & Leimgruber M. (2016). Explaining the Failure of International Tax Regulations Throughout the 20th Century. Working Papers of the Paul Bairoch Institute of Economic History,6/2016. https://archive-ouverte.unige.ch/unige:88348.

sion of a range of financial and corporate services could be treated as "active" business. This led to the creation of the euro-dollar market, the transnational expansion of US banks, and the first offshore boom.

A key role for intermediary conduit entities was the management of assets such as intellectual property rights (IPRs), which TNCs in sectors such as pharmaceuticals transferred to the nominal ownership of affiliates resident in low-tax countries. IPRs are legally protected know-how, technology and cultural products, which generally become corporate assets. IPRs are notoriously hard to value, as they are simply the result of processes of research and intellectual activity, often requiring enormous and continuing investments to develop into marketable products and services. Hence, the mere ownership of IPRs does not create value or profits, nor can their management through the grant of licences, particularly to related entities within a TNC group. Essentially, they facilitate the corporate control of science, technology and culture, which all result from the human processes of creativity and inventiveness. Contrary to the common image of the individual genius inventor or creator, these processes are collective, and depend on continuous interactions and cross-fertilisation of ideas, nowadays on a global scale.

Next came the rise in economic importance of services in relation to the production of physical goods. This was not a matter, as commonly supposed, of the emergence of a new economic sector, but the growth in value created by intellectual and cultural work.[21] Manufacturing, and even extractive industries and agriculture were themselves transformed. Automation greatly reduced the role of physical labour, while the application of new technologies, as well as creative inputs such as design, transformed the quality of physical goods. From the tax perspective, this enabled TNCs to take further advantage of the independent entity principle, by reorganising their corporate structures through functional fragmentation. This involved forming affiliates in conduit countries, to which could be attributed substantial income from activities considered to be high-value-adding, such as procurement, logistics, marketing, sales management, and commodity trading. Since these would be regarded as "active" business, the profits would not be taxed by home countries under CFC rules, while being exempt or subject to low tax in the conduit country. At the same time, entities engaged in labour-intensive production or distribution activities were treated as low-value-adding contract manufacturers or distributors, earning only "routine" profits.

Activities involving intellectual rather than physical work can be described as intangible. While they are frequently closely tied to the production and distribution of physical products, the functions can be separated and attributed to different entities. This fragmentation of functions in TNC corporate structures, taking advantage of the separate entity principle, has been the main driver for the enormous growth of international tax avoidance.

A further shift towards the intangible economy occurred in the 1990s with the emergence of digital technologies. The OECD hailed these as transformative in its 1998 Ottawa conference "A Borderless World", but the CFA took a cautious approach to the implications for international tax.[22] It agreed in 2000 to include a new section on Electronic Commerce in the commentary to Article 5 of the model convention, which confirmed that the PE definition required physical presence. This meant that hu-

21 This has been increasingly recognised recently, and some have begun to refer to "servicification": e.g. Miroudot Sébastien & Cadestin Charles (2017). *Services in Global Value Chains: From Inputs to Value-Creating Activities*, http://dx.doi.org/10.1787/465f0d8b-en; Cadestin Charles, et al. (2018). *Multinational Enterprises and Global Value Chains: New Insights on the Trade-investment Nexus*, https://doi.org/10.1787/194ddb63-en .

22 Its immediate response resulted in a number of technical reports, available on https://www.oecd.org/tax/treaties/ecommercereportsandtechnicalpapers.htm.

man intervention was not an essential requirement for a PE, but also that a website by itself could not be a PE,[23] although a physical facility such as a server could. The wider possibilities of changes to tax treaty rules were referred to a technical advisory group (TAG), which included representatives from businesses (such as Microsoft) and some non-OECD countries. The TAG considered several possibilities, including a shift to formulary apportionment. It concluded that this could be a comprehensive and effective solution if implemented uniformly, but it faced two major obstacles. First, since there had never been any serious discussion of the elements of a standard system for apportionment, no agreed standards were available, and the issues on which international agreement would be desirable were controversial; and secondly, it would conflict with existing transfer pricing rules, so a transition would be difficult.[24]

The perspective on digitalisation changed by the time of the launching of the BEPS project in 2012, a main motivation of which was the impact on international tax of the digital economy, which was Action 1. The report on this Action in 2015 analysed the effects of digitalisation and the "broader tax challenges" it raised, as well as possible unilateral actions that states could take, without making any recommendations or proposals. A more far-reaching report in 2018 showed that digitalisation had affected the whole economy, and that this now required a reconsideration of the two basic principles of international tax: the physical presence requirement for a taxable presence in the PE definition, and the principles for allocation of TNC income.[25] It identified interim measures that some countries might consider in response to these, and provided agreed "guidance" on the design of such measures. These measures included introducing a taxable presence test based on a significant economic presence, without the need for a physical base, and digital services taxes (DSTs).

The 2018 report presaged a major shift in international tax. Now a wide range of countries, including some OECD members, accepted the need, long argued by developing countries, to strengthen taxation of profits at source, by the country from which they derive. Many countries began to enact or propose unilateral measures, particularly DSTs. However, these resulted in retaliation through trade sanctions by the US, on the basis that such taxes on the gross payment for transactions are trade restrictions. These sanctions were suspended while negotiations continued, but the conflict increased the pressure to find a more effective way to tax the net profits attributable to sales, especially of services. This would entail agreeing on a taxable nexus without a physical presence, and the related issue of how to allocate the net profits attributable to revenue purely from sales, if expenditures on capital assets and employees take place elsewhere.

5. The Transition to Unitary Taxation

Ten years after the launching by the OECD of the BEPS project, we can now see that the shift to a new paradigm is well under way. Indeed, the proposals for both of the Two Pillars now put forward in the BEPS project are based on unitary taxation of TNCs.[26] This approach

23 Portugal and Spain did not accept this view.

24 OECD (2005). *E-commerce: Transfer Pricing and Business Profits Taxation*, https://doi.org/10.1787/9789264007222-en. pp. 143-4. The TAG report is Part II of this publication, Part I is the report of a sub-group of the CFA's Working Party 6 on e-commerce.

25 OECD (2018). *Tax Challenges Arising from Digitalisation — Interim Report*, https://doi.org/10.1787/9789264293083-en. pp. 167-168.

26 This was first proposed in the negotiations by the G24 developing countries. *Proposal for Addressing Tax Challenges Arising from Digitalisation*, https://www.g24.org/wp-content/uploads/2019/03/G-24_proposal_for_Taxation_of_Digital_Economy_Jan17_Special_Session_2.pdf.

treats TNCs in accordance with the notion that they operate as unitary enterprises, and aims to allocate their profits among states in line with their real activities.

These proposals were rightly referred to as "revolutionary" by the OECD Secretary-General.[27] Pillar One would allocate a share of the TNC's global profits based on sales revenue, subject only to a monetary threshold and regardless of physical presence. It provides an agreed definition of TNCs' global consolidated profits for tax purposes, and uses a formulary method to allocate a share of those profits by sales. The building blocks for the two Pillars issued within the last year also include the technical specifications to enable the application of the generally used factors for formulary apportionment (assets, employees, and sales by destination). The sourcing rules for sales are particularly important, as they resolve contentious questions, such as the place of performance of services, and the weighting of user contributions related to income from digital sales. All this provides a basis for the gradual transition of MNE taxation towards unitary taxation, potentially with formulary apportionment, which, in my view, is the most effective method.[28]

However, the proposals for implementation of Pillar One are both limited and impractical. They are designed to apportion only a small part of the so-called "residual" profit of around 100 of the largest and most profitable TNCs, leaving in place the current defective rules for attributing the remaining profit of these in-scope TNCs, as well as all the profits for all others. Instead of replacing the present flawed and complex rules, they simply add a new layer of complexity, while resulting in small revenue gains for states. Their adoption would require rapid ratification by a large number of states of a multilateral convention, which is highly unlikely.

Pillar Two's proposals for implementation are also deeply flawed, mainly because they involve unfair and ineffective priority rules. Its main component is a global minimum corporate tax (the GloBE), which is designed to give priority to TNC home countries to apply a top-up tax, to ensure that all affiliates of TNCs with global revenues over EUR750 million are taxed at the agreed minimum effective rate of 15%. Since this is unacceptable to many low-income countries that are mainly hosts to TNCs, Pillar Two also included a proposed subject-to-tax rule (STTR), a rule with higher priority which would allow a withholding tax at source to ensure taxation at a minimum of 9% on interest, royalties, and some other payments. However, the scope of this has not been agreed, and is unlikely to extend to most services. Also, it would require changes to tax treaties; while there is a commitment to include it in treaties with developing countries, doing so would lock them in to this standard. Developing countries generally have relatively few tax treaties, and may prefer to renegotiate them to protect their rights to tax income at source more effectively than the STTR would allow. The GloBE is easier to implement than the STTR, because the OECD considers that it does not require changes to tax treaties; but this also means that its priority rules are not enforceable. Many countries are likely to try to strengthen source taxation, including members of the OECD.[29]

27 OECD (2022). *Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors, Indonesia*, https://www.oecd.org/ctp/oecd-secretary-general-tax-report-g20-finance-ministers-indonesia-july-2022.pdf.

28 For further details see Picciotto S. (2017). Taxing Multinational Enterprises as Unitary Firms. International Centre for Tax and Development, and Picciotto S. & Kadet J. (2022). The Transition to Unitary Taxation. *Tax Notes International*, 24 October.

29 The UK, in its proposals to introduce the GloBE, stated that it also intended to retain the existing UK measures protecting source taxation, both the diverted profits tax (DPT) and its variant, the tax on offshore receipts in respect of intangible property (ORIP): UK Treasury (2022). *OECD Pillar 2 — Consultation on Implementation*, https://www.gov.uk/government/consultations/oecd-pillar-2-consultation-on-implementation.

Thus, the outcome of the design of Pillar Two is an elaborate accumulation of competing and potentially conflicting taxing rights. This is no way to resolve the fundamental question of allocation of taxing rights over the global profits of MNEs. Instead it will only increase complexity, confusion and conflict. In my view, a fairer, simpler and more effective basis for the GloBE would be to allocate the rights to apply a top-up tax on a formulary basis, dispensing with the need for the GloBE's unfair and elaborate interacting priority rules.[30]

6. Conclusions

The emergence of a globalised and increasingly intangible and digitalised economy greatly exacerbated the dilemma of how states should tax the large TNCs which dominate the international economy. Already over a century ago it was understood that these firms operate activities in different countries under central control, raising difficult questions over allocating rights for national states to tax their business profits. There were two perspectives on this: to treat corporate groups as an "organic unity", with apportionment of their total profits, or to adjust the accounts of each subsidiary by comparing them with similar independent businesses. Both approaches have been accepted in the rules that became formalised in tax treaties.

In practice, however, technical methodologies were developed only for the separate accounting and independent entity approach, particularly by the OECD, and in the Transfer Pricing Guidelines in 1995. This provided a further incentive for TNCs to adopt complex corporate structures using conduit entities in intermediary jurisdictions to avoid tax both at source and in their ultimate residence countries. Yet the independent entity approach became firmly entrenched in the professional practices of international tax, even after the emergence of electronic commerce.

The BEPS project, launched in 2012, in its first phase aimed only to patch up the existing rules, although it included the development of a system for country-by-country reporting for TNCs with global revenues over EUR750 million. For the first time this now provides tax authorities with an overview of the global structure of these TNCs, and their presence in each jurisdiction. The availability of these reports inevitably changes the mindset of tax administrations in taxing MNEs, refocusing them on considering the share of global profit they should tax, rather than just the tax liability of specific affiliates.

The increased pressure since 2018 to find a more effective solution now opens the way to a paradigm shift. The two pillar proposals seem to partly accept the principle of unitary taxation of TNCs, and also provide agreed technical standards to allocate taxing rights over their global profits based on factors reflecting their real presence in each country: assets, employees and sales. Unfortunately, the method of implementation currently proposed would combine this with the continued application of rules based on the independent entity approach. This attempt to combine two incompatible approaches is a recipe for complexity, confusion and conflict.

The need now is to find a more stable foundation for the new paradigm. Only in this way can we resolve the dilemma that has undermined international tax rules, and design a system fit for the 21st century.

30 For such a proposal see Cobham A., et al. (2021). *A Practical Proposal to End Corporate Tax Abuse: METR, a Minimum Effective Tax Rate for Multinationals*, Global Policy. https://doi.org/10.1111/1758-5899.13029.

Tax Certainty Challenges and Opportunities from BEPS 2.0 in BRI Jurisdictions

David Linke, Grant Wardell-Johnson and Conrad Turley

David Linke
Global Head of Tax & Legal
KPMG International

Grant Wardell-Johnson
Global Tax Policy Leader
KPMG UK

Conrad Turley
Asia Pacific Regional Tax Policy Leader
KPMG China

Abstract: BEPS 2.0 is set to have a profound effect on the Belt and Road jurisdictions' tax certainty environment. In the initial stage, a heightening of tax uncertainty can be envisioned, though in the longer term there is reason to be optimistic that a new and more certain BRI tax environment will emerge, in which the BRITACOM can play a crucial role.

Keywords: BEPS 2.0; GloBE; BRITACOM; Tax incentives; Tax certainty

October 2022 saw the release of a slew of OECD reports, marking notable progress towards the finalization of the design phase of the Two-Pillar BEPS 2.0 tax reforms. Of Pillar 1 relevance was the Progress Report on the Administration and Tax Certainty Aspects of Amount A (Amount A Tax Certainty Report).[1] Of Pillar 2 relevance was a report on Tax Incentives and the Global Minimum Corporate Tax (Tax Incentives Report).[2] These were accompanied by the OECD Secretary General's tax report to the G20 finance ministers and central bank governors (OECD Report to G20 FMs).[3] This noted, among other developments, the forthcoming release of the Global Anti-Base Erosion rules (GloBE) implementation framework, now anticipated early in 2023.

The new rules set out and the future developments heralded in these three documents are of high relevance for tax certainty in Inclusive Framework (IF) jurisdictions, including many Belt and Road Initiative (BRI) members. This article explores a range of BEPS 2.0 tax certainty issues in three sections:

- Heralds of a new tax certainty landscape;
- BRI tax certainty agenda and the BEPS 2.0 impact; and
- The role of the Belt and Road Initiative Tax Administration Cooperation Mechanism (BRITACOM).

1. Heralds of a New Tax Certainty Landscape

Key takeaways from the three October 2022 OECD reports are set out below.

– Amount A Tax Certainty Report: The Amount A Tax Certainty Report presents the detailed procedures on how in-scope MNEs are to comply with the Amount A rules, including filings, payment, and double tax relief. It also brings up the early certainty framework for the new market taxing rights created under Amount A. Tax certainty mechanisms are also introduced to deal, in a mandatory and binding manner, with transfer pricing (TP) and permanent establishment (PE) issues arising for MNEs in-scope of Amount A.

Amount A involves a historic "break with the past" for international tax rules. This is both in terms of introducing nexus taxing rights over business profits for market jurisdictions that are not linked to local physical presence, and in providing for the formulaic allocation of MNE group profits to jurisdictions. Such a significant development with the shape of the international tax regime, and the unprecedented level of inter-jurisdictional coordination that it demands, must necessarily lead to a period of tax uncertainty for MNEs and tax authorities.

In this context, the effective implementation of the Amount A tax certainty and administration provisions will be central to maintaining tax certainty. At a more general level, final agreement amongst IF members on the adoption of the Amount A rules (which is at present still pending) is key to preventing the widespread adoption of unilateral measures to tax digital business activity (and possibly also further sectors), with the trade countermeasures this could attract.[4] The significant tax uncertainty derived from such a development would have an impact on BRI jurisdictions, as well as other IF members.

– Tax Incentives Report: In the Tax Incentives Report, the OECD Secretariat sets out how tax incentives are likely to be impacted by GloBE. This was accompanied by an observa-

1 OECD (2022). *Progress Report on Amount A of Pillar One, Two-Pillar Solution to the Tax Challenges of the Digitalisation of the Economy*, https://www.oecd.org/tax/beps/progress-report-administration-tax-certainty-aspects-of-amount-a-pillar-one-october-2022.pdf.

2 OECD (2022). *Tax Incentives and the Global Minimum Corporate Tax: Reconsidering Tax Incentives after the GloBE Rules*, https://doi.org/10.1787/25d30b96-en.

3 OECD (2022). *OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors, Indonesia*, https://www.oecd.org/g20/topics/international-taxation/oecd-secretary-general-tax-report-g20-finance-ministers-indonesia-october-2022.pdf.

4 Financial Times, OECD tax chief warns of trade wars if global deal is not implemented, 31 October 2022.

tion, in the OECD Report to G20 FMs, that in Q4 2022 the OECD would launch a series of pilot programs to assist developing countries in assessing the GloBE impact on their incentives. This is with a view to reforming them for continued effectiveness in the post-GloBE era. Most of the GloBE-related documents, issued by the OECD up to now, have focused on the technical design of the rules. The Tax Incentives Report is the first to look ahead to the waves of changes that would inevitably reshape incentive policy mixes across the world. Other international organizations have also been releasing their own research in this regard.[5]

Adaptation of tax incentives to GloBE may not necessarily be a straight-forward, one-off, global adjustment. Rather there may be rounds of changes as countries "figure out" what mix of incentives proves most appealing to investors in the post-GloBE world. The pace and nature of this adaptive process will be influenced by various factors, including the timetable on which jurisdictions around the world roll out the GloBE rules. It may also depend on the manner in which financial accounting standards and treatments are applied and modified in response to GloBE, among other factors. As many BRI members roll out a plethora of fiscal incentives, which will be impacted by GloBE and possibly need adaptation, movement in this area is likely to become a key source of tax uncertainty in the approaching years. At the same time, the tax incentives landscape that emerges from this transition will be conducive to greater tax certainty.

- Update on GloBE Implementation Framework: While the comments in the OECD Report to G20 FMs are brief, they confirm that core elements of the GloBE rule design, crucial for tax certainty, are still on track. The GloBE implementation framework includes modules like safe harbors and simplifications intended to lower MNE compliance burdens, as well as limiting the scope for error in the highly complex GloBE calculations. Greater clarity on rule operation is also expected in the forthcoming administrative guidance on the scope and transition-related rules. The framework also includes standardized GloBE tax returns and the information exchange framework needed to ensure that all relevant tax authorities are looking at the "same picture" of an MNE's effective tax rate (ETR) and top-up tax (TUT) calculations.

From a tax certainty perspective, the progress of the peer review process is perhaps most crucial, for it will ensure that IF jurisdictions roll out the GloBE rules in a manner conformant with the OECD's design. This allows for the necessary co-ordination of the rules adopted, across countries, within the context of the "common approach", thereby limiting risks of double taxation and of inter-jurisdictional disputes. The "blessing" of a country's GloBE rules under the peer process will also permit them to get a move on with the update of their tax incentives, and the offering of a new "investment proposition" to investors. Also, it is understood that tax dispute resolution provisions tailored to GloBE are in development.

These three October 2022 reports may be seen as the "heralds" of the emerging landscape of international taxation, and the new challenges and opportunities for tax certainty. In the following sections, we will examine what these developments might mean for tax certainty in BRI jurisdictions, and how the BRITACOM institutional framework is well-placed to play a key role in supporting BRI members through this transition.

2. BRI Tax Certainty Agenda and the BEPS 2.0 Impact

2.1 Major Drivers of Tax Uncertainty

Tax certainty is understood as that taxpayers have the capacity to make an accurate assessment of the tax and compliance costs associated with an investment over its lifecycle. Major sources of tax uncertainty include: (1) uncertain tax policy design and administration practices, (2) an inconsistent approach to the application of international tax standards and tax treaties, and (3) issues

5 World Bank (2021). The Global Minimum Tax: From Agreement to Implementation.

concerning the prevention and resolution of tax disputes.

With a view to assessing the extent to which the rollout of BEPS 2.0 rules globally may impact tax certainty among BRI members, we display below a list of some of the major drivers of tax uncertainty. This list draws on the work of the IMF/OECD and was set out in an earlier article by KPMG authors for the *BRITACOM Journal*.[6] Drivers of tax uncertainty might be described in the following three Categories (A, B and C).

A. Uncertain tax policy design and tax administrative practices

- Limited and unclear tax law guidance and frequent, sudden changes in rules, without advance warning/consultation and/or retroactive application;

- Lack of coordination between tax authorities, finance ministry, and other government agencies (i.e., absence of the "whole of government" approach);

- Inconsistent tax treatment by the tax authorities, whether over time, or across separate local tax authorities in the same tax jurisdiction, and unreasonable demands, such as on advance payment of years of tax; and

- Tax authority technology deficiencies and inadequate/cumbersome processes for handling foreign taxpayers.

The compound effect of these various deficiencies in tax rule design and administrative practices can create very significant uncertainty for taxpayers.

B. Inconsistent approach to applying international tax standards

- PE assertions and profit attributions, or TP adjustments, on bases that make it difficult to get tax relief in the residence country;

- Withholding tax (WHT) treaty relief requirements and procedures that frustrate access to treaty benefits;

- Unusual or excessive applications of anti-avoidance rules to cross-border transactions, including diverse and inconsistent localisation/interpretation of BEPS measures; and

- Going-forward concerns about the use of CbCR and EOI data, including leakage of commercially sensitive information.

Many of these issues arise from the lack of sufficient expertise in international tax amongst local tax authorities and are further aggravated by tax rules out of sync with new business models.

C. Issues with dispute prevention and resolution mechanisms

- Deficiencies in the taxpayer-tax authority relationship dynamic, meaning that taxpayers have to second guess tax authority's interpretations and priority focus areas, thus making disputes more likely;

- Lack of access to rulings, and issues with rulings being susceptible to revocation with turns in the political cycle;

- Lengthy court processes, lack of impartiality in tax administrative review, lack of alternative dispute resolution; and

- APA and MAP access, lack of resources to administer, time to conclude, and cost.

2.2 Impacts of Key BEPS 2.0 Aspects on Tax Certainty

As regards BEPS 2.0 rollout, particularly in the initial transition period, the complexity of the new rules and the administrative novelties needed to operate them may increase tax uncertainty. In many BRI jurisdictions, the rollout may consume considerable resources for already stretched tax administrations, particularly if the challenges of achieving uniform rollout across countries lead to tax disputes. However, in the long run, the BEPS 2.0 transition may be an opportunity to address, out of necessity, many of the existing drivers of tax uncertainty in BRI jurisdictions, including those on the capacity front.

We set out below, for the three key BEPS 2.0 aspects covered in the October 2022 OECD reports, an analysis of issues raised and long-term improvements.

2.2.1 Amount A tax certainty issues

2.2.1.1 Issues raised

Novel nature of Amount A: As men-

6 Lewis Lu, Xiaoyue Wang & Conrad Turley (2019). The Need for BRI Tax Certainty. *BRITACOM Special Edition*, pp. 128-137.

tioned earlier, the October Amount A Tax Certainty Report introduces the detailed procedures on how in-scope MNEs are to comply with the Amount A rules, including filings, payment, and double tax relief, as well as the tax certainty mechanisms with mandatory and binding effect. For BRI jurisdictions, the rollout of this new machinery of taxation and its integration with existing systems may accentuate several drivers of tax uncertainty listed in Categories A, B and C above. While only some of the MNEs in-scope of Amount A are headquartered in BRI tax jurisdictions (the Mainland of China, Hong Kong SAR of China, and South Korea), most of BRI jurisdictions would be expected to have Amount A taxing rights as markets. Entities in BRI jurisdictions might also end up having to grant double tax relief. As such, all BRI jurisdictions will need to tackle new sources of potential tax uncertainty.

Tax registration: To start with, many BRI jurisdictions (which do not already do so) will have to create mechanisms allowing foreign enterprises, with no local physical presence, to register for tax, which includes new legal provisions, website interfaces, new tax identification number protocols, etc. Tax registration adaptation is necessary because, in the main, as explained in the Amount A Tax Certainty Report, Amount A tax filings will be conducted via the "streamlined compliance approach". A foreign MNE will calculate the quantum of its global profits that are to be allocated to a particular jurisdiction, as an Amount A taxing right for that market — then either one entity in the MNE (single taxpayer approach) or several entities (multiple taxpayer approach), will need to register for tax identification numbers in each market country.

Tax payment: A given BRI jurisdiction will also need to establish, to the extent it does not already exist, a facility for a foreign entity in the MNE to remit Amount A tax payment to the local tax authorities from overseas. These new registrations and payment steps may require systemic overhauls through the use of local bank accounts for tax payment, registrations via locally accredited agents, and in-person handling of various matters at the tax office. Facilitative changes may also be required in foreign exchange control rules.

Tax filing: Further considerations relate to the Amount A filings themselves. It is envisaged that, to a large extent, the MNE will file the reporting package with the tax authority in their ultimate parent entity (UPE) location. This will be transmitted, via mechanisms modelled on those used to exchange CbCR information, to the tax authorities in market jurisdictions. The legal basis for these exchanges will be provided in the Amount A Multilateral Convention (MLC) and attendant competent authority agreements.

A question that might be raised though is how speedily these information-sharing mechanisms will enter into effect. As highlighted in a recent OECD report,[7] as of March 2022 just 5 developing countries were able to receive CbCR information from abroad. This was observed, in an article in *Tax Notes International*, to be in part due to issues with developing countries relating to confidentiality and screening requirements.[8] Given that many BRI jurisdictions may be the same developing countries that did not meet the requirements to receive CbCR data, it remains to be seen how smoothly this part of the Amount A administrative mechanism will operate. Similar issues could conceivably arise in relation to the information exchange mechanisms, which underpinning the tax certainty mechanism panels. When receiving the large quantum of data, BRI tax authorities will need to develop their processes for handling, including new rule features such as the revenue sourcing rules.

Amount A interaction with TP/PE rules: Moving further, additional complexities emerge in the interaction between Amount A and the traditional taxing rights exercised by a market jurisdiction over the entities, local and foreign, of an MNE. These include both mar-

7 OECD/G20 (2022). *Inclusive Framework on BEPS Progress Report*, https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-september-2021-september-2022.htm.

8 Developing Countries and the Empty Promise of CbC Reporting, 24 October 2022, *Tax Notes International*.

ket jurisdiction's taxation on local business activity through local subsidiaries (including TP adjustments) and local branches or visiting staff (PE tax), as well as WHT on outbound payment flows. Where the market jurisdiction imposes tax on local subsidiaries and PEs, the Amount A rules provide for an adjustment to the Amount A allocation under the marketing and distribution safe harbor (MDSH). The MDSH can treat a market jurisdiction as having "already taxed" all or part of the MNE residual profits that would have been allocated to the market under Amount A — the result is a reduction or even elimination of the market's Amount A taxing rights allocation. A similar reduction to Amount A allocations may potentially be made where a market jurisdiction collects tax on the MNE via WHT on outbound payments, though the details of this provision are yet to be worked out.

It is not yet certain what impacts these interactions may have on PE/TP/WHT tax enforcement activity by market jurisdictions vis-a-vis in-scope MNEs. To the extent that audit activity directed at raising more revenue through such channels is simply offset by reductions in Amount A allocations, this may influence tax authority's resource allocations and enforcement efforts. Furthermore, tax authorities will be aware that PE/TP disputes arising in relation to an in-scope MNE will fall within the remit of the tax certainty mechanism for issues "related to" Amount A. This provides, as a bolt-on to MAP, a dispute resolution panel process for resolving such disputes in a mandatory and binding manner. This may also feed into tax administrative decisions.

A further consideration for BRI tax authorities is that, if the application of local TP/PE rules results in significant profits being booked in local entities/branches, these entities would betreated as "liable" entities. That is, the BRI jurisdiction in point could find itself bearing part of the liability for Amount A allocations to other market jurisdictions, with all the complexities this brings.

New data analysis needs: Sitting alongside this are the early tax certainty mechanisms, dealing with whether an MNE is in-scope of the rules, reviewing whether the systems for compiling revenue sourcing information are sufficiently reliable, and providing a "comprehensive certainty outcome", i.e., whether the entirety of the MNE's Amount A calculations and allocation is acceptable to all relevant jurisdictions. This will require BRI jurisdictions to participate in review and determination panels, or at least provide input to panel determinations as "affected parties". As mentioned above, BRI tax authorities will receive large quantities of new types of tax information, including revenue-sourcing data that needs to be further analysed. Tax officials might need to contemplate questions they have not dealt with in the past, such as whether the segmentation adopted for global business lines appears appropriate, or whether the deemed MNE rules should be applied to compel a collection of entities to prepare consolidated financial statements. All will require skill sets in financial accounting and in data systems analysis.

Exacerbated tax certainty issues: As can be seen from the above, BRI tax authorities will have a lot to contend with on the rollout of Amount A. Existing deficiencies with (A) tax policy design and tax administrative practices, (B) inconsistent applications of international tax standards, and (C) issues with the use of dispute prevention/resolution mechanisms may be exacerbated and become more problematic. For example, an item listed in Category A is an inadequate or cumbersome process for handling foreign taxpayers. Local agents may require tax matters to be handled in person, or foreign entities may not be permitted to register for CIT at all — solely a local subsidiary/branch may be so permitted. At present, MNEs "get by", but moving ahead, the absence of remote registration and tax handling capacity would be a fundamental obstacle to Amount A implementation.

However, by the same token, the efforts pooled to get BRI jurisdictions "Amount A ready" provide opportunities to address long-standing drivers of tax uncertainty, of relevance beyond the 100+ MNEs in-scope of Amount A.

2.2.1.2 Long-term improvements

Long-term improvements might be achieved in the three Categories (A, B, C).

- **Tax handling for foreign enterprises**: With regards to inadequate/cumbersome processes for handling foreign taxpayers (Category A), the demands of Amount A might spur improvements in this important aspect. In our earlier BRI tax certainty article, we noted this to be a key focus for enterprises operating across BRI jurisdictions.

- **The "whole of government" approach**: To manage the absence of a "whole of government" approach (Category A), Amount A rollout will demand that foreign exchange control, tax, and customs authorities work together. The effect may be even more profound in the area of GloBE and tax incentives, requiring foreign investment agencies, energy, science and economy ministries, special economic zones and local governments, all to work together. This will be discussed further below.

- **Inconsistencies in cross-border tax rule administration**: With regards to PE/TP adjustments that make it difficult to get tax relief in the residence country, and WHT requirement/procedures that frustrate access to treaty benefits (Category B), the impact of the tax certainty mechanism for matters "related to" Amount A will be of relevance.[9] A diversity of TP/PE/WHT administrative practices exist among BRI jurisdictions, though not all of which conform to the provisions of the OECD/UN MTC models. Tax authorities, being conscious that they might struggle to justify certain practices before an international panel, may look to tighten up practices in this regard, which might benefit taxpayers beyond the MNEs in-scope of Amount A, providing a more certain basis for investment amongst BRI jurisdictions. Indeed, this was one of the key points raised by enterprises surveyed for our previous BRI tax certainty article.

- **Tax information exchange**: A source of uncertainty for businesses is the use of CbCR and EOI data (Category B). With the operation of the "streamlined compliance" process and the entire set of Amount A rules, concerns in this regard may be addressed more generally.

- **Dispute prevention/resolution**: Limitations of BRI jurisdictions in this aspect are APA and MAP access, lack of resources to administer them, concerns on time to conclude, and cost (Category C). The Amount A tax certainty processes could potentially overwhelm some tax authorities, but also spur the injection of greater resources into tax authority APA/MAP personnel/divisions, including tapping into capacity-building support from international organisations. Another area to watch is the use of mandatory and binding mechanisms in the Amount A tax certainty processes — it is uncertain whether this greater familiarity with such mechanisms through Amount A may pave the way for greater acceptance in cross-border tax disputes among BRI members.

2.2.2 Tax incentives and GloBE

2.2.2.1 Issues raised

Tax Incentives Report insights: As noted above, the October 2022 Tax Incentives Report looks at how tax incentives are likely to be impacted by GloBE. BRI members, which provide a range of fiscal incentives, are undoubtedly of high relevance to this.[10] The adaptation of incentives mixes, which may not be "one-off" but rather iterative, could be a key source of BRI tax uncertainty in the coming future.

The basic upshot of the Tax Incentives Report was as follows:

- The OECD observes that broad tax holidays, which are popular as policy instruments in developing countries, are particularly affected by GloBE. Indeed, many BRI jurisdictions offer generous tax holidays.

- At the same time, the OECD notes that research has shown tax holidays to be often wasteful and ineffective at spurring investment in practice. Consequently, the introduction of GloBE might be seen as providing a valuable opportunity to replace these with better incentives.

- In this regard, the OECD states that it can often be politically difficult to change existing

9 For WHT it remains to be seen whether such disputes are in scope of the final version of the tax certainty mechanism.

10 Interestingly, the 2021 BRITACOM Tax Certainty report survey (P9) already identifies the grant of tax incentives as a key source of tax uncertainty in BRI jurisdictions. The GloBE impact will further intensify this.

tax incentive regimes. Among other factors, one consideration is that other government ministries and agencies, not just ministries of finance and tax authorities, may have had a role in setting the incentive design. GloBE, by neutralizing an incentive's economic effects, is regarded as providing a unique "window" to push for change.

- The OECD particularly draws attention to contractual agreements between national governments and investing companies (e.g., in the energy sector), which commit governments to "lock in" the benefits of certain tax incentives. This may be regardless of changes to domestic tax law; so-called "stabilization clauses", which would raise complex GloBE considerations.

- The OECD seeks to provide countries with a "framework" for assessing their own local incentives, which includes several steps to identifying whether any of their existing regimes are, in fact, potentially problematic. This involves a methodology for calculating effective average tax rates (EATRs) as a metric for assessing the effectiveness of incentives pre- and post-GloBE.

- As a "near-term measure", the OECD recommends the adoption of a GloBE-qualified domestic minimum top-up tax (QDMTT) by developing countries. This will be discussed further below.

- It might be noted that many firms will be under the GloBE EUR750 million threshold, so the focus of change may be limited to the tax incentives enjoyed by larger enterprises.

The Tax Incentives Report provides much room for thought for BRI jurisdictions with regard to maintaining their investment attractiveness post-GloBE and preserving tax certainty in a period of transition.

- **Uncertainty on when incentives will be invalidated and altered**: Several jurisdictions around the world, including BRI members, have already announced that they are considering the adoption of the GloBE rules. Many of these have suggested IIR and QDMTT adoption from 2024, though most are still to confirm. BRI jurisdictions have difficulties in knowing when to "act" on tax incentive change. It could be that a particular BRI jurisdiction's investment largely comes from countries which have not yet set plans on GloBE rule adoption. The jurisdiction might also be banking on UTPR roll-out being several years later than IIR and QDMTT.[11] As such, they may figure that GloBE will not "bite" investors in their jurisdiction for several years — consequently, incentives can remain temporarily unchanged. This hesitancy on the part of the BRI jurisdiction could then feed into uncertainty on the part of investors. Should investors factor in the continuance of a given incentive for 2 years, 3 years, or 4 years in their cash flow forecasts and net present value (NPV) analysis? What should they reckon with in terms of the likely features of any substitute incentives? Would they necessarily qualify for any new incentives, and how might they need to adapt their operations to access these?

- **Withdrawal of incentives**: As stated above, a key source of tax uncertainty is sudden changes in tax rules and inconsistent administrative treatments by tax authorities (Category A). As tax jurisdictions, including BRI members, see the benefits of their tax incentives being neutralized, they may be inclined to withdraw these benefits (otherwise picked up by other countries under the IIR) — rashness in doing so could result in this process occurring in a haphazard way. The authors have already observed instances in which taxpayers in certain jurisdictions have been informed by the local tax authorities that a particular incentive, contractually granted to them for multiple years, will be withdrawn from the current year in view of the future GloBE impact. However, incentives might also end up being withdrawn where, due to significant local assets or staff, the incentive benefits would have otherwise been retained by the taxpayer under the GloBE rules. As such, the removal of the in-

11 Interestingly, Swiss tax officials have indicated that they are considering introducing UTPR at the same time as IIR and QDMTT, in 2024. If other jurisdictions follow this approach, it could overturn the assumption above. Bloomberg, Switzerland Sees Full Minimum Tax Rules Taking Effect in 2024, 27 October 2022.

centive may be unwarranted and unhelpful.

- **Stabilization clauses**: Uncertainty may arise, both at the level of the authorities and taxpayers in the face of the "stabilization clauses" mentioned above. This is because GloBE taxation, which would undo these tax benefits, could put these governments in the position of having to compensate the companies. The same issue could potentially emerge under international investment agreements. Dealing with such issues raises all manner of legal issues and, while these are being settled, a period of tax uncertainty may ensue.

- **Absence of "whole of government" approach**: Tax incentives and subsidies can be designed/granted/funded at many levels of government in a given jurisdiction, including foreign investment agencies, energy, science and economy ministries, special economic zones and local governments. As noted above, tax uncertainties already arise from the lack of a "whole of government" approach in many jurisdictions (Category A). A conceivable scenario in some jurisdictions is that, as investors declare that local incentives are no longer effective post-GloBE, and move to withdraw their investments, one or more of these bodies may come forward with new compensatory incentives. It may then be discovered that these are, themselves, neutralized by the GloBE rules, or that their granting generates problems under the GloBE rule peer review process. These may then need to be withdrawn and new measures again substitute in their place. Such volatility in incentive regimes could drive further uncertainty. It is with this in mind that the OECD has developed their framework for reassessing tax incentive regimes in the light of GloBE, to facilitate fully informed decision-making on adjustments – this will be discussed further below.

2.2.2.2 Long-term improvements

It is quite likely that in the field of tax incentives, as well as for the more general operation of CIT systems (as discussed below), the rollout of GloBE will generate a degree of tax uncertainty in BRI jurisdictions. However, looking into the future there are grounds to consider that updated incentives may be endowed with greater stability (a key element in greater tax certainty) and that long-standing sources of tax uncertainty in BRI jurisdictions may be addressed.

- **Review and amendment of BRI jurisdiction incentives**: The OECD Tax Incentives Report notes that expenditure-based tax incentives will hold up better under GloBE. This is because they are typically associated with outlays on staff and tangible assets that will be factored into the substance-based income exemption (SBIE), which will limit GloBE exposures to an extent. Deferred tax adjustments in the GloBE calculation in respect of tangible asset tax depreciation also mean that the benefits of temporary tax incentives will typically be shielded under GloBE. To the extent that jurisdictions use income-based incentives, these will fare better under GloBE where they involve targeted low rates for specific activities/income types, rather than broad-based tax holidays.

There are also other design features that can make tax incentives less sensitive to GloBE claw-back, such as having tax reliefs operate as "alternates" rather than letting them be enjoyed simultaneously (which might drive very low ETRs). Another would be to make non-refundable tax credits refundable.

This is all good as general guidance but, as the OECD observes, updating local tax incentives in response to GloBE requires jurisdictions to undertake detailed analysis first. The OECD notes that there is a complex interaction between (i) the diverse features of tax incentive regimes, (ii) the various elements of GloBE ETR calculations, and (iii) the attributes of different industries and specific MNEs. This means that it is not possible to make "simplistic" statements about how the tax incentives in use in a particular jurisdiction will be impacted under GloBE, and thus whether changes to incentive design are in fact needed.

This is where EATR analysis comes in. As noted, the OECD regards EATRs as the relevant measure of tax for MNEs when considering whether to make a fresh investment in a jurisdiction. Their methodology allows for comparison of EATRs, pre- and post-GloBE, for stylized fact sets, i.e., for an assumed set of case study facts for an MNE's planned investment in a jurisdiction.

As noted in the OECD Report to G20 FMs, from Q4 2022 the OECD will start to use this analytical framework with governments to help them decide what to do with their existing incentives.

To the extent that BRI jurisdictions adopt this rigorous approach to reviewing existing incentive regimes, it may contribute to the identification of incentive mixes that will work well, on a longer-term basis, post-GloBE. This may mitigate the risk of repeated change to tax incentives (Category A issue), as issues with rashly adopted approaches are discovered. Indeed, it would appear that the BRITACOM can play a significant role in sharing best practices between BRI members on EATR analysis and on new incentive designs/mixes.[12] To the extent that BRI jurisdictions modify their incentives towards certain "best practice" or "model" designs, this might also help to increase investor awareness of the incentives and a measure of conformity in their manner of application, so helping to raise tax certainty further.

In this regard, a crucial area for insight pooling via BRITACOM will be in financial accounting, and its interaction with the GloBE rules. BRI tax policy setters will need to understand how deferred tax adjustments (based on accounting numbers and then modified by GloBE rules) may either support or detract from the effectiveness of a particular design of tax incentive. Tax policymakers will need to understand how accounting rules will be applied to particular commercial arrangements for accessing tax incentives, which might render them more or less effective.[13]

- **Adoption of QDMTT**: As noted above, the OECD recommends developing countries to adopt QDMTT in the near term. This is in recognition of the fact that a careful and thorough review and amendment of existing incentives will take quite some time. Adoption of QDMTT in the meantime will ensure that the developing countries take the TUT (given rise to by use of incentives in their country) rather than allowing this to be taken by an MNE parent country under their IIR. They note that QDMTT adoption should not have an impact on competitiveness, given that the benefit of the incentive would be taken back (through the parent IIR) regardless of whether the QDMTT is adopted or not.

There is a logic to this. As mentioned above, a source of tax uncertainty is identified as sudden changes to rules without advance warning and consultation (Category A). QDMTT rollout provides a "breather" to allow for such deliberation in the resetting of incentives. Importantly it also gives time for a proper "whole of government" approach to tax incentive implementation (also Category A). With the incentives offered by all levels of government impacted by GloBE, this provides an instigation for them all to work together on the new incentive palette and mix.

2.2.3 GloBE implementation framework

2.2.3.1 Issues raised

A very large number of tax uncertainty issues may be either exacerbated or resolved by the GloBE implementation framework. Space constraints mean the authors will not look at the many issues of importance arising in relation to the safe harbors and simplifications, the GloBE filings and information exchange, and the many issues raised for administrative guidance in public consultation. Here we focus on a selection of considerations with regard to the tax dispute resolution provisions and the peer review process.

- **A big "ask"**: A key source of tax uncertainty, of relevance in BRI jurisdictions and elsewhere, is inconsistent tax treatment by the tax

12 Indeed, in the 2021 BRITACOM Tax Certainty report (P48) one of the proposals for raising BRI tax certainty is "to strengthen the assessment of the implementation of the preferential tax policies and fee incentives". So BRITACOM's work in this field has already been envisaged.

13 An example in this regard is tax credits accessed via investments accounted for under the equity method of accounting — as the return on investment would be removed from the GloBE ETR denominator it appears the tax credit would be removed from the ETR numerator, so protecting its value. This outcome is yet to be confirmed in the forthcoming GloBE administrative guidance.

authorities, whether over time, or across separate local tax authorities in the same tax jurisdiction (Category A). Many such issues remain to be resolved. However, the GloBE rules demand much more than just consistency in the application of tax rules at the jurisdiction level — they demand consistency in the application of tax calculation and tax burden allocation rules across all the countries of the world (at least those that adopt the GloBE rules). This requirement, at the heart of the GloBE "common approach" is a very big "ask".

The OECD has made utmost efforts to ensure consistency by (1) linking the GloBE ETR calculation, both at the numerator and denominator level, to financial accounting numbers and (2) setting out in great detail the granular GloBE-specific adjustments to be conducted to the numerator and denominator. Nonetheless, there will inevitably remain a plethora of ambiguities. In practice MNEs, in doing their GloBE calculations, may confer with the tax authorities of their UPE location for guidance in case of uncertainty. There is, however, no guarantee that other relevant jurisdiction will accept the positions taken. The answer to this tax uncertainty needs to be sought in the dispute resolution and peer review processes.

- **Room for dispute**: Among the sources of tax uncertainty mentioned in Category B above are variant approaches to PE identification/profit attribution and TP adjustments, as well as unusual/excessive applications of anti-avoidance rules to cross-border transactions. These tax certainty issues stand to be accentuated further with GloBE roll-out.

o **PE**: A long-standing source of tax uncertainty in many developing countries is the application of the Service PE concept. A significant diversity of practice in applying the thresholds exists across countries and also within countries, with different local tax authorities taking different positions on, for example, whether various separate projects are connected, whether time spent by local contractors needs to be considered, treatment of secondees, or whether staff holidays need to be considered in time calculations. Profit attribution, as it cannot rely on local accounts, is typically by way of deemed margins or mark-ups. Residence countries may deny the provision of double tax relief for the Service PE tax, either due to disagreement on PE existence or profit allocation. With GloBE additional factors come into play, where a country can assert a Service PE then they can claim a "slice of the pie" of TUT in other jurisdictions under UTPR rules. Challenges may arise in applying the GloBE PE profit and tax allocation rules, which presuppose the existence of (or the possibility to generate) local accounts. With more at play for countries, GloBE may be set to exacerbate existing BRI tax certainty challenges with PE.

o **TP**: A wide range of TP practices exist among BRI jurisdictions, including in cases where the use of local TP concepts is still in the process of being reconciled to OECD TP guidance, e.g., local market premium. Elements of the GloBE rules may increase tax uncertainty. In particular, much attention is now focused on GloBE Art. 3.2.3. This requires that where there is a unilateral TP adjustment in a "high tax" country (say, Country A), then there needs to be an adjustment to the GloBE income in both Country A and in the counterpart country (say, Country B).

Let's say that the Country A tax authority decides to increase the taxable income of a Country A subsidiary of a Country B group, through a TP adjustment to a Country A-B transaction, which then also reduces the GloBE income taxable to Country B. By lowering the GloBE income of the Country B entity, this raises the GloBE ETR in Country B, and so reduces the top-up tax rate. The amount of GloBE TUT that Country B might collect on a Country B entity through the local QDMTT will then be diminished.

The behavioral impacts of Art. 3.2.3 are not yet certain. While in concept, a MAP-coordinated TP adjustment to Country B profits would ideally follow the Country A adjustment, and Country B might have not been overly anxious about a double tax outcome for the MNE. However, now the effect is far more direct — Country A's Art. 3.2.3 adjustment may directly diminish Country B's GloBE tax revenues. This may lead to Country B's more vigorous action.

o **Anti-avoidance rules**: The application of anti-avoidance rules can be a significant source of tax uncertainty in BRI jurisdictions. New dimensions will come into play with GloBE, with one area of particular interest being the usage of GAARs. As GloBE rules (IIR, UTPR, QDMTTs) will all be domestic law rules, and likely in most instances to be provisioned within existing corporate income tax codes, existing GAARs would appear to have applications. So far, the GloBE rules/commentary have not dealt with the GAAR interaction — it remains to be seen if the GloBE implementation framework explicitly solve this matter. Any number of tax certainty issues could arise in this space — for illustrative purposes the deemed MNE rule is looked at here.

The GloBE rules deemed MNE provision can require a collection of entities, under common control, to prepare consolidated financial statements (CFS), where they do not already do so. If the group so recognized has CFS revenues above EUR750 million, then the GloBE rules may apply to this group. This then puts the focus on how GAAP consolidation standards (e.g., IFRS 10) should be applied. The catch is that many of the control structures in point may be ones that accountants very rarely have to contend with in practice when performing consolidations. Say, for example, that a wealthy family controls many separate businesses through a family trust. This could possibly be caught by the deemed MNE rule — a trust can be a constituent entity for GloBE purposes, and therefore a UPE.

Now, say that as part of estate planning the family holdings are subdivided under several trusts, each with separate beneficiaries, trustees, etc. In this case, the accountants might reach the conclusion that the proper application of GAAP consolidation standards would result in the preparation of several sets of CFS – each of the "groups" so recognized would have revenues below EUR750 million. It seems at least conceivable that some country, in which the family businesses have an entity, might assert that the re-organization of the family holding arrangements have a tax purpose to diminish exposures under GloBE. The country may also assert that as a potential UTPR country, the family "groups" they stand will lose tax revenue. By contrast, other countries might take the position that this arrangement is not intended to be caught by the GloBE rules. Disputes and tax uncertainty could then ensue.

o **Accounting-related issues**: There are many other instances in which GAAR impositions could perhaps arise. Like the consolidation example above, what is strikingly new about the GloBE rules is how many of these could potentially relate to accounting judgments. This is because the GloBE rules lean so heavily on the work of accountants. For example, as noted above, where an MNE holds an investment accounted for under the equity method of accounting, then associated tax credits might potentially be removed from the ETR numerator and their benefit can be effectively protected. It is anticipated that tax authorities might scrutinize the accounting judgments made by the MNE more closely in deciding to use the equity method of accounting for investment, rather than full consolidation.

Another area of tax uncertainty could appear due to differences between GAAPs, and their interactions with the GloBE rules. A much-discussed example is the difference in the treatment of intra-group asset transfers under IFRS and US GAAP. Under IFRS, transfers will typically be booked in the accounts at transaction value (i.e., the price paid) while under US GAAP, historic costs will be used, being more or less than the price paid. This leads to a different GloBE analysis under the two GAAPs and areas of uncertainty. While hopefully this will be addressed in the forthcoming administrative guidance, further GAAP-difference-related issues might well crop up in future years.

In view of the above, a period of increased tax uncertainty, including for BRI members, may be anticipated as GloBE is rolled out. However, at the same time, measures taken to overcome these challenges may contribute to greater tax certainty in the longer term.

2.2.3.2 Long-term improvements

In the long term, tax certainty may be bolstered in several ways:

- **Dispute resolution and coordination on cross-border tax rules**: Based on the OECD releases to date, it appears that mechanisms for GloBE tax dispute resolution are being worked on. Dispute prevention mechanisms, like the early certainty mechanisms in Amount A, might also be devised. It is not clear whether these would just cover disputes relating to the strict operation of the GloBE rules (e.g., the manner of application of the deemed MNE rule to a specific fact set) or whether they could also help to cope with linked cross-border tax issues (e.g., the existence of a Service PE which could trigger a UTPR obligation). Even if they are limited to the former, this would provide taxpayers with some comfort around the uncertainties inherent in the GloBE rules.

However, it could also be that some jurisdictions, including the BRI members, may take the opportunity to tackle the existing Category B uncertainties with cross-border tax rules (TP, PE, anti-avoidance rules), exacerbated through GloBE. If so, then this would contribute to a more certain tax environment overall, which could be realized through policy coordination between countries to achieve a more coherent and consistent application of international tax rules and through improvements of existing dispute prevention/resolution mechanisms. Indeed, these very matters are envisioned in the BRITACOM *Nur-Sultan Action Plan (2022-2024)* on "Raising Tax Certainty", as discussed further below.

- **Peer review process**: A key element of the GloBE implementation framework, which the October OECD Report to G20 FMs notes to be still on track, is the peer review process. Endorsement of a country's GloBE rules by the peer review panel is crucial to the coordinated interaction of the GloBE rules across countries, as the application of "qualified" GloBE rules in one country vis-a-vis an MNE allows for the GloBE rules in another country to be "turned off". Without this, double taxation could frequently appear. Peer review panel endorsement is also key to forward planning by countries and MNE — once GloBE rules in a country are endorsed, then countries can move ahead with upgraded incentives that are consistent with these, and MNEs can work these into their investment decisions. It is suggested that the peer review process could also cover further matters, such as whether particular taxes can be considered as "covered taxes" for the purposes of the GloBE ETR calculation. This will also add further certainty to countries and MNEs, and perhaps prompt countries to modify "unusual" taxes to be considered as covered taxes. Indeed, the peer review process could hopefully, over time help to drive greater conformance between the design of tax systems and greater consistency in the application of international tax rules, contributing to tax certainty.

3. Looking Ahead and the Role of BRITACOM

As noted in the prior section, in recognition of the importance of tax certainty to BRITACOM members, the *Wuzhen Action Plan (2019-2021)* and subsequent *Nur-Sultan Action Plan (2022-2024)* set out a series of related commitments and resolutions. The *Nur-Sultan Action Plan (2022-2024)* notes the following in relation to "Raising Tax Certainty":

- A commitment to establishing explicit domestic tax laws and administration procedures to ensure predictable and consistent law interpretation and standards, and unified tax administration.

- A resolution to establish tax dispute prevention mechanisms including APAs to prevent and reduce tax disputes to the maximum extent possible.

- Stresses the need to institute and improve dispute resolution measures including administrative review, legal remedy, and MAP under tax treaties.

- Devotion to enhancing international cooperation and exchanges in formulating and enforcing coherent and consistent international tax rules and guidelines.

These actions speak to the existing issues identified in BRI jurisdictions, as reflected in the results of the 2021 BRITACOM Tax Certainty report survey research.

As will be clear from the analysis of BEPS

2.0 related tax certainty issues in the prior section, the *Nur-Sultan Action Plan (2022-2024)* approach to "Raising Tax Certainty" is highly pertinent for the years ahead.

- Unified tax administration, involving "whole of government" coordination, will be crucial to ensuring that Amount A can be implemented effectively. Upgrades in tax administration would also contribute to addressing existing tax uncertainties for BRI enterprises operating cross-border.

- Explicit and clear tax rules, with consistent interpretation, will be key to ensuring that existing tax rules can be made to "gel" with the new Amount A and GloBE rules and avoid new tax uncertainties.

- Greater exchanges on formulation and application of cross-border tax rules are key to limiting the tax uncertainties that could arise from the interaction of Amount A and GloBE rules with diverse usage of TP/PE/anti-avoidance rules. Long-standing tax certainty issues for BRI enterprises could simultaneously be managed.

- The BRITACOM's focus on improving dispute resolution/prevention mechanisms gels with what is envisioned, and needed, for Amount A and GloBE operation.

The parallel BRITACOM work streams on "Reinforcing Capacity Building of Tax Administration", "Promoting Tax Administration Digitalization", and "Improving Tax Environment", will also be of high importance.

Furthermore, concrete dialogues and deepened trust between business and government will be central to achieving enduring BRI tax certainty. This has already been listed as a priority for BRITACOM in the 3rd BRITACOF Statement, which states that "we *encourage tax administrations to maintain a good relationship with taxpayers and the business community. This will help tax administrations better understand taxpayers' concerns, optimize tax policies and improve taxpayer service, thereby facilitating their capacity building."* This is also in evidence in the *Nur-Sultan Action Plan*'s observation that BRITACOM *"since its inception, has adhered to the principle of extensive consultation, joint contribution and shared benefits, and enhanced communication, experience sharing and cooperation"*.

In Section 2, we noted the 2021 BRITACOM Tax Certainty report takeaway that aligning tax administration and enterprise understandings on the sources of, and solutions to, tax uncertainty was of the utmost importance. With this in mind, consideration might be given to whether a charter on business and government conduct, setting out mutual expectations, might be of value, both in dealing with the BEPS 2.0 tax certainty challenges and more broadly.

A further observation is that BRITACOM's interface with international organizations will become increasingly crucial as BEPS 2.0 is rolled out. In this regard, we are highly encouraged by the position taken in BRITACOM documents. The *Nur-Sultan Action Plan (2022-2024)* makes clear (7.5) that BRITACOM *"will promote cooperation with other international organizations, regional organizations, academic institutions, and intermediate agencies to facilitate the steady development of the BRITACOM"*.

The 3rd BRITACOF statement makes this even more concrete, noting that BRITACOM *"attach great importance to the cooperation with other international organizations, and would be glad to work together with them on providing training programs and technical assistance. We also encourage the countries (regions) participating in the BRI to strengthen engagement with international organizations to meet demand for capacity building, and to strengthen specific project docking and project cooperation with international organizations to build tax administration capacity"*. This observation on tapping into capacity-building support is very well made — as observed in Section 2 in the 2021 BRITACOM Tax Certainty report, surveyed enterprises identified lack of capacity as the main source of tax uncertainty. This will become of even greater importance as the BEPS 2.0 roll out further tests the limits of BRI tax authority capacity.

The forthcoming years will witness significant tax certainty challenges, as the BEPS 2.0 rules are rolled out. While at the same time, a unique window is opening up for across-the-board improvements. BRITACOM is ideally placed to make a major contribution in this regard, which will undoubtedly keep us all busy.

Build up Tax Administration Capacity of Developing Countries and Inject China's Strength into Global Tax Governance:

Launch of the First China-OECD LLM Programme on Taxation

BRITJ Editorial Team

On 9 May 2022, the Organisation for Economic Co-operation and Development (OECD), the State Taxation Administration (STA) and the Ministry of Finance (MoF) of China and the Xiamen University (XMU) held an online ceremony to mark the signing of a Memorandum of Understanding for Co-operation in establishing the China-OECD LLM Programme on Taxation (COTP), drawing up a blueprint for talent cultivation in international tax law among Belt and Road jurisdictions, capacity building of tax administrations of developing countries and the construction of a global tax governance system. On 15 September 2022, the launch ceremony of the COTP was held at the XMU, attended by representatives of the participating parties and the inaugural 19 students from six developing countries including China, Egypt, Myanmar and Kenya.

"We should enhance global tax cooperation to combat international tax evasion and avoidance, and help the developing countries and low-income countries improve their tax administration capacity." At the 9th G20 Leaders' Summit in Brisbane, Australia in November 2014, President Xi Jinping outlined the position and direction of China's efforts in global taxation. Mr. Wang Jun, Commissioner of the STA, stated that at present, economic globalisation, and technological and industrial changes such as digitisation have brought new challenges to taxation where the need for capable hands is of unprecedented urgency. Legions of highly qualified tax professionals are needed whether to implement the Opinions on Further Deepening the Reform of Tax Collection and Administration issued by the Chinese government, or to participate in international tax cooperation and the formulation of international tax rules. To that end, the STA has taken the initiative to discuss with the OECD on the joint development of a world-class Master's programme on taxation, to help China and other Belt and Road jurisdictions, especially those developing ones, cultivate a group of versatile talents who are familiar with patterns of globalisation and digital economy, adept in international tax law, and proficient in English.

Online Group Photo at COTP Launch Ceremony

"The COTP was born out of an ambitious shared vision of the OECD, the STA and the MoF of China." Mr. Ben Dickinson, Head of the Global Relations and Development Division in the OECD's Centre for Tax Policy and Administration, highlighted that capacity building is as critical as ever to enable tax officials to deal with complex and fast-changing international tax rules and ensure their effective and consistent application. In recent years, valuable capacity development efforts have been undertaken through the OECD-STA Multilateral Tax Centre in China, which provides tax officials from China and other countries in Asia with short-term technical training programmes. That said, it's hard for short-term programmes to manage both depth and breadth, theoretical study and practical training at the same time, whereas the COTP complements these efforts with a comprehensive, long-term, policy-based training programme, in partnership with a world-class academic institution. As such, the COTP aims to provide the educational underpinning for current and future generations of tax officials from developing countries working on international tax matters and equip them with the skills and competencies needed to engage in fast-paced developments in taxation. Over a two-year period, participants in the programme will have the opportunity to deep dive into international tax matters, Mr. Dickinson said, such as tax treaties, transfer pricing, value-added tax and the OECD/G20 work on Base Erosion and Profit Shifting (BEPS). To make it deliver, the OECD will contribute cutting-edge materials and expertise on these topics, including by bringing in OECD staff and making available other experts from its network (serving tax officials and academics) to deliver teaching inputs. In addition, the OECD will also provide internship opportunities for the participants.

On the question of why the OECD chose China as a partner for its first specialised degree programme, Mr. Dickinson pointed out that the OECD has long had a strong relationship with China on tax matters, which spans all major areas of international tax cooperation, as well as tax policy and administration. China is an active member of the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) and the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes. In this capacity, China participates on an equal footing in the development of international standards aimed at tackling tax avoidance, improving the coherence of the international tax system, and ensuring a more transparent global tax environment. Notably, China joined the 137 Inclusive Framework member agreement on a Two-Pillar Solution to address the tax challenges arising from the digitalisation of the economy, which provides a framework for reform of relevant international tax rules and a global corporate minimum tax. As the largest developing country, China plays an important role in building a more balanced and sustainable global tax governance system. The OECD looks to deepen and expand cooperation with China in the COTP and more areas beyond to jointly reform the global tax governance system.

"The key to building up tax administration capacity of developing countries lies in talent cultivation and intellectual support," said Prof. Liao Yixin, Director of the Centre for International Tax Law and Comparative Taxation of Xiamen University. He mentioned that the international community has come to realise that it is the administration bottlenecks for international taxation facing developing countries, involving lack of relevant professionals and experience in this regard, that largely hamper their effective participation in international tax cooperation. Prof. Liao said that the XMU, one of the leading universities listed on China's Project 211, Project 985 and Double First-Class Initiative, has been actively seeking collaborative programmes with universities and institutions abroad and willing to provide talent cultivation and intellectual support for developing countries to build up tax administration capacity. Therefore, the purpose of the COTP is highly attuned to XMU's operational philosophy. Through the programme, the XMU can share the latest theoretical and practical developments in international tax of recent years, as well as the concepts of win-win cooperation, extensive consultation, joint contribution, and shared benefits pursued by China, with participants from other Belt and Road jurisdictions, especially developing ones.

When talking about why the host of the COTP fell on the XMU, Prof. Liao believes that the rich experience the faculty team of the XMU's School of Law has accumulated in the teaching of international tax law is one of the many reasons why XMU was selected by the OECD among many candidates. Developed and finalised by the four signing parties, the COTP is framed based on the knowledge structure required by practical work in international tax law, especially those knowledge modules needed for reforms. "In the future, we will also seek input from prestigious professors of international tax law around the world for relevant courses and dissertation mentoring," said Prof. Liao, who feels confident of the future of the COTP.

"To ensure successful delivery of the COTP, the STA has joined hands with all participating parties to make plenty of meticulous preparations," said Mr. Guo Jiayin, Deputy Director of the International Cooperation Division under the International Taxation Department of the STA. The STA, on the one hand, together with other parties, drafted and signed the Memorandum of Understanding for Co-operation, laying a solid foundation for the final launch of the programme, and on the other hand, consolidated all resources within tax authorities and rallied other ministerial support and assistance, to buttress the operation of the COTP.

For the upcoming two years of study, the inaugural students are enthusiastic and expectant. "I hope to learn more about the work that goes into negotiation of tax treaties from the programme," said Frida, a student from Kenya, a developing country, "to boldly defend our positions to enable us to maximise our revenue mobilisation efforts." After graduation, Frida intends to make a request to join the International Tax Office of the Kenya Revenue Authority, where she could exert the skills and expertise acquired in the programme. Given the opportunity, she would also like to further her studies, then go on to teach international tax law in universities or serve as consultant to international organisations, contributing her part to improving the tax administration capacity of developing countries.

The COTP is the latest outcome achieved by the STA in implementing President Xi Jinping's guidance. It is the first cooperation programme between China and the OECD in degree education, and another milestone of bilateral cooperation since the establishment of OECD Multilateral Tax Centre in China. In the coming years, the STA, following Commissioner Wang Jun's requirements to enhance talent cultivation by basing it on development needs and broadening global vision, will work with all parties to make the programme an incubator for professionals of high quality in international tax law.

It's the common expectations and shared wishes of all stakeholders to see the smooth running of the COTP, and the continuous nurturing of high-calibre talents in international tax law from China and other Belt and Road jurisdictions, and to help developing countries build up tax administration capacity and promote the construction of the global tax governance system.

For more detailed information including application guide to COTP, please see:
https://www.britacom.org/xw_7086/gg/202205/t20220511_1124743.html

On-Site Group Photo at COTP Launch Ceremony

April-November 2022

BRITACEG and CIDCA Joint Programs

From April to November 2022, the Belt and Road Initiative Tax Administration Capacity Enhancement Group (BRITACEG) cooperated with China International Development Cooperation Agency (CIDCA) to launch a series of online courses, covering topics of VAT reform, tax dispute resolution, taxpayer service and business environment, the use of information technologies in tax administration, etc. More than 100 tax officials from tax and finance departments of over 20 jurisdictions have participated in these programs.

Mid-June to Mid-July 2022

The First Tax Administration Theme Day Event of the BRITACOM

According to the *Nur-Sultan Action Plan (2022-2024)*, three theme day events were held in 2022 with the theme of "Better Connection for a Better Future" to build a platform for communication between tax administrations and businesses and improve the doing business environment. Each theme day event lasts for around one month, and consists of a virtual seminar, an online exhibition, and an interactive Q&A module. The first theme day event was held from mid-June to mid-July 2022.

The virtual seminar of the first event was held on 23 June 2022, co-organized by the State Taxation Administration of China, the Inland Revenue Department of Hong Kong SAR, China and the Financial Services Bureau of Macao SAR, China. Speakers from the above-mentioned tax administrations presented their tax administration system, tax incentives for "bringing in" enterprises, taxpayer services, etc. Representatives from BRITACOM Members and Observers, the Advisory Board, and the businesses attended the meeting and had exchanges with speakers on key topics and issues.

July 2022

Release of Tax Policies in BRITACOM Jurisdictions

Based on the *Nur-Sultan Action Plan (2022-2024)*, the BRITACOM has released on the BRITACOM official website (https://www.britacom.org/zchj/TaxLawsandPolicies/) a compilation of 12 BRITACOM jurisdictions tax policies to improve information sharing among BRITACOM parties, promote facilitation of trade and investment, and optimize tax environment. So far tax policies from 12 BRITACOM Members have been uploaded on the website, and the BRITACOM Secretariat is planning to cover more tax administrations to continuously improve the database.

15 July 2022

Virtual Seminar on Mobile Applications for the Fulfillment of Tax Obligations by Citizens and Entrepreneurs

The Virtual Seminar on Mobile Applications for the Fulfillment of Tax Obligations by Citizens and Entrepreneurs was held on 15 July 2022. Representatives from the BRITACOM Members, Observers, the Advisory Board, and the businesses attended the meeting. Four speakers from tax administrations of the Republic of Kazakhstan, Italy and China made presentations on their respective practices in making use of mobile application in tax administration. Representatives from the Ernst & Young and other businesses commented on each presentation, and emphasized that mobile application could be a valuable tool if applied properly.

Early August to Early September 2022

The Second Theme Day Event of the BRITACOM

The second theme day event of the BRITACOM was held from early August to early September. On 4 August, the virtual seminar of the second event co-organized by tax administrations of Indonesia, Myanmar and Singapore was successfully held. Speakers from those three tax administrations shared their tax administration system, tax incentives for "bringing in" enterprises, taxpayer services, etc. Representatives from BRITACOM Members, Observers, the Advisory Board, and the businesses attended the meeting.

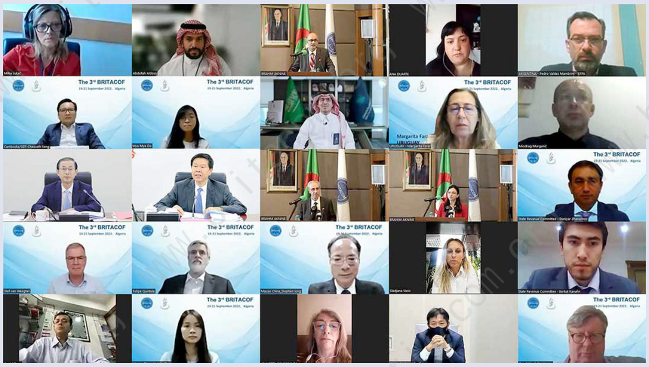
15 September 2022

Four Intermediate-Level Courses Lauched

Since 15 September 2022, the BRITACEG has launched four intermediate online courses on the Belt and Road Initiative Tax Academy website (https://www.brita.top/#/), covering the topics of dispute resolution, digitalization of tax administration, VAT reform and taxpayer service, which are open until 31 December 2022. The intermediate courses of the BRITACEG is for tax officials with moderate practical experiences and theoretical level.

19-21 September 2022

The Third Belt and Road Initiative Tax Administration Cooperation Forum



The Third Belt and Road Initiative Tax Administration Cooperation Forum (the Third BRITACOF) themed "Enhancing Tax Administration Capacity Building in the Post-Pandemic Era" was held on 19-21 September 2022. Nearly 300 delegates, including heads of ministries of finance and tax authorities from 40 jurisdictions and representatives from 12 international organizations, attended this event either onsite in Algiers or online.

The Third BRITACOF was hosted by the General Directorate of Taxes of Algeria, aiming to build a growth-friendly tax environment, enhance tax administration capacity building in the post-pandemic era, promote tax administration in the Belt and Road Initiative jurisdictions, and facilitate global economic recovery with taxation functions. Six outcomes were released during the Third BRITACOF, including the Joint Statement of the Third BRITACOF, the BRITACEG curriculum system, the establishment of the BRITACEG Expert Group, the construction of the Belt and Road Initiative Tax Academies network, the Rules and Regulations on the BRITACEG, and the Annual Report of the BRITACOM (2022).

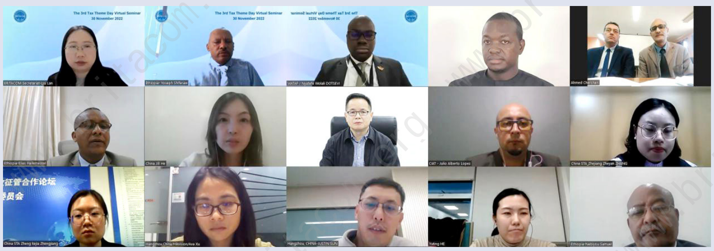
29 September 2022

BRITACOM Training Program on Exchange of Information and Inter-Agency Cooperation in Combating Tax Crimes

A BRITACOM training program themed Exchange of Information and Inter-Agency Cooperation in Combating Tax Crimes, co-hosted by the Belt and Road Initiative Tax Academy of Kazakhstan, Institute for Austrian and International Tax Law Vienna-WU Global Tax Policy Center, and the BRITACOM Secretariat, was held on 29 September 2022. Professor Jeffrey Owens, a member of the BRITACOM Advisory Board and his team shared their researches and practices on tax transparency and exchange of information, access to information on beneficial owners, unexplained wealth orders, the role of inter-agency cooperation, and lessons from the African experience. All participants and speakers contributed to this informative and engaging event.

Late November to Late December 2022

The Third Theme Day Event of the BRITACOM



The third theme day event of the BRITACOM was held from late November to late December. On 30 November, the virtual seminar of the third event, co-organized by tax administrations of Algeria, Sierra Leone, Ethiopia, and West African Tax Administration Forum (WATAF), was successfully held. Speakers shared their views and practices on current tax policies, tax administration, taxpayer services, tax incentives for investment, etc. Representatives from BRITACOM Members, Observers, the Advisory Board, and the businesses attended the meeting.

Contributions Invited

Dear readers and writers,

We highly appreciate your contribution to the *Belt and Road Initiative Tax Journal* (BRITJ), and look forward to your continuous support in the future.

As an official journal sponsored by China Taxation Magazine House in collaboration with the BRITACOM Secretariat, BRITJ is committed to serving as a platform for communication and cooperation among tax administrators, academia, tax practitioners and other stakeholders around the world, and providing strong theoretical support and international reference for tax reform and administration among the Belt and Road jurisdictions.

Given your expertise and reputation in the tax arena, we sincerely invite you to contribute papers to the journal on such themes as tax issues concerning the Belt and Road Initiative, the latest development and reform of tax system and tax administration as well as hot topics in the field of international taxation. Papers written in English with less than 5,000 words and sent in a WORD format would be highly appreciated.

Papers can be sent to britj@britacom.org. For more information, please visit our website: www.britacom.org.

Kind regards,

Li Wanfu

Editor-in-Chief
China Taxation Magazine House
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