The Platform for Collaboration on Tax

Comments received on public discussion draft:

The Toolkit on Tax Treaty Negotiations

October 2020

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COMMENTARY

The Platform for Collaboration on Tax

DISCUSSION DRAFT:

Toolkit on Tax Treaty Negotiations

Public Consultation on the Toolkit on Tax Treaty Negotiations

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General Comments

The African Tax Administration Forum (ATAF) welcomes the work of the Platform on Collaboration for Tax (PCT) and the efforts to assist developing countries in tax treaty negotiations. We would further like to provide specific comments on areas of the toolkit to enhance its interpretation as well as adoption by developing countries.

Our comments are specific to pages and paragraphs within the document. The commentary from ATAF is as follows:

Page 6, paragraph 4

The provision of a country's treaty model is a basic principle and the reference to "if available", we believe creates the wrong impression. We, therefore, recommend the word "if available "be deleted.

Page 6, paragraph 6

Additionally, ATAF recommends adding a cross-reference to unilateral elimination of double taxation as discussed in A.3 in the third paragraph

Page7, paragraph 3

We believe the text to be unclear in this paragraph. The possibility of termination of bad treaties is not as clear as it should be. Renegotiation or use of the MLI may not be best suited to the way forward. Particularly the MLI may give one party what it needs but leaves other issues unaddressed for the other party which may then find further renegotiation to be a problem in getting the first party to participate therein. Constraints arising from different priorities often arise.

Page 9, paragraph 2

The issue of capacity building in both negotiation and administration as referred to in the Introduction is vital for developing countries and should be promoted in the Kit as much as possible. It is the view of ATAF that ensuring the first steps in the negotiation process are well established to remove the fear of the unknown.

Page 9, paragraph 3

We welcome the commentary in this section and encourage the acknowledgement and existence of other Mutual Assistance treaties in other regions, e.g. ATAF, SADC etc. These two multilateral agreements allow for assistance in collection, which is helpful in the developing country context.

Page 10, paragraph 2

ATAF wishes to alert that the need to consider that reliance on domestic law provisions can create problems for investors. Domestic law is often amended, usually on at least an annual basis. However, this is not the case with tax treaties and therefore gives foreign investors a measure of certainty of tax treatment which is, of course, one of the real advantages of treaties. We believe that this factor should be mentioned here as a further risk.

Page 10, B1, paragraph 1

We welcome the structure of this section and would further like to encourage the mentioning of other regional Models would be helpful.

Page 11, paragraph 3, bullet 2

“The reasons for entering into a tax treaty with the specific treaty partner, including the current volume of cross-border trade and investment with the treaty partner;” ATAF is of the opinion that reference to the importance of potential treaty partners should be added as a separate bullet pointPage 12 B2, bullet 4

We believe that the USA Model might not be the most helpful for developing countries.

Page 15, C7 paragraph 2

ATAF would like to hight that there should be a check when the treaty partner has indicated non-negotiable provisions by referring to its treaty network to confirm whether it has been allowed in whole or part in other treaties. Additionally, we encourage checking other regional Models which have included reservations such as the ATAF Model as not all countries have stated their positions in the OECD Model Commentary.

Page 15, C8, paragraph 2

Important to note that under the VC, international treaties should take precedence over domestic law in cases of conflict.

Page 15, C9, paragraph 1

ATAF applauds recognition of the importance of this inclusion as it is useful and time saving for countries.

Page 18, D5, paragraph 2

In this light, ATAF believes that countries should not agree to automatic acceptance of MFN provisions if possible. We believe it is better to provide that MFN provisions will apply after renegotiation of the issue.

Page 20, E1, paragraph 5

ATAF wishes to bring to attention that in some countries, the draft text is discussed with relevant Parliamentary committees prior to the signature to avoid later problems at or after the signature.

Page 21, E4, paragraph 2 and 3

We wish to highlight that in a few countries require a formal exchange of instruments of ratification rather than just notification. Should the technical explanation be jointly approved by both partners, we see this as creating a valuable tool in the later interpretation of treaty provisions.

-END-

Asim Jaffry, Oxfam Pakistan

From: Asim Jaffry <AJaffry@oxfam.org.uk>
Sent: Thursday, September 24, 2020 1:56 PM
To: Platform for Collaboration on Tax <taxcollaborationplatform@worldbank.org>
Subject: Feed back on tool kit

Dear Manager
Tax collaboration platform
World Bank

Greetings from Pakistan.

First of all, I would like to appreciate Platform for Collaboration on Tax to initiate this toolkit which is actually a huge help for the developing countries while signing tax treaties. As developing countries are the needy one, this will surely make sure to secure their basic rights and make these treaties work better for them and for their people.

Reference to toolkit, I would like to provide feedback in the context of my own country, Pakistan.

1. Despite of its comprehension, I feel that it must address the issue of rising inequalities in developing countries. Those treaties must work and address these deep rooted issues where signing of treaties may bring progress & prosperity in to developing countries i.e. chapter 4 of Country IMF program where clearly stated that assessment of inequalities must be done before assessing the situation of program's development.
2. The toolkit must address the issue on how a country can ensure they are not being violated for bilateral gains. There must a complete chapter on it and some examples for learnings especially for those who are directly involve into the negotiations.
3. Although, this toolkit addresses the area of tax incentives, however there must be a clear road map to reduce such practices. In a single year in Pakistan, there are 04 billion dollar annual tax incentives only to the multinational companies. This huge amount could have been spent more on human development or at least double the education budget or health when country is facing the shocks of COVID.
4. The tax treaties must take on board all the stakeholders, however the current practice is, only a few representatives participate in the process and sign it. This usually does not come downward where it actually has to be implemented under jurisdiction of provinces, after 18th amendment in the case of Pakistan.
5. The treaty also shall address country by country reporting mechanism as there is a huge capital flight, specially in developing countries by the multinational companies. The tax that companies usually pay is at their head office level, which is made usually in tax free zone while the country where actual operations are being done gets nothing. This tax regime of country by country reporting and taxation must be addressed at OECD level so it become internationally recognized and indeed, help to stop the loop holes of avoidance.

This feedback which I felt must be given to further sharpen the toolkit so it can actually make a difference for developing countries. This is indeed a great initiative where developing countries like Pakistan can actually learn and implement for their own development.

Looking forward…

Warm Regards

Asim Jaffry | Manager, Finance for Development- (Campaign Even It Up)
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William Morris
Chair, BIAC Tax Committee
13/15, Chaussée de la Muette, 75016 Paris
France

Submitted by email to: taxcollaborationplatform@worldbank.org

21 September 2020

BUSINESS AT OECD FEEDBACK ON PLATFORM FOR COLLABORATION ON TAX (PCT) DRAFT TOOLKIT ON TAX TREATY NEGOTIATIONS

Dear PCT Secretariat,

Business at OECD (BIAC) thanks the PCT for the opportunity to comment on the PCT's draft Toolkit on tax treaty negotiations, and specifically, the chance to consider whether the draft (i) effectively addresses relevant technical and practical considerations to build capacity for tax treaty negotiations in developing countries and (ii) provides all the resources and tools to enable that.

We believe work in this area is more necessary than ever, particularly given the growing importance of eliminating the risk of double taxation and ensuring the availability of bilateral dispute resolution in the context of the development of a global tax framework under the OECD's digital tax proposals, and increased international tax cooperation more generally.

Business at OECD looks forward to continuing to provide feedback into the PCT's draft Toolkits, as work continues on the Toolkit on tax treaty negotiations and on other policy issues of relevance to developing countries.

Sincerely,

Will Morris
Chair, BIAC Tax Committee

Comments

1. We welcome the PCT's work, at the request of the G20, to develop "Toolkits" to guide developing countries in their implementation of international taxation policy, including in the area of tax treaty negotiations that is the subject of the following comments.

2. The opening discussion in the document provides useful background on the role treaties play in encouraging cross-border trade, investment, and transfer of skills and technology; however, the discussion of these matters is quite short and may lead a reader to infer that there is more potential downside, and less upside, to negotiating a tax treaty.

3. We suggest that a more thorough background discussion regarding the total considerations involved in pursuing tax treaties may help countries approach treaty negotiations with a more balanced mindset. Indeed, perceived downsides or risks in the tax treaty negotiation process can be appropriately mitigated through a practical approach and increased resources, including by relying on the guidance in the Toolkit. It could also be noted that there is increasingly significant downside for countries that do not have a broad network of tax treaties, as this inhibits investor interest and dispute resolution. We think it would be useful to expand the opening discussion around these points, particularly given the vital role tax treaties play in preventing double taxation by providing for bilateral dispute resolution via mutual agreement clauses, especially those with binding arbitration.

4. For example, while credit or exemption systems might provide relief from double taxation, as is referenced on page 9 of the draft Toolkit, this only applies where the two tax authorities take an identical view on profit allocation. Where there is a mismatch and the tax authorities take a different view on profit allocation, tax treaties provide a mechanism to resolve the dispute through a bilateral process.

5. This need for bilateral dispute resolution will only increase as a result of the OECD's work to address the tax challenges arising from the digitalization of the economy, which the OECD itself has noted.[1] Likewise, the OECD has emphasized that rules designed in the context of this work will be implemented by changes to domestic law and tax treaties, which further highlights the importance of tax treaties to developing countries.[2]

6. In this respect, we note it would be helpful if the draft highlighted the potential need for tax administrations to develop internal resources skilled at understanding treaty provisions to ensure potential disputes with treaty partners are avoided in the first place. Likewise, it would be useful to include discussion of the administrative systems that might be required in response to increased investment resulting from executed tax treaties (e.g., cooperative compliance, MAP, international tax capacity building) and the assistance (e.g., ATAF/OECD/CIAT) that is available. Recognition also should be made that tax administrations will need to upskill in terms of understanding treaty provisions to make sure they are avoiding these potential disputes in the first place.

7. We also think it would be useful to frame the "revenue impact" of implementing tax treaties (page 8) also by reference to the positive impact from investment by having tax treaties in place. In this respect, it would be helpful to put discussion of certain treaty positions into context of their impact on investment. For example, investors often assess where to make investments based on whether countries have tax treaties in place that provide certain assurances, such mutual agreement provisions providing a mechanism to reach bilateral agreement through a pre-determined process.

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[1] https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf (refer to paragraph 65, for example).
[2] http://www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf.pdf (refer to paragraph 6, for example).

Likewise, while withholding tax is certainly important to the developing country tax base, high withholding tax rates often deter investment. It would be helpful if the draft framed discussion of withholding tax provisions (and whether to include provisions with a similar effect, such as offshore capital gains tax provisions) in tax treaties in the context of potential impact to investment. Discouraging investment could have negative secondary effects, such as on decreased corporate income tax revenues and local employment.[3]

8. In connection with this, we think it would be worthwhile to add to the discussion of treaty shopping on page 6 to clarify benefits associated with a wider network of tax treaties, such as ensuring a level playing field for investors regardless of their jurisdiction. As noted above, countries with tax treaties are often attractive to investors because of their preference to mitigate the risk of double taxation through access to dispute resolution procedures, including MAP, and to mitigate excessively high withholding tax rates. An expanded network of tax treaties reduces the systemic disadvantages facing investors from less developed countries or from countries that do not access a wide network of treaties. We think the draft could expand upon this, also highlighting that countries might prioritize jurisdictions with whom they wish to establish tax treaties based on level of trade and likely source of capital investment.

9. Further to this, on page 7 the Toolkit recommends that countries should focus on renegotiating problematic treaties rather than entering into new ones. This is somewhat simplistic, as there are a number of reasons why a country might prioritise new treaties with new or increasingly important trading partners. Adding new jurisdictions might offset the negative impact of existing treaties by providing more choice to investors.

10. We would also encourage having the Toolkit take a broader perspective on the risks of double taxation. In contrast to the draft language on page 6 of the Toolkit, investment can diminish in circumstances where there is even a perceived potential for double taxation, rather than only in cases where there is actual double taxation. Accordingly, this section would benefit from a more expansive acknowledgement that the threat of double taxation can be a hindrance to investment. It may in fact be the case that existing double taxation is low because investors elect not to invest at all because of anticipation of double taxation risks.

11. Another topic worth explaining in greater detail in the Toolkit is the Multilateral Instrument (MLI), which is specifically designed to allow jurisdictions to swiftly modify their bilateral tax treaties with other countries who have signed the MLI and also identified the relevant tax treaty as a Covered Tax Agreement (CTA). The MLI presents an attractive option to developing countries curious about

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[3] See the following helpful research studies on these topics:
Effect of tax treaties on investment: "The Foreign Investments Effects of Tax Treaties," Oxford University Centre for Business Taxation (2014), https://www.eesc.europa.eu/resources/docs/2014-the-foreign-investment-effects-of-tax-treaties_oxford-univ-centre-for-business-taxation.pdf; Policy Framework for Investment User's Toolkit, Chapter 5: Tax Policy, OECD (2013), http://www.oecd.org/investment/toolkit/policyareas/41890309.pdf; "The impact of double taxation treaties on foreign direct investment: evidence from large dyadic panel data," Barthel, Fabian, Busse, Matthias and Neumayer, Eric (2010), Contemporary Economic Policy, 28 (3). pp. 366-377, available at http://eprints.lse.ac.uk/28823/.
Effect of withholding taxes on investment: Riedle, Michael, Withholding Tax Effects on the Investment Decision of Multinational Firms (March 1, 2016), available at https://ssrn.com/abstract=2759293.
Benefits of foreign direct investment: "The Impact of Investment Policy in a Changing Global Economy: A Review of the Literature," Roberto Echandi, Jana Krajcovicova, Christine Zhenwei Qiang, World Bank (2015), http://documents1.worldbank.org/curated/en/664491467994693599/pdf/WPS7437.pdf.

potential downsides or time investment associated with tax treaty negotiations and could be discussed in this context.

12. Finally, and perhaps most fundamentally, we think it would be helpful if the Toolkit reiterated the importance of consulting with business and relevant industries when preparing for tax treaty negotiations with another country, as is appropriately reflected in the U.N. Manual for the Negotiation of Bilateral Tax Treaties (2019), para. 94.[4] The U.N. Manual highlights several benefits of consulting business, including obtaining business input on important issues in economic sectors or issues that should be taken into account in treaty negotiations, often based on real problems business has encountered or anticipates when engaging in cross-border activities. In this context, the Toolkit omits the U.N. Manual language that business may initiate the request for tax treaty negotiations between countries and also seems to remove certain references encouraging business involvement, replacing the term "business" with "relevant ministries and agencies."[5] In combination, these changes might leave an unintended impression that business input is not (or should not be) sought. We think it would be helpful, in this respect, to adhere more closely to the tone of the U.N. Manual, which highlights the important role business can serve in the context of tax treaty negotiation initiation and consultation. Indeed, active engagement of business before and during the treaty negotiation process can yield substantial insights and identify practical concerns that can be proactively addressed, benefitting all stakeholders (both private and public).

[4] https://www.un.org/esa/ffd/wp-content/uploads/2019/06/manual-bilateral-tax-treaties-update-2019.pdf.

[5] Compare U.N. Manual, para. 94 (stating that "[c]onsultation with business will, in most cases, provide the team with important information on economic sectors or issues that should be taken into account during the negotiations") with the draft Toolkit, page 13 (citing this same sentence buy replacing "business" with "relevant ministries and agencies").

Commonwealth Association of Tax Administrators (CATA)

From: Onduru, Duncan <d.onduru@commonwealth.int>
Sent: Wednesday, September 16, 2020 7:53 AM
To: Ashima Neb <aneb@worldbank.org>
Subject: RE: Last date extended: Public Consultation on the Toolkit on Tax Treaty Negotiations Open Until September 24, 2020

Dear Ashima,

The above refers. I have gone through the document and finds it quite comprehensive on all the critical processes and stages of DTA negotiation. Just one area worth some future consideration: On the chapter on **"Contact and Logistics**", I think there is need to explore in details the possibilities of conducting virtual negotiations e.g. when forced by a crisis like the present one. This could be in the form of highlighting important consideration that negotiating teams need to take into account when carrying out virtual negotiations.

Kind regards,

Duncan Onduru

Executive Director

Commonwealth Association of Tax Administrators

Commonwealth Association of Tax Administrators

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DVS Advisors LLP

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DVS Advisors LLP

Date: 23.09.2020

To

The Secretariat

Platform for Collaboration on Tax

Organisation of Economic Co-operation and Development

Subject: Inputs and Suggestions on Draft Toolkit on Tax Treaty Negotiations

Dear Sir

We take pleasure in providing you with our inputs and suggestions on Draft Toolkit on Tax Treaty Negotiations. As an organization, we believe that it is our responsibility to contribute in whatever little way possible towards global public policy dispensation with a specific focus on taxation.

We are additionally attaching our Firm's profile for your kind reference.

Thanks and Regards

Divakar Vijayasarathy

Managing Partner

DVS Advisors LLP

Summary of the Inputs and Suggestions on Draft Toolkit for Tax Treaty Negotiations

Section	Suggestions
A	**Why Negotiate Tax Treaties?**
1	Though avoiding double taxation of income is the main objective of treaty negotiations, countries especially developing countries would also be keen on the economic benefit in terms of attracting investments because of the DTAAs. Hence, it is recommended to prepare a detailed cost benefit analysis i.e., the extent of tax foregone because of the DTAA and investment value expected to be attracted, to justify the need for negotiating a treaty with the other contracting state
2	Instead of negotiating a separate treaty for "Information sharing", countries should also ensure that agreement for the same is included as part of the DTAA
B	**Designing a Tax treaty Policy Framework**
1	Countries should adopt a balanced approach in negotiating bilateral tax treaties especially with low-income countries, taking into account their fiscal situation and the fact that they are exposed to profit shifting and ensure that fair share of tax is allocated to the low-income country with which treaty is being negotiated
2	Although MLI offers a potentially efficient way to modify existing treaties to counter treaty shopping, however areas such as maximum withholding tax rates, key elements of the PE definition and service fees are outside the ambit of MLI and hence the tax treaty framework adopted for the negotiation shall be full proof in these areas.
3	On account of the increasingly arising digitalization debate, particular focus should be given on defining a policy position on the same i.e. dealing with the corporate tax implications of digitalization and taxing income associated with digital-heavy business models is to be put into place in negotiation of a treaty
4	While designing a tax treaty model, if any variation is expected to be made from the known UN or OECD model, then such tax treaty model shall be accompanied with a supplementary note explaining such variation and the interpretable meaning of the same which has been agreed by both the countries to the treaty.
C	**Preparing for Tax Treaty Negotiation**

1	Considering the ongoing pandemic, rapid development in high speed internet connection and technology etc, countries can consider the use of **“video conferencing”** as an effective medium for negotiation. This could save money, time and energy.
2	In the team, a translator (who is well versed with the language of the other country) is also required so that proper communication with persons from such country can be made.
3	• Where both the parties have the same non-negotiable provisions or where the non-negotiable provisions cause damage to the other party, “Balance of Convenience” could be a factor for reaching consensus. • That is, if a particular provision, which is proposed in favour of one contracting state, causes more damage to the other contracting state than it would cause to the first mentioned state, had the provision been in favour of that other state, then that other state shall have the right to negotiate further and make a level-playing field. • This approach must be adopted only in cases where the non-negotiable provisions are same for both parties or cause “damage”. (in most cases, damage is loss of revenue; damage may be defined separately). In any other case the non-negotiability of the provisions should be acknowledged. • This approach could also be followed in case of controversial provisions, before resorting immediately to alternative provisions (C.6.). This way, the needs of both states would be effectively met, without rejecting in the first instance the controversial provisions. • The contracting states should also ensure that compromising on a non-negotiable provision in their draft treaty does not violate any other domestic or international laws.
4	It is also recommended to obtain an analysis report from the other contracting state regarding the instances in which the businesses of the other contracting state are subjected to double taxation in the contracting state. A framework / draft prepared with a view to ensuring reasonable relief to the businesses of other contracting state would augur well and would contribute to the success of the negotiations.
5	In preparing the draft treaty for negotiation, the current trend of trade relation (exports and imports) with the other country, the Free Trade Agreements, current capital inflow in the form

	of FDI, FPI and ECB, shall be considered and ensure that the DTAAs in addition to avoiding double taxation also facilitate business.
6	Though generally the Ministry of Finance & the Tax administration are responsible for treaty negotiations, representatives from Ministry of Trade & Commerce, Ministry of external affairs, Ministry of MSME and the authority who would be authorized for Mutual Agreement Procedures in the future should be part of the negotiation team
7	Before the preparation of the framework, analyzing the clauses opted by the other contracting state in the MLIs to alter their existing treaties would give a fair idea of the clauses that would be proposed by the other contracting state and aid in preparing counter arguments
8	Though the tool kit prescribes for a general understanding of the domestic tax regime of the other contracting states, special emphasis should be given on the anti-abuse provisions in the domestic act which would deny the benefits of the DTAA to the residents of the contracting state
D	**Conduct of Negotiations**
1	When conflict becomes apparent or the negotiation process moves towards a dead end, the chairman/ another person can request the meeting to be suspended for a brief period. This will help in the following:- **I.** Gather more information **II.** Time for consultation with right people and adoption of right strategies **III.** Better analysis of the situation and future course of action.
2	In case the treaty is negotiated in a language other than the official language of the country, the translation should be carried out by a person who in the opinion of the jurisdiction's respective authority has sufficient proficiency in both the languages.
3	It is recommended to provide a detailed manual along with the draft tax treaty proposed by the contacting state to the negotiating team of the other contracting state. Such a manual should contain detailed analyses and explanation for each clause included in the draft tax treaty highlighting the intended interpretation. illustrations and examples shall also be included for easy understanding.

4	It is also recommended to prepare a matrix of questions / issues which in the view of the negotiating team of the contracting state could be raised by the negotiating team of the other contracting state based on the draft tax treaty shared and probable arguments for the same. This would minimize the time taken for negotiation and is carried out in a structured manner.
5	The negotiating team shall ensure that all ambiguities and clarifications regarding the clauses discussed on a specific day are cleared on the same day and not to raise issues in the next round unless both the teams have agreed to continue the discussion on the specific unresolved clause in the next meeting as well.
6	The environment of the venue is to be positive and comfortable. For instance, food, temperature, ventilation, crowd, optimism etc should be taken care for effective negotiation for treaties. Also, the host country can have casual / Complimentary talks and also provide food of their choices (like Veg and Non-Veg).
7	It is recommended that the negotiations and discussions is documented in detail including all the arguments put forth by the both parties. This would ensure that in case of litigation in interpretation of the treaty or cases of MAP, the intent in including a specific clause could be envisaged and help in resolving the disputes
E	**Post Negotiation Activities**
1	The details of website in which any press releases, notifications, etc. would be issued by each contracting state with respect to the DTAA may be included as part of tax treaty itself. This would ensure that the residents of the other contracting state taking shelter under the DTAA have easy access to all the information.
2	A non-disclosure agreement may be entered between the parties under which both the parties shall not notify the DTAA until the DTAA is approved for notification in the other contracting state

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24 September 2020

Secretariat
The Platform for Collaboration on Tax
Sent via email to: taxcollaborationplatform@worldbank.org

Subject: Comments on the Draft Toolkit on Tax Treaty Negotiations

Ladies and Gentlemen:

The work of the Platform for Collaboration on Tax in developing the new Toolkit on Treaty Negotiations is both important and timely. EY welcomes the opportunity to join other stakeholders in providing comments on the draft toolkit. We have focused our comments on key issues that, in our experience, are critically important to both governments and global businesses with respect to the negotiation and operation of tax treaties. Our comments address the underlying objectives of tax treaties, the value of broad engagement in the development of treaty policy, and the necessity of effective tax treaty dispute resolution along with the value of supplemental dispute resolution programs.

Underlying objectives in pursuing tax treaties

From our work with both governments and global businesses, we have seen an evolution in the motivations for pursuing (or encouraging governments to pursue) double tax treaties. Historically, the single most important objective in concluding a tax treaty was to facilitate investment, trade, and capital flows between the two partner countries, through clarification and agreement on the extent of their respective taxing rights to provide tax certainty to foreign investors and businesses. Developing countries in particular would enter into tax treaties that include reductions in source country taxation as a means of encouraging foreign investment into their economies.

More recently, with the expansion of cross-border transactions associated with globalization together with the increased focus on transparency and the greater need for better cross-border communication both between tax authorities and taxpayers and between tax authorities, we have seen additional objectives that build on this investment promotion objective and further enhance the interest in and value of tax treaty relationships for governments and global businesses alike. These additional objectives include:

- Providing transparency and predictability in the tax treatment of cross-border transactions,
- Further enhancing the investment climate by providing safeguards, protections, and

recourse to investors,

- Providing a “common language” globally for key terms and procedures,
- Providing mechanisms for submitting and sharing information with full confidentiality protections, and
- Providing robust and effective mechanisms for both preventing and resolving disputes.

Tax certainty continues to be a core objective in concluding tax treaties, as global businesses and governments recognize that the predictability that is fostered by tax treaties is itself a valuable ”lure” for investment given the importance of being able to build business plans and strategies around a stable tax environment. In this regard, and particularly in the case of developing countries, the standardization of treaty provisions is increasingly valuable to both investors and tax administrations in ensuring that there is a recognizable, standard set of operating provisions, such as mutual agreement procedures (MAP), exchange of information processes, non-discrimination rules, and entry into force provisions.

As countries make decisions about pursuing tax treaties and evaluate potential tax treaty partners, it is important that they factor in all these objectives. The multiple objectives with respect to tax treaty relationships are relevant not only to the specific provisions that should be included in a treaty but also to the evaluation of the benefits that can be gained from establishing a treaty relationship with a new partner country. In addition, these benefits should be considered not only through a bilateral treaty relationship lens, but also in terms of the new treaty as a component of the treaty network as a whole and how the addition of the new treaty enhances that network.

Value of broad engagement on tax treaty policy

Based on our experience in working with governments on treaty development and negotiation, most countries in the past approached tax treaties as an instrument to fulfill a specific economic policy objective
– in other words, countries typically focused on the particular bilateral relationship and the specific set of issues targeted with that relationship. This is especially the case with those developing countries that have large treaty networks built over many years. However, today we are seeing an increasing focus in countries on creating an overarching treaty strategy rather than pursuing treaties on an ad hoc basis. This expansion of focus is further intensified by the global increase in multilateral discussions among several treaty partners on the treatment of arrangements that go beyond the traditional bilateral model. More often than not, developing countries are key players in these multilateral discussions. In light of these important developments, we are seeing developing countries prioritize the improvement of their capabilities with respect to treaty negotiation, implementation and application in order to be able to take a more expansive strategic approach to developing their treaty networks. This push to upgrade treaty capacity has generated a significant increase in demand for the international community to provide more technical assistance with respect to all aspects of treaties.

In our view, there is real benefit to be gained from forming a coalition between public and private sector experts to provide capacity building in the treaty area. This combination of skills and experience provides the full range of relevant perspectives and is most effective in providing recipient countries with the necessary support.

In particular, we would underscore the value of capacity building that:

- Focuses on developing treaty policies/strategies to support economic objectives and serve as a guide to prioritizing treaty negotiations,
- Provides specific training on key treaty components or issues (such as MAP),
- Provide training that covers all aspects of the treaty lifecycle: identification of potential partners, negotiation, implementation and application,
- Coordinates international organization initiatives and programs with specific policy or administrative initiatives (such as the work of the Forum on Tax Administration (FTA) MAP Forum), and
- Supports the development and operation of key administrative functions with respect to treaties, including, most notably, resolution of tax-treaty related disputes through MAP.

We believe that this kind of capacity building would be enhanced through the creation of collaborative assistance groups, with governments, international organizations, academia, and business and private sector groups working together to provide support. We further encourage countries to actively engage with all stakeholders in order to benefit from all relevant perspectives.

Importance of effective tax treaty dispute resolution

In our view, it is essential that the expanded focus on treaty negotiation be supported by a commitment to improving tax treaty implementation and application. Central to this early attention putting in place effective dispute prevention and resolution mechanisms. Countries intending to negotiate and enter into a tax treaty must develop the capacity to engage in MAP in a meaningful manner as soon as possible. This includes making a commitment to ensuring the timely, effective, and efficient resolution of disputes, in line with the minimum standard agreed among the Inclusive Framework member jurisdictions and laid out in
the BEPS Action 14 Final Report “Making Dispute Resolution Mechanisms More Effective.” In our experience, where MAP cannot be reliably accessed and is not considered a feasible option (due to the lack of necessary procedural guidance and/or resources), this can undermine the function of tax treaties as an instrument for providing certainty for investors. The erosion of this core objective of treaties is ultimately to the detriment of the country, which may have given up taxing rights under the treaty in the interests of attracting foreign investment that will not materialize without the certainty that large investors need to feel confident in approaching a new location. It is therefore our view that when entering treaty negotiations, it is critical that countries have a line of sight to how they will ensue accessible and effective dispute resolution through the MAP provision.

The competent authority function needs to be adequately staffed and resourced. A treaty dispute resolution taskforce should be established and provided with relevant training, with the goal of a long- term sustainable strategy. This may seem more daunting than in fact it should be, given the many resources available to support development of the necessary infrastructure. In fact, building capacity for conducting MAP will be facilitated by allowing all stakeholders, including the international business community, to assist in developing and implementing the strategy. In addition to skilled personnel, the competent authority will need financial resources to meet its obligations under a treaty. For example,

face- to-face meetings with other competent authorities, which require incurring costs for travel and accommodations, are encouraged at least once and sometimes more during the process for complex or contentious cases. It is our experience that personal interaction can be extremely effective in advancing MAP solutions, recognizing that the current COVID-19 crisis requires creative approaches for accomplishing personal interaction.

The minimum standard under BEPS Action 14 requires that countries become members of the FTA MAP Forum and regularly share details about their MAP environment (such as the number of cases opened and closed during the year, and the time required to solve them). While this may seem to represent an additional strain on administrative resources, in fact it is a worthwhile investment. The FTA MAP Forum works to collectively improve the effectiveness of MAP for all jurisdictions. In order to comply with the Action 14 minimum standard, countries should make it a priority not only to join the FTA MAP Forum but to actively participate in its work to eliminate all barriers to access MAP. For example, one barrier that has been identified in the past was that taxpayer requests for MAP under a treaty were not being adequately addressed and the other country was never notified of the taxpayer's objection. To address this situation, a treaty country should allow not only its own residents, but also residents of the other country, to approach its competent authority. If a country wishes to limit MAP access only to its residents, it must then put a procedure in place that ensures that the competent authority of the other country is always notified or consulted about the taxpayer's objection that triggered the request for MAP. Another identified barrier was the practice of limiting access to MAP for matters on which adjustments were made under domestic law, in particular where those adjustments were accepted by the taxpayer through a settlement. This practice is particularly likely to lead to double taxation in cases where the agreed adjustment relates to allocation of income between two (or several) jurisdictions. Thus, a country that is considering entering into a treaty should be ready to commit to regulating the relationship between domestic audit/enforcement activity and the avenue for taxpayers to access MAP. A competent authority should be able to inform taxpayers regarding the consequences of seeking to obtain relief through both MAP and a domestic recourse procedure. Thus, if the competent authority cannot deviate from a domestic court decision, a settlement, or an Advance Pricing Arrangement (APA), the taxpayer should be informed of that in advance.

As another example, competent authorities have denied MAP based on insufficient information, when the minimum required information was in fact provided. A country should ensure transparency in its approach to allowing access to MAP by developing clear rules on how taxpayers can request competent authority assistance and under what terms and by making these rules readily accessible to the public.

In terms of implementing agreements reached under MAP, the country entering into a treaty should understand that it may have to be able to override its domestic time limits for amending tax returns. This typically is accomplished by including the second sentence of paragraph 2 of Article 25 of the OECD Model Tax Treaty, which requires that agreements reached in MAP cases are implemented without regard to time limits in the domestic law of the treaty countries. In practice, this means that a MAP agreement is not barred from being implemented because the statute of limitations for auditing

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a certain year has closed for

the taxpayer. When a country cannot include such provision in its treaty, it should be willing to accept alternative provisions limiting the time within which an adjustment can be made that can potentially affect the taxable income in the other country.

Countries should also be prepared to delay enforcement of tax adjustments until the conclusion of MAP and to consider waiving interest and penalties on matters to be resolved under MAP. It has been our experience that the additional burden of penalties and interest and the early collection of these amounts unduly exacerbates situations where taxpayers are already negatively impacted by double taxation.
Incorporating relief for these additional elements along with, or in parallel to, MAP is advantageous to taxpayers and tax administrations alike.

Specifically in transfer pricing cases (i.e., cases dealing with the allocation of profits between related entities), a country considering entering into a tax treaty should be ready to provide access to MAP and corresponding adjustments once a primary adjustment is agreed upon under MAP. In order to avoid the economic double taxation that would result, if only the primary adjustment is applied, countries should include paragraph 2 of Article 9 of the OECD Model Tax Treaty in their treaties, rather than only commiting to allow corresponding adjustment based on paragraph 1 of Article 9.

In addition, we would stress that dispute resolution mechanisms should be mandatory and binding. Moreover, we urge that countries give due consideration to the use of arbitration processes as an efficient and effective mechanism for resolving disputes that also has the added benefit of encouraging the resolution of disputes in advance of any arbitration.

Finally, countries should understand the significant benefit of MAP and encourage MAP use where appropriate. A MAP agreement will generally provide a comprehensive bilateral or multilateral resolution of the particular cross-border issue. A domestic recourse procedure, in contrast, will not provide a resolution in all of the countries involved, and may therefore fail to relieve international double taxation. It is our experience that the potential for unrelieved international double taxation significantly undermines the country's objectives in entering into the treaty.

Valuable supplemental MAP programs: ACAP & APAs

The dispute resolution mechanisms within tax treaties are essential in achieving the objectives and purpose of the treaty. However, without the procedures and processes to aid in a tax administration's deployment of MAP, there is likely to be little advancement in tax certainty where taxpayers are unable to achieve resolution. In addition to typical MAP processes and programs, countries should also implement, as soon as possible, supplemental procedures such as Accelerated Competent Authority Procedures (ACAP) and APAs to further enhance the objectives of the tax treaty.

ACAP is an administrative procedure that allows taxpayers to request, and the Contracting States to consider, the application of a MAP settlement for years under dispute to future filed (but yet to be adjusted) taxation periods that would likely give rise to the same issues under the same circumstances. We have extensive experience in MAP where ACAP was requested and applied by tax administrations; this procedure has permitted an expedited resolution to repeated disputes such as recurring transfer pricing issues. ACAP is easily implemented with limited procedural rules and no changes required to standard MAP article wording. ACAP has reduced timelines and reduced costs for both taxpayers and tax administrations.

APAs also are widely used in many jurisdictions where global businesses seek tax certainty for future taxation periods. APAs are arrangements with relevant tax authorities to apply appropriate Transfer Pricing Methodologies (TPM) for cross border transactions between or among related parties. Once agreed upon, the TPM may be applied for a specified future period (upwards of 5 years) and may be rolled back to prior filed taxation years under certain conditions.

Again, EY has wide-ranging experience with APAs and we can categorically state that the tax certainty achieved over extended periods makes APAs an extremely effective tool in resolving recurring international tax disputes. Like ACAP, use of an APA program does not require any particular changes to typical model wording of a MAP article. Moreover, an APA program can be established by replicating general administrative guidance promoted by international organizations and used by many mature APA programs in developed and developing countries.

APAs offers taxpayers and tax administrations a cost effective and proactive mechanism to favorably resolve the largest and most contentious international tax disputes. Treaty partners work together with global businesses by sharing information and analysis to facilitate a common understanding of issues and potential outcomes and work toward prospective, implementable solutions. There is also an opportunity to work collaboratively via international forums, such as the FTA MAP Forum, to overcome challenges such as resource deficiencies or inexperience with particular issues or scenarios.

Given the trajectory of global trade, the ongoing expansion of global businesses, and the disputes that inevitably follow, EY encourages jurisdictions with newly enacted tax treaties to consider the immediate development of MAP guidelines and at the same time to implement additional dispute resolution mechanisms, such as ACAP and APA processes. Other benefits for developing countries from having an effective MAP process include information sharing, which allows tax administrations seamless access to information they would otherwise not be able to collect. The experience that tax authorities gain simply by participating in a MAP/APA process is invaluable, as practical experience is an important part of capacity building. In addition to tax certainty and the conservation of resources for an extended period of time once an agreement is reached, countries that have implemented effective cross-border dispute resolution processes see reputational benefits which further encourage investment.

Thus, EY encourages the Platform for Collaboration on Tax to supplement the draft toolkit with additional guidance on treaty dispute resolution processes and their role in the negotiation and implementation of bilateral tax treaties.

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We would welcome the opportunity to discuss these comments in greater detail and to provide support for the deployment of the Toolkit on Treaty Negotiations.

If there are questions regarding this submission, please contact Barbara Angus at +1 202 327 5824 or barbara.angus@ey.com or Luis Coronado at +65 6309 8826 or luis.coronado@sg.ey.com.

Yours sincerely, on behalf of EY,

Barbara M. Angus
EY Global Tax Policy Leader

Luis Coronado
EY Global Controversy Leader
and Global Transfer Pricing Leader

Global Tax Advisors Platform

To the Platform for Collaboration on Tax 24 September 2020 Via email: taxcollaborationplatform@worldbank.org

Copy to:
The Organisation for Economic Co-operation and Development (OECD)
The International Monetary Fund (IMF)
United Nations (UN)
World Bank Group (WBG)

Statement of the Global Tax Advisers Platform on the Platform for Collaboration on Tax Draft Toolkit for Negotiation of Tax Treaties

The Global Tax Advisers Platform (GTAP)[1] welcomes the draft Toolkit for tax treaty negotiations between developed and developing countries. This practical guide will assist governments and other stakeholders in developing countries by supplementing with practical insights the existing tools such as the UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries (the “UN Manual”).

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[1] The founding members of GTAP are:
- CFE Tax Advisers Europe (Confédération Fiscale Européenne),
- Asia-Oceania Tax Consultants’ Association (AOTCA), and
- West African Union of Tax Institutes (WAUTI).

Observers to GTAP are:
i International Association of Financial Executives Institutes (IAFEI),
ii Society of Trust and Estate Practitioners (STEP),
iii Arc Méditerranéen des Auditeurs (AMA), and
iv Centro di Diritto Penale Tributario (CDPT)

GTAP is an international platform, representing more than 700,000 tax advisers in Europe, Asia and Africa, that seeks to bring together national and international organizations of tax professionals from all around the world. The principal aim of GTAP is to promote taxpayer and tax advisers’ interests by ensuring the fair and efficient operation of the global tax framework, including recognition of the rights and interests of taxpayers, and the role of tax professionals.

For further information regarding this statement, please contact Piergiorgio Valente, President of CFE Tax Advisers Europe and Chairman of GTAP or Aleksandar Ivanovski, Secretary - General at gtap@taxadviserseurope.org
For further information regarding GTAP, please visit our web page: http://www.taxadviserseurope.org/about-us_gtap/.
The GTAP Secretariat is located in Brussels, CFE, Avenue de Tervueren 188-A, B- 1150 Brussels, Belgium.

The members of the Global Tax Advisers Platform see significant benefits for countries from entering into a double taxation treaty that could advance their economic interests, such as:

- Creating tax certainty that could incentivise stronger economic ties between countries;
- Incentivising cross-border trade through reduction of double taxation;
- Creating a legal mechanism for tax dispute resolution;
- Relieving of double taxation;
- Creating mechanisms to prevent discrimination against taxpayers;
- Fostering internal economic growth within a developing country brought by more efficient and beneficial international relations in context of the benefits of the toolbox.

Historically, double taxation treaties have accorded a more significant portion of taxation rights to so-called "residence" jurisdictions and have restricted those applicable to "source" jurisdictions, the majority of developing countries. That is now perceived by developing countries as a restriction of their ability to tax a "fair share" of the profits created within their jurisdictions.

A consequence of this perceived imbalance in the structure of double tax treaties is that developing countries have long been in a position of ceding taxation rights with respect to economic income created at "source" within their jurisdiction. As a tool which enables any imbalance between developed and developing countries inherent in their tax treaties to be addressed, the Global Tax Advisers Platform members are strongly supportive of its introduction and use.

We also support the related policies set out by the Platform for Collaboration on Tax in their efforts to provide for practical guidelines that will build and strengthen existing capacity in developing countries. Balancing taxation rights inherent in a double tax treaty also requires a careful balance of the mix of taxes framed within tax policy. Careful choice from a corporate tax and/or a personal income tax perspective can provide or contribute to the equilibrium necessary to create a positive economic climate within the jurisdiction. Applying the principles of fairness and equitability will no doubt result in development of more stable and sustainable taxation systems, managed in an efficient and transparent manner.

As a corollary, we wholly agree that collaborative work on transparency is indispensable in providing countries with the necessary tools and information to combat and prevent tax evasion and BEPS practices. We recognise that the work of the Global Forum on Tax Transparency has been at the forefront of international efforts in addressing shortcomings of the present framework for international cooperation among jurisdictions. As a result of these efforts, the peer-review process, and obtaining access to relevant data from other tax jurisdictions, administrations in developing countries are increasingly able to identify and assess tax on income created within their jurisdiction.

The Global Tax Advisers Platform (GTAP) is a strong and determined advocate for the need for all stakeholders to commit to multilateral knowledge sharing and training. In a digital world communication is instant and global, and the practices, experiences and expertise of tax professionals and administrators have a ready, worldwide audience. Sharing such knowledge between professionals is a significant facilitator in the creation of a sustainable environment in which actual and perceived legacy imbalances in capacity between developing and developed countries will be reduced and eventually removed as we evolve an efficient global tax system fit for the 21 Century.

We, as an international non-profit platform of tax professionals, stand ready to support and advance these efforts, by offering a forum for sharing and exchange experience by tax professionals across the globe. As a result of the joint efforts of the founding bodies and observers of the GTAP, an inaugural global tax conference, entitled “Tax and the Future”, was held in Torino, Italy in October 2019 on the occasion of the 60th Anniversary of CFE. This event was held under the patronage of the European Parliament, acknowledging the role of CFE in sharing the values of the EU, and in the presence of the Director of the OECD Centre for Tax Policy and Administration, and the European Commission.

As tax professionals, we will continue to seek to achieve these goals by advancing the principles set out in in the “*Torino-Busan Declaration*”, which brings stakeholders’ attention to the relevance of sustainability, capacity building and the need to achieve streamlined tax system operations, both internationally and nationally, in order to guarantee equitable and fair taxation for the benefit of citizens, governments and taxpayers. This Declaration, signed by all our members and observers is a key document which relates closely to the policy goals and aspirations underpinning the establishment of the Platform for Collaboration on Tax.

The constituent member organisations and observers of GTAP stand ready to support these efforts in practice and welcome a closer cooperation. We will continue to aspire to contribute to an international taxation framework that, from our perspective, should be based on four key-pillars: taxation policy as a key instrument for growth, sustainability of tax policies in context of climate policy, fair taxation in context of the digitalisation of the economy; and focus on improvement of taxpayers rights in certainty in a fast-paced world.

On behalf of the Global Tax Advisers Platform,

Chairman | **Secretary - General**

Professor Piergiorgio Valente | **Aleksandar Ivanovski. *LL.M***

Appendix I: Further technical issues related to the Draft Toolkit.
Appendix II: Specific Comments from the West-African Union of Tax Institutes (WAUTI)

Appendix I: **Technical Issues Related to the Draft Toolkit**

1. Interpretation of tax treaties

GTAP members stand ready to provide their expertise in the context of interpretation of tax treaties. Following the phase of negotiation and ratification/implementation of a tax treaty, significant technical issues arise due to interpretation of tax treaties. The interpretation of double tax treaties, which are instruments of both international and domestic law (dual nature of the tax treaties), is governed by the Vienna Convention of the Law of Treaties.

Following the entry into force of the MLI, as a result of BEPS Action 15, the operation of tax treaties has become streamlined, but the interpretation and need of capacity and well qualified experts has become even more pressing. Gaining understanding of the common rules of interpretation of tax treaties could help developing countries to bring certainty and will serve as a major aid in future treaty negotiations. Finally, when dealing with EU member states, negotiations need to be trained on the specificities of the interaction between EU law and double tax treaties (cf. Case C-307/97 *Saint-Gobain*).

2. Tax sparing in treaties with developing countries

Double tax treaties which are based on the UN Model Tax Convention often contain so-called “tax sparing” clauses, whereby the “residence” state would give credit to the resident taxpayer related to economic activity in a developing country, even though tax has not been paid in reality in the developing country. GTAP members encourage further knowledge sharing and awareness raising among treaty negotiators to explore such policy options in negotiations, which will encourage and strengthen economic trade whilst preserving the value of any economic incentives offered in the source country.

3. Domestic revenue mobilisation, tax morale and tax treaties

GTAP members have repeatedly raised the importance of tax morale as key concept which will improve domestic revenue mobilisation and strengthen the relationship of trust between the taxpayers and governments, as well as empowerment of the taxpayer’s position. By increasing tax morale and therefore domestic revenue mobilisation, GTAP members believe that countries will be further able to increase the pool of experienced tax professionals both in the private sector and the public institutions. As a result, the trust in the governments will be strengthened and an atmosphere of positive returns from the system back to citizens will be produce, with willingness of individuals to voluntarily contribute to the “social contract” by paying more taxes. Strong capacity in the public service are also a means to demonstrate how well governments turn tax revenues into beneficial expenditures, so these can produce a double dividend comprising both the intrinsic benefit of the service provided and the spill over benefits from public satisfaction generated by its provision.

Appendix II: Specific comments from the West African Union of Tax Institutes (WAUTI)

In Africa, developing countries rely heavily on their tax revenues in setting their annual budgets. However, the most ambitious budget forecasts during their execution may come up against the great capacity of multinational companies to optimise their taxes by resorting to complex strategies, but primarily based on the existence of international tax treaties.

International tax treaties are bilateral or multilateral agreements binding countries which seek to avoid double taxation of taxpayers who are nationals of countries signatory to these conventions. They are also used as instruments preventing fraud and tax evasion. Government authorities play a leading role in the negotiation. But in the international context, the power games between developing and developed countries are not balanced, and this situation often benefits the economically stronger countries (investors) to the detriment of the poorer (holders of resources).) and developing countries.

The tax authorities have a role to play in the interpretation of these conventions for their proper application and thus to curb the potential misuse of these treaties by investors.

- <u>The role of government and tax authorities</u>

Governments of developing countries should adopt the models provided by United Nations or the OECD during negotiations of their tax treaties to ensure proper application of the rules derived from those Conventions practices. But the reference to these models may not be enough, because the developing country Parties should ensure that the resources and policies necessary for the achievement of development objectives, including ODDs are in place and operational at the domestic level.

When these policies are well defined and supported, their application should be easy for the tax administrations who will vigorously enforce and foresight international rules in line with local regulations against unfair practices in the use of certain tax treaties.

- <u>Prevention of abusive practices</u>

Tax administrations in developing countries are confronted with abusive use of tax treaties for the avoidance of double taxation especially in the area of investment for the exploitation of natural resources. Thus, in Senegal, there is an example of the case of the Senegal - Mauritius convention.

This Treaty was signed in Dakar on April 17, 2002, and was ratified by the President of the Republic of Senegal by virtue of Law No. 2004-04 of February 6, 2004 authorizing the President of the Republic to ratify the Treaty.

In Mauritius, the Treaty is introduced into the tax system in accordance with Article 76A (ITA 1995 consolidated with 2018) which provides that for arrangements to assist in the collection of foreign tax, "the Minister may enter into arrangements with the government of a foreign country for the purpose of providing assistance in the collection and recovery of foreign tax ".

The treaty entered into force on January 1, 2005 after the completion of the necessary notification formalities in each State, in particular on the date of receipt of the last of these notifications in accordance with Article 28 of the treaty. However, on 30 June 2019, the Ministry of Foreign Affairs was instructed to initiate the unilateral termination process of the Treaty on the date of June 15, 2019 for effectiveness of the so-called termination on 1 July 2019.

According to the reason put forward by the country's high authorities, in the 17 years of the Treaty's existence, Senegal has lost nearly 150 billion francs in tax revenue because of this Treaty, which has been more beneficial for Mauritius. The President of the Republic, anxious to protect the interests of Senegal on the verge of oil and gas exploitation in 2021, could have lost several hundred billion dollars like those recorded over the past 17 years if nothing had been done .

Mainly, this denunciation is made through the diplomatic channel and with the consequence, the termination of the treaty in Senegal, on January 1, from the date immediately following the notification of its denunciation, that is to say on January 1, 2020.

Unfortunately since this announcement, the Senegalese government has not made available any documents indicating how the termination process is unfolding and materialising the effectiveness of this denunciation.

This is why it is necessary to incorporate into international conventions the practical modalities of denunciation in order to leave no doubt about the decision of the States Parties and consequently to inconvenient taxpayers who have set up their economic models on the conventions in question.

Part A	Background Notes
Part B	Nigeria and Her Treaty Partners (ADTA)
PartC	Comments on Key Issues Discussed in the Draft
PartD	Other Issues and Views to Consider

Part A Background Notes

Generally, treaties address issues of avoidance of double taxation, concept of permanent establishment and residency (as required to encourage foreign direct investment amongst others), exchange of information amongst contracting states to reduce the incidence of global tax evasion.

The Toolkit represents a joint effort to provide capacity-building support to developing countries on tax treaty negotiation, building on previous contributions and reducing duplication and inconsistencies.

We note that the Toolkit has excellently built on the UN Manual, particularly on its Section 11 by providing tax Administrators with the tools they need in tax treaty negotiation, in all its phases namely (preparation, conduct and follow-up), complementing it with a set of tools and resources. The Toolkit, a joint initiative of the IMF, OECD, UN and World Bank is a great effort designed to help developing countries build capacity in tax treaty negotiations. The Toolkit describes the steps involved in tax treaty negotiations such as how to decide whether a comprehensive tax treaty is necessary.

Merits of DTC include:

A. prevention of fiscal evasion by residents of the contracting states especially in respect of income derived from cross border transactions involving the two countries.

B. Creation of a more conducive atmosphere for bilateral trade and investment between the contracting states.

C. Increased flow of goods and passengers including skilled personnel resulting from the exemption from tax of the profits of enterprises engaged in international shipping and air transportation between the contracting states;

D. Increased co-operation between the tax administration of the contracting states through the exchange of information and skills;

E. Easier resolution of disputes between the tax administrations of the contracting states;

F. Prevention of discriminatory tax practices on enterprises of one contracting state operating in the other state;

G. Allowing for planning and easier decision making as to which country to invest in or in what proportion; and

H. Creation of a stable tax regime that inspires confidence in investors.

I. DTTs can address cross-border transactions between associated enterprises (article 9 of the OECD Model Tax Convention on Income and on Capital (OECD Model)

Part B Nigeria and Her Treaty Partners (ADTA) (The Nigerian Model)

Nigeria is one of the developing countries that have entered into bilateral double taxation treaties with some countries to avoid taxing non-residents twice; once where the income is earned and again in the country of residence. The scope of the double taxation treaty between two countries is to promote and strengthen economic, technical and industrial cooperation of these two countries on a mutual benefit basis.

Apart from the OECD and the UN models that are used in negotiating bilateral tax treaties, Nigeria has adopted its own model which serves as the basis for negotiating bilateral tax treaties with other countries. Nigeria's model reflects the text of the OECD Model in as much as she has the OECD members as her trading partners. The Nigeria model, in 7 chapters and 31 Articles takes care of the peculiarities in her tax laws. Nigeria has limited numbers of treaties signed with fourteen few countries across the globe even though approximately 3,000 DTAs are in force. While this is a large number, it is only a fraction of the number of potential bilateral relationships (IMF, 2014, p.25). Depending on how "developing country" is defined, between 1,000 and 2,000 of these agreements involve at least one developing country (Hearson, 2016a, p.10).

Process of Tax Treaties in Nigeria

The Federal Inland Revenue Service (FIRS) under the auspices of the Federal Ministry of Finance is the competent authority with responsibility for tax treaty processes in Nigeria. A completely fledged Department of Tax Policy is in charge of Treaty issues. Nigeria prefers the term "Avoidance of Double Taxation Agreement (ADTA). Nigeria signed her first Treaty with the United Kingdom on 9th June 1987 while the Treaty entered into force on 1st January 1988.

In order to enjoy the benefits of a tax treaty with Nigeria, a taxpayer must be a resident of Nigeria or the treaty partner or both countries. The FIRS Information Circular published on 4th December 2019, lists the following criteria:

1 The taxpayer must be liable to tax in the treaty country of which he is a resident
2 the income in question is not exempted from tax in Nigeria
3 the tax for which that individual is seeking benefit is covered by the treaty
4 the benefit is not specifically excluded under the treaty; and
5 the benefit is claimed within the time stipulated by the treaty or domestic laws. The stipulated time is 2 years after the end of the year of assessment in which the foreign tax was paid.

Peculiarities in the Nigerian Model

<u>Article 8</u> <u>Shipping and Air Transportation</u>

Like any other, this Article provides the rules for taxation of incomes from shipping and air transport operations between treaty countries. It also deals with the principle of reciprocity, a major feature of Nigerian Model. The incomes from the operation of ships and airlines in international traffic are to be exempted on reciprocal basis. The reciprocity may arise from three instances (a) where reciprocity exists, (b) where reciprocity is deemed and (c) where no reciprocity exists.

Article 11 Interests

Interests arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. The term 'interest' is defined as 'income from debts claims of every kind, whether or not secured by mortgage.'' Currently, the treaty rate applied to interest is 7.5%., previously 12.5%. The interest on loans paid by a Government is free from tax. The Agreement also provides that the recipient of the interest must be the beneficial owner of the interest, to enjoy the treaty benefits.

Article 14 Independent Personal Services

The Article relates to natural persons. The OECD Model no longer feature this Article as it does not appear in recent Treaties. It has been covered by Article 7 (Business Profits).

Article 22 Other Incomes

Under this Article, the Agreements of certain countries provides for 'Other Incomes' but the UK DTA does not.

2019 Information Circular

The FIRS in 2019 issued an information circular on claim of tax treaty benefits in Nigeria. The 2019
Circular was issued pursuant to the following domestic tax laws:

- Companies Income Tax Act (CITA), Cap. C21 LFN 2004 (as amended up to 2020), (Sections 45 and 46)
- Personal Income Tax Act (PITA), Cap. P8 LFN 2004 (as amended by the Finance Act 2019),(Sections 38 and 39)
- Petroleum Profits Tax Act (PPTA), Cap P13 LFN 2004 (as amended by the Finance Act 2019) (Sections 61 and 62)
- Capital Gains Tax Act (CGTA), Cap C1 LFN 2004. Section 41 (as amended up to 2020)

The Circular is aimed at providing guidance and clarity on the requirements, process of accessing and computing various tax treaty benefits available to residents and non-residents deriving income from Nigeria and its treaty partners. According to the Circular, Nigeria currently has effective double taxation agreements (DTAs) with fourteen countries.

Treaties In Force/ Countries with which Nigeria has concluded Avoidance of Double Taxation Agreements (ADTA)

Nigeria has currently concluded the ADTA with in respect of taxes on income and on capital gains with 14 countries. The first country is UK, and the Agreement was entered into on 1st January, 1989, followed by Pakistan and Belgium with the same effective date of January 1st, 1991. As at December 2019, the 14 countries that Nigeria has concluded the ADTA with, with the Agreements in force are presented in the following list:

Countries	ADTA Type	Date/Place of Signing	Date of Entry into Force	Effective Date
Nigeria – Canada	Comprehensive	4th August, 1992 in Abuja	16th November, 1999	1st January, 2000
Nigeria – Pakistan	Comprehensive	10th October, 1989 in Lagos	7th March, 1990	1st January 1991
Nigeria - Belgium	Comprehensive	20th November, 1989 in Brussels	1st January, 1990	1st January, 1991
Nigeria - France	Comprehensive	27th February, 1990 in Paris	2nd May 1991	1st January, 1992
Nigeria - Romania	Comprehensive	21st July, 1992 in Abuja	18th April, 1993	1st January, 1994
Nigeria - Netherlands	Comprehensive	11th December, 1991 in Lagos	9th December, 1992	1st January, 1993
Nigeria - United Kingdom	Comprehensive	9th June, 1987 in London	1st January, 1988	1st January, 1989
Nigeria – China	Comprehensive	15th April, 2005 in Abuja	21st March, 2009	1st January, 2010
Nigeria - South Africa	Comprehensive	29th April, 2000 in Cape Town	5th July, 2008	1st January, 2009
Nigeria – Italy	Air & Shipping Agreement Only	22nd February, 1976 in Lagos	1977	1st January, 1978
Nigeria – Philippines	Comprehensive	30th September, 1987 in Manila	18th August 2013	1st January, 2014
Nigeria - Czech	Comprehensive	31st August 1989 in Lagos	2nd December, 1990	1st January, 1991
Nigeria – Slovakia	Comprehensive	31st August 1989 in Lagos	2nd December, 1990	1st January, 1991
Nigeria – Singapore	Comprehensive	2nd August, 2017	1st November 2018	1st January 2019

Part C Comments on Key Issues Discussed in the Draft

1 Discussion Draft

A country's decision to negotiate a tax treaty should be the based on an analysis of the relevant economic factors, a review of the tax regimes of both countries (with the primary objective of identifying risks of double taxation and non-taxation) and an analysis of the tax treaty model of the other country (if available) and of its recent tax treaties in order to identify the main elements of its tax treaty policy.

Further, a country's decision to negotiate a tax treaty should also be guided by an assessment of its available resources, including in terms of the availability and skills of current tax officials.

COMMENT

These valuable considerations are not always taken into when treaties are negotiated in Nigeria. Few officers are skilled in the area of treaty negotiations.

e. Discussion Draft

Countries entering into tax treaty negotiations need a good understanding of the ways in which treaties operate and of the potential benefits and costs arising from treaties.

COMMENT

This is not always the case in Nigeria. As noted by Evert Jan Quak, despite being in a majority, developing countries lack influence in the UN's Committee of Experts, while the OECD's Committee of Fiscal Affairs has considerably more resources and technical capacity than the UN Committee. In effect, Nigeria and other developing countries seem to be incapacitated in decision making.

2 Discussion Draft

Treaties are frequently primarily used as a tool to attract investment into developing economies (Zolt 2018.

COMMENT

Not much has been achieved in this area in Nigeria.

3 Discussion Draft

Examples of countries that have renegotiated or cancelled tax treaties include Argentina in 2012, Rwanda in 2013, Mongolia in 2013, India in 2016, and Senegal in 2019

COMMENT

Nigeria has had its own experience of outright cancellation or renegotiation of some treaties in the past. Nigeria Sweden Agreement was terminated in 1989, with fresh tax treaty negotiations which commenced in 2002 and eventually concluded in 2016, but awaiting ratification by the National Assembly.

5 Discussion Draft

A country should not agree to negotiate tax treaties until it has the necessary technical expertise, having first researched the terms upon which a potential treaty partner has negotiated tax treaties with other countries.

COMMENT

There is a gap in this area which needs to be closed.

▪ Discussion Draft

A question that should always be considered before agreeing to enter into tax treaty negotiations with a country is whether there is a material risk of double taxation with that country, which is unlikely where a country levies little or no income tax. Countries should also consider whether there are elements of the other country's tax system that could increase the risk of non-taxation, such as tax advantages that are ring-fenced from the domestic economy.

COMMENT

Nigeria takes this into consideration.

7 Discussion Draft

In almost all countries, the signed treaty has to be approved by the parliament or legislative assembly before it can be considered that the state has given its consent to be bound by the treaty

COMMENT

This requirement is provided for in the 1999 Constitution but the ratification process is always slowed and delayed.

▪ Discussion Draft

It is a good practice to inform all interested parties when a new treaty enters into force and when its provisions will have effect. This may be done through a press release, notice in the official gazette or journal or on the website of the tax administration or of the ministry in charge of finance.

COMMENT

Nigeria needs to reflect the current version of the UN Model Double Taxation Convention between Developed and Developing Countries and the relevant UN Commentaries as well as ongoing decisions of the Committee in her draft Agreement.

Countries especially developing ones should develop capacities to enable them understand the complexity in international trade to avoid abuses of the provisions of treaties. Concept like international transfer pricing, BEPS, thin capitalization are strategies that can hedge against tax avoidance.

9. Discussion Draft

For instance, where a main reason for wanting to conclude a tax treaty is to obtain administrative assistance from another country, such as the benefit of exchange of information or assistance in collection of taxes provisions, an alternative approach would be to use a tax information exchange agreement (TIEA) or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters ("MAAC"). This approach, however, requires that the other country signs and ratifies the MAAC (unless it has already done so) or be willing to conclude a TIEA rather than a tax treaty.

COMMENT

On 17 August 2017, Nigeria became a signatory to two major international multilateral instruments to address tax avoidance and evasion. These are:

(a) the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument" or "MLI ") and

(b) the Multilateral Competent Authority Agreement for the Common Reporting Standard (CRS MCAA).

By signing the MLI, Nigeria becomes the 71st jurisdiction to signify interest in preventing base erosion and profit shifting (BEPS). Nigeria is also the 94th jurisdiction to join the CRS MCAA.

CONSULTATION QUESTIONS

<u>Question One</u>

Does this draft toolkit effectively address all the relevant technical and practical considerations as well as skills necessary to build capacity for tax treaty negotiations in developing countries?

COMMENT

Not absolutely. Nigeria is one of the developing countries that enter into double taxation treaties with the belief that it will benefit the economies of the both contracting parties. This is however not really the case as benefits of treaties skews uneven among nations in treaty arrangements. In effect, every country that engages in double taxation treaty must review the tax treaty it currently has with other contracting States to determine if it truly benefits from each of the treaty it enters. Re negotiation is inevitable where it is established that the merits are not as beneficial as anticipate. Furthermore, amending the key clauses of the treaty should be considered.

Anderson Tax, is of the view that in order to fairly examine treaties and their enactment process in Nigeria, the provisions of the 1999 Constitution of the Federal Republic of Nigeria (as amended) (CFRN); the TMPA; and Companies Income Tax Act 2007 (CITA) must be considered as some of the provisions show some inconsistencies regarding the treaty enactment process. Section 12 of the Constitution and Section 3 of the TMPA provide that the National Assembly, which is the supreme law must ratify all treaties before they become effective. However, Section 45 of the CITA provides that the Minister of Finance "may by order" give effect to any DTT between Nigeria and another country.

<u>Question Two</u>

Are there particular resources or tools, especially beneficial for developing countries, not covered in this toolkit that should be considered?

COMMENT

The application of refunds of withholding taxes, is not effectively put to use in Nigeria. The relevant OECD Action Plan to tackle BEPS are not yet embeded in the Nigerian model.

Part D Other Issues and Views to Consider in Building Effective Tax Treaty Negotiation Teams.

Some of the foregoing issues may pose challenges to treaty process of developing countries such as Nigeria. Section 12 of the 1999 Constitution of the Federal Republic of Nigeria expressly provides that before a treaty between Nigeria and another state shall have the force of law it must be enacted into law by the National Assembly. There are always delays from this arm of Government in executing this process. Others are:

i. countries entering into treaties with other Contracting States should carefully evaluate certain issues in the Agreement such as the extent of conformity of the treaty with the UN or OECD model on tax treaties,

ii. likely impact of the treaty on sharp practices by multinational enterprises,

iii. implication of the treaty for resource generation for the country,

iv. Implications of Treaty Shopping for Foreign Direct Investment.

v. Need to examine whether an anti-avoidance legislation will have any complimentary role in addressing abuses.

vi. Consider whether there are policies and existing tax legislations in the country the treaty may be in conflict with.

vii. Does the country's tax administration/arbitration system have the capacity and the strength to respond to some of the challenges and conflict that may arise from the treaty.

Challenges

Nigeria does not have adequate DTAs. Presently, Nigeria has only fourteen subsisting tax treaties. Few countries that are not as developed as Nigeria or some developing countries have up to 50 -100 DTAs. The treaty with Mauritius signed in 2012 is long overdue for ratification. A delay in the ratification of any treaty would give room for uncertainty amongst the treaty's stakeholders and will hold back the flows of certain foreign direct investment into Nigeria. Nigeria should speed up the process of ratifying the already signed treaties in order to bring in foreign direct investment.

Some of the hurdles against procurement of tax treaty in Nigeria are as listed below;

i. Bureaucratic process involved in the initiation, data gathering, correspondence and negotiation;

ii. Constitutional requirements on treaty;

iii. Legislative process - span and procedures;

iv. Political structure as relating to taxation

v. The federal government of Nigeria signed the DTA with Sweden in 2004, with South Korea in 2006 and with Spain in 2009. However, these agreements are yet to become effective in Nigeria on the basis of the constitutional provision which requires such treaties to be domesticated through ratification by the National Assembly.

vi. It should be noted that the more recent DTAs signed with Mauritius, the UAE and Qatar are yet to be presented for ratification.

vii. DTAs signed with Mauritius, the UAE and Qatar are yet to be presented for ratification.

Overcoming the Challenges

Nigeria should:

i. embark on accelerated legislative process on the three Bills;

ii. conduct joint sitting, where it is possible with a view to gaining time;

iii. ensure conclusion of the three Bills in earnest and seek Executive assent to be effective.

iv. the Federal Government should also review the tax treaties it currently has with other countries to determine if Nigeria is benefitting from the DTTs. Where it is established that Nigeria is not, re-negotiating and amending key clauses of the DTTs could be considered.

FINDINGS/EXCERPTS FROM PREVIOUS STUDIES WHICH MAY BE USEFUL

International DTA network:

• Countries in Eastern and Southern Asia have concluded more DTAs than countries in Sub-Saharan Africa. There are 314 tax treaties in force in Asia, compared to 205 in Africa (Hearson 2016b). Six Asian countries (Pakistan, Vietnam, Sri Lanka, Philippines, Bangladesh and Mongolia) have concluded 30 or more DTAs, while no African country has concluded more than 19 (Figure 1).

• Over half of the agreements are with non-OECD countries. 51% of the treaties in Africa and 55% of the treaties in Asia are with non-OECD countries (Hearson, 2016b).

The majority of developing countries' DTAs were with advanced economies (Hearson, 2016b; Hearson 2015, p.8).

Among African countries, the largest number of treaties are with South Africa, Mauritius, United Kingdom, Italy and Norway.

• Asian countries' treaties grant the source country greater taxing rights than African countries' treaties.

• Developing countries' DTAs contain lower withholding tax rates than in the past, but less stringent permanent establishment provisions.

There are two key ways that DTAs can restrict a country's ability to tax foreign investors. First, by lowering the rate of withholding tax levied on foreign income earned at source. Second, by imposing a high threshold for permanent establishment, that is, the minimum level of activity that must take place before taxes can be levied (Hearson, 2016a, p.9).

For both African and Asian countries, there is a trend towards lower withholding tax rates. In Africa, this trend is more pronounced in DTAs with OECD countries (Hearson, 2016a, p.22).

However, PE provisions are becoming less restrictive over time, which means that recent DTAs expand the circumstances in which countries can tax foreign companies' income within their borders (Hearson, 2016a, p.22).

- Neumayer (2006) analyses with which developing countries industrialized countries sign bilateral investment treaties (BITs).
- He concludes that economic and political interests motivate industrialized countries when choosing their partners to sign BITs with.
- To a lesser extent, they also take into account the needs of developing countries. Good governance is not found to play a role.
- Also looking at BIT formation, Elkins et al. (2004)34 find that "developing countries are more likely to sign BITs with developed countries if their competitors have done so already" and thus conclude that the spread of BITs can be explained by the "increased competition for FDI among developing countries".
- Neumayer and Plümper (2010) find that "a capital-importing country is more likely to sign a BIT with a capital exporter only if other competing capital importers have signed BITs with this very same capital exporter. Similarly, other capital exporters' BITs with a specific capital importer influence an exporter's incentive to agree on a BIT with the very same capital importer".36 Swenson (2005) concludes that BITs have a backward and a forward looking element.
- She finds evidence that developing countries enter into BITs to retain the existing FDI stock and also to attract new foreign investors.
- The study revealed that countries with a bigger population tend to have more double tax treaties. However, once gross domestic product (GDP) is included, population is completely dominated by GDP and ceases to exhibit any significance. GDP is therefore the vastly superior indicator for the size of the economy. Graphs 1a and 1b show the effect of GDP on the number of DTTs of a country.
- Despite the fact that there are only 34 OECD member countries in the sample, as opposed to 142 developing economies, it only requires a 9% increase in FDI to stipulate one additional DTT.
- Whereas in both cases GDP matters, the degree of openness is correlated with DTTs among developing economies, whereas DTTs between industrialized and developing economies depend on FDI.

• political variables are considered. The political system of a country may have an impact on the number of DTTs it can forge. As DTTs are both difficult to negotiate but also difficult to implement and prosecute, it is tested whether institutional variables matter for DTTs. Also, in view of DTTs also providing for the exchange of information, countries which are concerned about the secrecy of their citizens' tax data may be less inclined to sign DTTs with states with high corruption levels.

• countries undoubtedly lose tax base and hence tax revenue by signing a DTT that transfers part of the profits of foreign direct investors to the home country .

With Whom Do Countries Have Double Tax Treaties? The following section tries to establish determinants that explain which countries sign DTTs with each other.

Data and Methodology

• "specific target contagion" is accounted for, i.e. that a specific developing country may be more likely to sign a DTT with a specific OECD member country, if the developing country's neighbouring countries have already entered into a DTT with that specific OECD member country. To illustrate, it is tested whether, say, Uruguay is more likely to sign a DTT, with, say,
Norway if Uruguay's neighbouring countries such as Brazil have already signed a DTT with

Norway. For Norwegian firms, Uruguay and Brazil may represent close substitutes when making an investment in South America. Thus, Uruguay may be more ready to sign a treaty with Norway if Brazil already has a treaty in place, so not to be at a competitive disadvantage. In the regression analysis, both types of spatial

• According to Barthel and Neumayer (2012), the strong positive target contagion interdependence can explain why developing countries sign DTTs with OECD member countries, even though the treaties "systematically favour a distribution of the taxes generated from MNCs [Multinational Corporations] to the advantage of the capital-exporting residence country".

RECOMMENDATIONS & CONCLUSION

As noted by the National Tax Policy (2012), Nigeria will continue to expand her treaty network in the best interest of the Nigerian state. Brazil had signed 37 treaties between 1967-2017. It should also continue to meet her international obligations under the tax treaties, protocols and agreements that are currently in force.

Proposed treaties in Nigeria and in other developing countries should be widely circulated amongst stakeholders and the general public in order to encourage a robust consideration of the benefits or otherwise of the treaties.

There should be regular review of the existing treaties and re-negotiation in line with best practices.

The Federal Inland Revenue Service working in consonance with the Federal Ministry of Finance and the Federal Ministry of Foreign Affairs shall be responsible for the negotiation and conclusion of the terms of the treaties and shall ensure that they provide the maximum benefit to the Nigerian economy.

The Joint Tax Board, an umbrella body for Tax Authorities, a legal body set up under the Act should be playing a critical advisory role in the negotiation of treaties prior to conclusion. Treaty partners shall also ensure that all terms in the treaty are fair and beneficial to both parties to the treaty.

Nigeria should reserve the right at all times to cancel any arrangements which are no longer beneficial to its economy, which have become obsolete or which are not being observed by the other party. Cancellation of such treaties should be done in line with the provisions of the treaty and in accordance with Nigerian law.

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Inter-American Center for Tax Administrations (CIAT)

CIAT Comments on the Toolkit for Tax Treaty Negotiations

- **Page 4, Introduction**

"For instance, one of the tools proposed in this document is a shared calendar of training events on tax treaties. Having a centralized and accessible source of information about the courses, workshops and seminars on tax treaties organized by the PCT Partners would not only be useful for tax officials but would also contribute to achieving some of the expected outputs in the area of capacity development issues. Among other collective actions, the 2016 "Concept Note" (which describes the purpose and functions of the PCT) foresees: "(…) ensuring synergies and an effective division of labor among the major providers based on transparent information about who is doing what (…)".

CIAT Comment

If possible CIAT may consider adding its capacity building events relating to this topic into the shared calendar.

- **Page 4, Introduction**

"Many countries are currently reviewing their existing treaty network and treaty policy in light of a better understanding of revenue losses associated with treaty abuse, the recommendations resulting from the BEPS project, including the minimum standard to combat treaty shopping, and the 2017 updates of the OECD Model Tax Convention on Income and on Capital ("OECD Model") and of the UN Model Double Taxation Convention between Developed and Developing Countries ("UN Model"). This toolkit should help new treaty teams or team members to swiftly initiate that work."

CIAT Comment

Suggestion to eliminate the reference to the year of the latest updates to the OECD and UN model tax treaties as these could be updated shortly. The sentence could read; *"…, and the most recent updates of the OECD Model…"*

- **Page 6, A.1**

"Typically, tax treaties are negotiated with the objectives of encouraging cross-border trade, investment and the transfer of skills and technology (by preventing double taxation, prohibiting tax discrimination and providing more tax certainty and stability) and to enhance tax co-operation between countries in order to counteract international tax avoidance and evasion. A country may also negotiate a tax treaty to pursue political or diplomatic objectives: as an expression of willingness to conform with international tax standards or as a sign of close political and/or economic relationship between the parties. A country may also be asked to enter into a tax treaty for other non-tax reasons, such as a condition for obtaining economic assistance."

CIAT Comment

Considering the MLI clauses and BEPS recommendations, we can mention that tax treaties not just trust in cooperation (Art. 26 and 27) to counteract international tax avoidance and evasion. General and specific anti-evasion and avoidance rules (PPT, LOB, preamble, etc.) contribute to preventing the misuse of tax treaties.

- **Page 6, A.1**

“A country’s decision to negotiate a tax treaty should be the based on an analysis of the relevant economic factors, a review of the tax regimes of both countries (with the primary objective of identifying risks of double taxation and non-taxation) and an analysis of the tax treaty model of the other country (if available) and of its recent tax treaties in order to identify the main elements of its tax treaty policy.

CIAT Comment

It could be worthwhile to put a further emphasis on the analysis of recent tax treaties signed by the other country, as well as the provisions given to treaties signed with countries that have a similar profile as yours (for example; the neighbours, countries with a similar tax system, etc.).

- **Page 7, A.2**

“A tax treaty is usually structured so as to include (a) general provisions and definitions, (b) substantive provisions on taxation (distributive rules) and elimination of double taxation, and (c) provisions on non-discrimination and international cooperation and assistance. The distributive rules will in most likelihood reduce the amount of tax that a source country can charge non-residents based on its domestic law (ignoring any behavioural changes effected by the treaty). That said, commitments on international cooperation may result in an increase in the amount of tax being collected, even though they may also require additional administrative resources.”

CIAT Comment

This paragraph (especially the last sentence) may lead to the misunderstanding that tax treaties increase tax collection. This is a fundamentally misleading, even if taxing rights are allocated to a country through the tax treaty provision, these rights will have no effect without the existence of a domestic tax law provision that calls for the taxation of that specific item of income.

In the following paragraph it talks about the implementation of the tax treaty through domestic law, however, this is not the same thing as having the income tax law of a country requiring taxation on that particular item of income (even if it is covered under the treaty). Seeing as this is a very common misconception that could lead to developing countries signing unnecessary treaties, we suggest for this paragraph to be rewritten in a manner as to reflect the abovementioned point.

“Administrative measures are essential for a country to fulfil its international obligations deriving from a tax treaty. Generally, a treaty has to be implemented through domestic tax law and most treaty rules will be applied through the usual administrative processes required to assess and enforce income taxes (e.g. self-assessment, assessment, withholding, tax examination and administrative and judicial dispute resolution). However, the application of tax treaties may require the performance of additional administrative functions, for example in the application of reductions or refunds of withholding taxes, the resolution of treaty-related disputes through the mutual agreement procedure, the exchange of tax information and the assistance in the recovery of taxes. These administrative measures and the resources that they require will add to the resources required for the negotiation and updating of a country's tax treaties. "

CIAT Comment

We would consider it necessary (part of the cost of implementing a treaty) to have an effective risk assessment system to evaluate the proper use of treaty benefits by taxpayers. This constitutes a challenge for many developing countries.

- **Page 8, A.2**

"While the determination of a treaty's cost-benefit trade-off for a country is not straightforward, a range of options exist to try to measure some of these costs and benefits. Treaties are frequently primarily used as a tool to attract investment into developing economies (Zolt 2018, see toolbox). 3 Challenges to measuring treaty effects may thus be similar to analysing other types of tax expenditures and could be informed by approaches summarized in the 2015 PCT toolkit "Tools for the assessment of tax incentives" (see toolbox). For income flows (dividends, interest and royalties) the theoretical impact on tax revenues can be captured relatively easily, comparing treaty withholding tax rates with the domestic rate (see in the toolbox for instance, McGauran (2013), Balabushko et al. (2017), and Janský and Šedivý (2018). This theoretical impact has analytical value even without taking into account the behavioural effects of higher withholding tax rates. For other aspects of treaty costs, including indirect costs of base erosion and profit shifting linked to treaties, taxpayer information can be analysed (Balabushko et al. 2017) and often administrative experience can at a minimum provide anecdotal evidence of aggressive tax planning strategies (and associated costs) that take advantage of specific treaties, although such an analysis would not take account of the effect of new treaty rules designed to address treaty shopping and treaty abuse."

CIAT Comment

The pros and cons of tax incentives are well explained however, we suggest adding a brief mention of the issues surrounding tax sparing credits as these could render a country's tax concessions or similar targeted taxation strategies completely ineffective.

- **Page 10, A.3**

"If a country's ultimate objective for entering into tax treaties is to attract foreign direct investment, one could also argue that an alternative to treaties could be to adopt unilateral measures in domestic tax laws governing taxation and investment (e.g. investment/cost-based incentives; not harmful preferential tax regimes). On the one hand, measures in domestic law can be better tailored and targeted to a country's specific circumstances, thereby reducing redundancy and crowding out effects; also, these measures can be designed to be more transparent and easier to monitor, with an increasing number of countries regularly publishing tax expenditures and subject to peer reviews. On the other hand, such domestic tax incentives create economic distortions and risk promoting a "race to the bottom". In addition, many developing countries have been adversely affected by the adoption of ineffective and inefficient tax incentives (2015 PCT toolkit), as well as the inclusion of special tax regimes in concession agreements, in particular where the tax provisions of such agreements have stability clauses or have been made subject to binding investor-state dispute resolution mechanisms".

CIAT Comment

It could be mentioned that unilateral clauses to avoid double taxation may give less certainty to investors than a tax treaty. Proliferation of tax incentives granted to affected businesses will be a key topic in the 'post-COVID' scenario.

- **Page 11, B.1**

"In light of the above factors, a sensible starting position for the development of the tax treaty policy framework would be for a country to carefully consider all the provisions of the UN Model and the OECD Model (including the alternative provisions contained in its Commentary) and the interaction of those provisions with their own domestic and international tax policy, with a particular focus on defining a policy position on each of the following (with an inclination to protect source country taxing rights):

– Withholding tax rates for dividends, interest, royalties, technical service fees, and capital gains; – A MAP-based tiebreaker for dual resident entities;

– A definition of permanent establishment ("PE"), which may include a services PE;

– A technical services fee article following Article 12A of the UN Model;

– A definition of royalties including payments for the use of industrial, commercial or scientific equipment;

– The right to comprehensively tax indirect transfers of immovable property; and

– A principal purpose test ("PPT"), with the consideration of the use of a limitation-on-benefits ("LOB") provision; and

– All the other BEPS tax treaty-related measures."

CIAT Suggestion:

Add to this list of bullet points with the following topics:

IV. The need to clarify the opacity or transparency of partnerships and similar entities under domestic law (see the UN Model commentary on Article 4, Paragraph 8.8)
V. The need to clarify the country's stance on entities that are considered 'comprehensively liable to tax' even if the tax is not actually imposed (see the UN Model commentary on Article 4, Paragraph 8.6-8.7)

- **Page 12, B.2**

"For an example of a regional treaty model, find the ATAF model"

CIAT Comment

Suggestion to also include a reference to CIAT's Model Tax Treaty.

- **Page 12, C.1. and C.4**

Relating to the authority to negotiate and the suggestion to consult the private sector.

CIAT Comment

In some developing countries, where there is no experience in tax treaties but there is a need to negotiate a tax treaty, private advisors are contracted to be part of the negotiation team. It would be useful to provide recommendations on the characteristics to be considered at the moment of selecting professionals, specifically how to sustain objectivity, neutrality, confidentiality, etc. when designing treaty provisions.

- **Page 13. C.2.**

CIAT Comment

Consider touching upon the aspects that come up in the negotiation process between an experienced country and a non-experienced country. Perhaps administrative cooperation could be arranged.

- **Page 13, C.4**

“Consultations with business could be useful to address problems they have met or are anticipating when engaging in cross-border activities. Consultations with relevant ministries and agencies could be useful to provide the team with important information on economic sectors or issues (including noneconomic) that should be taken into account during the negotiations.

When preparing for negotiations with another country it is prudent to consult with business and relevant ministries and agencies and the embassy in the other country.”

CIAT Comment

Include in this section the importance of consulting with the tax administration as the treaty provisions being negotiated will have a direct effect on various aspects of the tax administration. Consider whether the provisions that you are agreeing to will create difficulties for the tax administration.

Similarly, the country needs to be aware of the diplomatic relations between the country they are negotiating with and their other treaty partners. Signing a treaty could have unintended political implications outside of the tax arena.

Also, see CIAT comment number 10.

- **Page 14, C.6**

“Find other sources of information on countries’ treaty network”

CIAT Comment

Another source of information is the Tax Treaty database found in CIATData;

https://www.ciat.org/treaties/?lang=en

- **Page 16, C.10**

"Another part of the comparison between the two countries' draft texts involves the identification of provisions proposed by a country that deviate from provisions agreed to by that country in treaties with third countries, with a particular focus on more current treaties concluded with comparable third countries. The negotiating team should be aware of and ready to explain provisions that its country has accepted in negotiations with third parties."

CIAT Comment

Related to CIAT comment 3: it could be worthwhile to put a further emphasis on the analysis of recent tax treaties signed by the other country, as well as the provisions given to treaties signed with countries that have a similar profile as yours (for example; your neighbours, countries with a similar tax system, etc.).

- **Page 17, D.2**

"Whatever approach is adopted, a negotiator must remember that his/her style should be adapted to the goal of the negotiations, which is to achieve a mutually beneficial treaty."

CIAT Comment

Perhaps mention could be made to the adaptations necessary when the negotiations are unilaterally motivated, or when one side has more strength or influence over the other. Perhaps reference could be made to materials that cover the negotiation style needed for such situations.

- **Page 18, D.5**

"If a provision relates specifically to one of the countries or is merely a clarification of the meaning of a provision, it is sometimes better to include that provision in a protocol rather than trying to include it in the treaty itself."

CIAT Comment

Here, a mention should be made to the need for reflecting important domestic law provisions in the treaty. If a country decided to change their domestic law, and a provision in the treaty (or the protocol) relates to this issue, then it could lead to a treaty override. Negotiators should keep in mind that features of domestic law will change over time.

- **Page 19, D.7**

"Countries are encouraged to follow the practice of producing "Agreed Minutes" to acknowledge that the meeting took place and to record the main outcomes, outstanding issues, agreed interpretations, next steps, etc.

After agreement has been reached on all the provisions of the working draft, which may happen at the end of the first or a subsequent round of negotiation, it is usual for the head of each delegation to initial each page the draft treaty. This simply means that the draft reflects the results of the negotiations."

CIAT Comment

It could prove useful to mention that these 'agreed minutes' and other supporting documents such as the model used to negotiate and the Memorandum of Understanding, will be considered as part of the supplementary material which makes up the context in the case of disagreement that may lead to the application of the Vienna Convention on the Law of Treaties.

Furthermore, if the countries so wish, there could be an explicit mention as to whether the commentaries of the model that was used in the negotiations (whether the OECD or UN models) shall be considered in the case of disagreement on the interpretation of a provision.

- **Page 20, E.2.**

Relating to the translation and official texts.

CIAT Comment

Suggestion to include the relevance of this issue in an arbitrage process. The negotiators should define a language to use in the case of disputes.

- **Page 22, E.5**

"The date on which the provisions of a tax treaty start to have effect for the taxpayers and the tax administration of each country, which is the most important date as regards the practical application of the treaty, should not be confused with the date of signature or the date of entry into force of a tax treaty.

Following the entry into effect of its provisions, the treaty should become part of a regular exercise to track its effects in terms of investment and income flows. The process should allow for a regular assessment of whether the expected benefits were achieved, the costs associated with its adoption, and to help refine and inform the economic analysis of decisions to negotiate/renegotiate treaties."

CIAT Comment

Mention that it could be agreed for a treaty to have retroactive effects if convenient for both countries.

- **Other comment not related to a specific section of the document.**

CIAT Comment

We suggest including an additional section 'E.6' in which a brief mention is made of the following topics:

VI. the ability/procedures for calling the other country into renegotiations if necessary,
VII. the ability/procedure for soliciting a protocol,
VIII. the procedure to be followed if a country wishes to end the effects of the treaty.

- **Other comment not related to a specific section of the document.**

CIAT Comment

We suggest including an additional section in which a discussion of the following topics is presented:

IX. Present a brief discussion relating to prevailing laws and the potential for a country to override the treaty due to aspects of their domestic law. In the case of inconsistency between the treaty provision and the income tax law of the country, it is important to see which will prevail.

A. For example; in some countries, the most recent law prevails meaning that any law adopted after the treaty is signed, will effectively override the treaty.

B. Must look at specific provisions of the other country's domestic law such as the treatment given to continental shelf, international waters, pension funds, etc.

X. In relation to the abovementioned point, we suggest to briefly mention the possibility to include in the treaty resourcing rule which says the income covered under the treaty will be subject to the treaty source rules and not the domestic laws.

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International Center for Tax and Development (ICTD)

Comments on the PCT toolkit on tax treaty negotiation

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1. Thank you for the opportunity to comment on the draft PCT toolkit on tax treaty negotiation. We write as researchers who study the negotiation of tax treaties and their impact on lower-income countries. Our comments are based on interviews conducted over the past decade with treaty negotiators and other tax policy officials, as well as our own analysis of lower-income countries' tax treaties.

2. In our view, the toolkit makes a unique contribution, in two senses. First, it is admirably concise and accessible. This is valuable in resource-constrained contexts, as well as for actors across government who are not treaty specialists. The toolkit therefore complements more detailed guidance, such as is found for example in the UN negotiation manual. Second, it adopts a more balanced view of the costs and benefits of tax treaties than many publications from international organisations. This should encourage lower-income countries to conduct a thorough interrogation of existing (and potential) tax treaties that does not presuppose that they should be signed (or kept in force) at all. Such an evaluation provides a stronger basis for (re)negotiations, where lower-income countries might otherwise be at a disadvantage because negotiators feel they cannot walk away empty-handed.

3. We have divided our comments in response to question 1 into four major concerns and several minor points. Some suggested resources in response to question 2 follow.

Major comments

A. References to Model Treaties

4. Throughout the toolkit, the UN and OECD models are mentioned in the same breath, but this is inappropriate. The UN model is designed for negotiations between developed and developing countries. It should be borne in mind that the UN model has been formulated by the UN Tax Committee, which consists of a balanced membership of developed and developing country experts. Hence, even the UN model is a compromise between the perspectives of capital-exporting and capital-importing countries. It should not be regarded as the optimal result for developing countries, but a possible balanced outcome following negotiations. Developing countries should be advised to formulate their own models, tailored to their own tax systems and their economic policy priorities.

5. Indeed, the toolkit makes no mention of regional models such as those of the ATAF, EAC or ASEAN. Unlike either the OECD or UN models, these are formally endorsed by groups of developing countries, and may be a more appropriate starting point for them. For example, at C7: "If applicable, it is advisable to be aware of each country's reservations and positions on the OECD Model." Depending on the country, it may be more pertinent to check its reservations on regional models, where they allowed, as they are for example in the ATAF and SADC models.

6. The OECD model was formulated between countries that were simultaneously capital-exporting and capital-importing, and designed to restrict source taxation in order to stimulate international investment. It is therefore not appropriate to the context of negotiations by developing countries, most of which are in an overwhelmingly capital-importing position. Indeed, its defects even for developed countries have become increasingly evident, leading to the extensive efforts to revise the model in recent years. These efforts are still continuing, and the toolkit should include a discussion of whether developing countries might be better advised to suspend negotiation of new treaties until the outcome of the continuing negotiations and debates can be seen more clearly.

7. The following statement at B1, for example, is inappropriate: "decisions to depart from specific policy choices endorsed in the UN or the OECD Models should be, if possible, exceptional and always carefully reasoned." Domestic law, existing treaty practice and regional organisations' models seem much more pertinent than these models, neither of which are endorsed by developing countries, and especially the OECD model.

B. Parliamentary and Public Involvement

8. The toolkit states, we think misleadingly, that "In almost all countries, the signed treaty has to be approved by the parliament or legislative assembly before it can be considered that the state has given its consent to be bound by the treaty." Parliamentary approval in most countries, especially developing countries, is usually purely formal. If there are any prior consultations, these are generally held in private with interested parties from the business sector. Normally, the decision to ratify is taken by the executive branch of government, and the treaty only has to be laid before parliament. Even where parliamentary scrutiny exists, it is often ineffective, for two main reasons. First, because it occurs at the level of individual treaties that have already been signed, rather than at earlier stages where some scrutiny by the legislature can have a more meaningful impact. Second, treaties are technical documents, and it is rare for legislatures to be provided with any adequate explanation or impact assessment of a treaty.

9. The Toolkit should explain that tax treaties generally take direct effect as law, and create legally enforceable rights for non-residents, overriding other provisions of domestic tax law. It should therefore stress the need for adequate and informed public and parliamentary debate before entering into tax treaties, in view of their important impact on taxation and on public revenues. Countries should have a public treaty policy statement, which is debated in parliament and consulted on not only with business but also civil society. Comments on specific treaties should ideally be invited between agreement on a text at official level and the decision on signature, when changes are still possible. They should be presented to parliament together with a full explanation of their provisions, and the reasoning behind them, as well as an appropriate impact assessment.

C. Revenue Authority Involvement

10. The toolkit emphasises the need to adopt a whole-of-government approach, but limits itself to mentioning the ministries of finance and foreign affairs. Many of the most problematic treaty negotiations that we are aware of resulted from the failure to involve the revenue authority either at the policy stage or even at the negotiation stage. The toolkit should emphasise much more strongly that expertise on treaty content often resides in the revenue authority, and further that revenue authority involvement can safeguard against the worst effects of politically motivated treaty negotiations. It is usually only revenue authorities that have direct experience and knowledge of the application of tax treaty provisions and the potential difficulties that they cause. We suggest that the toolkit should stress that revenue authority involvement in tax treaty negotiations at every stage is essential.

D. Existing Treaty Networks

11. The toolkit is written with no regard to countries' existing treaty networks. Yet countries need advice on how they should handle treaties that may have been poorly negotiated in the past, could be significantly outdated, and may even date from prior to the country's independence.
    There are two main impacts from these treaties: their direct revenue impact, and their impact on future negotiations through precedent. We consider that a whole section in its own right is needed on this topic, since it differs significantly from the advice given on fresh negotiations. For example, what should a country that does not have the capacity to renegotiate, as set out in the toolkit, do about its existing problematic treaties?

12. This is all the more important in view of the extensive changes that have been made to treaties in recent years, starting with the expansion of the provisions on administrative cooperation, and then the revisions to both the UN and OECD models, many of them resulting from the BEPS project.

Minor comments

13. A1. The opening statement is "Typically, tax treaties are negotiated with the objectives of encouraging cross-border trade, investment and the transfer of skills and technology" As mentioned in A2, the evidence for these effects is in fact mixed, so it would be appropriate to underline this upfront.

14. A2. "The proper negotiation and practical application of tax treaties may require substantial resources from a tax administration. That said, treaties' provisions on dispute resolution, exchange of information and assistance in collection will make it easier for tax administrations to apply their countries' laws to cross-border transactions." As this section discusses, all of these entail resource commitments, and so the language of "make it easier" is inappropriate. "Enhance their ability to" may be better.

15. A2. One impact not mentioned is that, depending on the provisions used, tax treaties may constrain countries' policy space by binding them into the application of certain norms and standards, notably the arm's length principle and OECD Transfer Pricing Guidelines.

16. B. This section considers prerequisites for negotiation in terms of a policy on treaty content. The toolkit should do the same in terms of process. For example, in the absence of adequate negotiating capacity, countries should be advised not to enter into negotiations.

17. B. This section should discuss the sequencing of negotiations. Countries beginning a (re)negotiation programme would be well advised to start with negotiations in which the stakes are lower. This can allow them to learn from experience and acquire useful precedents for subsequent negotiations. The temptation to begin with the most important treaty partners should be resisted.

18. B1. The list of provisions is one-size-fits-all. For example, for a minerals-rich country, different objectives may take priority. We suggest the list is removed, or at least points out the need for countries to develop their own list of priorities that may differ from this list as part of the policymaking process. It seems odd, for example, that a MAP-based tiebreaker appears high up the list, but assistance in the collection of taxes is not mentioned.

19. C. This section should recommend that countries prepare by gathering data on economic transactions with the negotiating partner, to inform negotiating priorities.

20. C4. Consultation beyond business – for example with civil society and academia – should be mentioned here.

21. D2. Negotiating style is also influenced by power dynamics created by mismatches of experience and expertise. Negotiators from lower-income countries should be ready for countries and individuals with long histories of negotiation and intimate knowledge of OECD and UN deliberations to emphasise this experience as part of their negotiating strategy.

22. D5. If MFN clauses are to be mentioned here, there should be some discussion of the dangers: we consider them inappropriate in most circumstances.

23. D5. The term "grandfathering" should be replaced with an alternative that does not have the same connotations. As the entry in Merriam Webster dictionary explains, this term originated as "a provision in several southern state constitutions designed to enfranchise poor whites and disenfranchise blacks by waiving high voting requirements for descendants of men voting before 1867."

Additional resources

24. ICTD's tax treaties dataset is already mentioned at A1, but the citation can be updated to the 2020 version available at http://treaties.tax, which contains over 2000 treaties and will soon move out of 'beta' phase.

25. Some relevant references are:

    a. [Section A] Brooks, K. & Krever, R. (2015). The Troubling Role of Tax Treaties. In Michielse, G.M.M. & Thuronyi, V. (eds.), Tax Design Issues Worldwide, Series on International Taxation, Volume 51 (Alphen aan den Rijn: Kluwer Law International), 159-178. Open access link

    b. [Section A] Hearson, M. & Kangave, J. (2016) *A Review of Uganda's Tax Treaties and Recommendations for Action.* ICTD Working Paper 50, Brighton, IDS. Open access link

    c. [Section A]. ActionAid (2016). *Mistreated: The tax treaties that are depriving the world's poorest countries of vital revenue.* Johannesburg. Open access link

    d. [Section B] Mutava, C. N. (2019) *Review of Tax Treaty Practices and Policy Framework in Africa*, ICTD Working Paper 102, Brighton, IDS. Open access link

e. [Section D] Hearson, M. (2017). The UK's tax treaties with developing countries during the 1970s. In: Harris, Peter and de Cogan, Dominic, (eds.) *Studies in the History of Tax Law*, volume 8. Hart Publishing, Oxford, UK. Open access link

INTERNATIONAL CHAMBER OF COMMERCE

International Chamber of Commerce (ICC)

Trade and Investment

Commission on Taxation

ICC Comments on the Platform for Collaboration on Tax Draft Toolkit on Tax Treaty Negotiations

The International Chamber of Commerce (ICC), as the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world, welcomes the opportunity to comment on the Platform for Collaboration on Tax (PCT) Draft Toolkit on Tax Treaty Negotiations (Toolkit) designed to help developing countries build capacity in tax treaty negotiations, and which serves as a joint effort to provide capacity-building support to developing countries on tax treaty negotiations, building on existing guidance, particularly from the UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries (the "UN Manual").

ICC advocates for a consistent global tax system, founded on the premise that stability, certainty and consistency in global tax principles are essential for business and will foster cross-border trade and investment.

GENERAL COMMENTS

ICC commends the work done by the PCT on the Toolkit which provides a comprehensive overview of the nature and negotiation process of tax treaties with useful references to existing work such us the UN Manual and the OECD/UN model tax conventions.

ICC believes that the PCT consultation is a useful opportunity for stakeholders to make the case for the existing benefits of tax treaties, including the business community as well as developing countries who would welcome and benefit from additional guidance and capacity building in this respect.

It is ICC's view that guidance from international organizations to developing countries on this topic has not previously received particular focus or attention, perhaps due to the wrong premise or understanding that treaty concessions provide unnecessary give-aways to business with no benefit to the country in terms of investment, employment levels, etc. However, greater clarity and certainty, as provided by this Toolkit, would not necessarily imply additional costs or burden and would benefit all interested parties. In fact, tax treaty provisions that may provide concessions on an amount of domestic tax could be outweighed by other benefits to the treaty country, including a greater investment base on which to impose tax.

ICC encourages the PCT to continue to pursue this work, with a view to producing practical and useful guidance for developing countries in order to better equip them to participate on an equal footing in tax treaty negotiations. To this end, capacity building is key; sufficient resources, adequate training and skilled teams are essential to achieve a broader international network of tax treaties which, particularly in the current troubled times, could be an additional incentive for the economic recovery of developing countries. ICC considers that this Toolkit is a great opportunity to promote the negotiation of tax treaties as a tool for both countries and taxpayers to achieve greater tax certainty.

As a general comment, ICC notes that the overall tone of the document appears to be inclined towards the drawbacks of tax treaties rather than potential positive implications. In light of this, ICC would recommend addressing these issues with a more balanced perspective.

A few examples are highlighted below:

- The discussion draft from Section C onward provides a helpful step-by-step guide, covering many of the practical aspects of treaty negotiation. The initial discussion in sections A (Why negotiate tax treaties?) and B (Tax treaty policy framework and country's model tax treaty), however, is presented in a way that focuses heavily on the potential downsides of ill-advised tax treaties, and only briefly mentions the potential beneficial effects of a strong tax treaty network. Without a more balanced approach, countries may have the impression that tax treaties are to be avoided unless absolutely necessary, rather than that treaties are an important part of maintaining a tax system in a way that can provide stability and tax certainty that can encourage cross-border trade and investment, while also helping prevent tax avoidance and evasion.

- In particular, the discussion on pages 6-11 of the discussion draft initially lists a variety of reasons (both tax- and non-tax related) that countries may enter into tax treaties. After this brief acknowledgment that there may be reasons to pursue tax treaty negotiation, however, the discussion that follows is focused almost exclusively on reasons why a country might wish to avoid a tax treaty. While it appears that some of the discussion on page 8 is intended to present a more balanced view of the issues to be assessed in deciding whether to negotiate a treaty, it appears to gloss over the positive impact that a treaty can have in addressing double taxation and promoting tax certainty, and the role that those features can play in attracting meaningful investment.

- The Toolkit points out that countries have entered into tax treaties in furtherance of non-tax objectives and appears to take for granted that this would always be inappropriate. The text in section A.1 in particular implies strongly that tax policy priorities should be given precedence over other national interests, without explaining why that would be the case. It is not clear, however, why tax treaties should never be used in pursuit of other non-tax objectives, if a country chooses to do so. While it is true that a country should carefully consider the tax policy implications of tax treaties when evaluating whether a tax treaty will be in their overall national interest, expecting countries to focus solely on those tax policy implications appears unrealistic. It also ignores the fact that in many countries, tax policy is used as a vehicle for achieving non tax objectives. It is ICC's view that it would be relevant instead to accurately evaluate the tax policy and broader economic implications of tax treaties so that the country is able to correctly evaluate the treaty in its overall domestic policy context.

- It is also concerning that the draft mentions on page 6 the addition of anti-treaty shopping rules in the OECD and UN Models as a reason to be wary of entering into tax treaties. Presenting the existence of anti-treaty shopping rules as evidence that treaties are risky appears to be backwards. These provisions, which were arrived at through an inclusive negotiation process under the BEPS project (in which developing countries also took part), were developed to minimize treaty-shopping risks and address other treaty provisions that had raised concerns among developed and developing countries alike. ICC holds that it would be more appropriate to provide information about how concerned countries can adopt anti-treaty shopping rules in their treaty policy in order to ensure that treaty benefits go to the intended persons, rather than focusing solely on the underlying risk of treaty abuse. In other words, it is possible to realise the benefits of treaties while mitigating risk of abuse.

v Similarly, the Toolkit mentions on page 7 the fact that treaties may be difficult to modify, replace, or terminate, which may limit flexibility to change domestic law. While the document notes briefly that there is potential value to such stability in attracting foreign investment, it goes into a much more lengthy discussion in the following pages of alternatives to tax treaties, so in effect the overall thrust is that tax treaties are something to be regarded with apprehension.

vi Finally, as indicated above, many developing countries would like to be competitive in the treaty space but lack the experience and resources to get there. In this context, ICC supports the idea of creating a support/learning structure for developing countries to feel more comfortable with gaining experience in treaties. For example, the equivalent of a "tax inspectors without borders" function for treaty negotiation or providing a framework for expert advice and mediation in the dispute resolution function (a major benefit of treaties), would be useful options to consider.

SPECIFIC COMMENTS

Some additional comments regarding specific sections are provided below:

- Page 8, footnote 3 and accompanying text: in the case of dividends, it could be added that the residence State may grant a participation exemption in order to alleviate multiple layers of corporate taxation: this is not the equivalent of an exemption and should not be grounds for refusing to reduce source State taxation.

- Page 10: in addition to preventing double taxation, the source State may wish to prevent disincentives to foreign investment caused by high statutory withholding rates, which can approach or exceed a taxpayer's total profit from engaging in transactions with source State payors. Also, a treaty may provide a way to trade a reduced withholding tax rate in the source State for better double taxation relief in the residence State.

- Page 14: preparation should include a thorough review of the other country's treaties (particularly its recent ones and its ones with countries whose policies are likely to resemble those of the source State) to see to what extent they have agreed to the source State's preferred provisions. [This is referenced on page 16 in the section related to preparing a comparison of the respective models.]

- Page 18: in the course of discussions, countries should be willing to indicate whether their interpretation or application of a provision that aligns with the OECD or UN Model differs in any respect from the relevant OECD or UN Commentary on that provision.

- Page 18: negotiators should consider whether to develop a Memorandum of Understanding or Exchange of Notes to address particular issues of interpretation or application of individual treaty provisions, particularly if the agreed provisions differ from prior established practice and/or from the OECD or UN Model.

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In conclusion, it is ICC's view that the Toolkit could be improved by taking a more balanced approach, as the enhancement and promotion of this process and its outcome is viewed as a win-win for all stakeholders.

About The International Chamber of Commerce (ICC)

The International Chamber of Commerce (ICC) is the world's largest business organization representing more than 45 million companies in over 100 countries. ICC's core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world's leading companies, SMEs, business associations and local chambers of commerce.

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International Tax and Investment Center

To: Platform for Collaboration on Tax

From: International Tax and Investment Center (ITIC) Oil and Gas Taxation and Regulatory Dialogue

Re: Request for Comments – Discussion Draft: Toolkit on Tax Treaty Negotiations

The Oil and Gas Taxation and Regulatory Dialogue of the International Tax and Investment Center (ITIC) is pleased to submit the following comments on the Platform for Collaboration on Tax - Discussion Draft: Toolkit on Tax Treaty Negotiations (hereafter "Discussion Draft").

We appreciate the opportunity to provide our views and look forward to working on elements of future Platform endeavours.

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General Comments:

This Toolkit presents a quite balanced and informative approach in providing high level guidance and access to further resources to enable developing countries to make informed decisions on pursuing bilateral tax treaties. It necessarily relies heavily on the UN Manual governing this subject, which we firmly support as a resource.

As many developing countries have extractives-based economies, we further suggest reference to the relevant aspects of the United Nations Handbook on Selected Issues for Taxation of The Extractive Industries by Developing Countries contained in "Chapter 2: Tax Treaty Issues." Of particular note, it should be emphasized that that tax treaties work in conjunction with domestic law; i.e., a tax treaty does not provide benefits or levies on transactions that domestic law otherwise does not provide or tax.

Specific Line by Line Comments:

- 8 (A.2. Consideration of potential costs and benefits: Guidance and Recommendations, 3rd par.) – The examples of "[b]ehavioural effects of a tax treaty" are limited to those aimed at a "reduction in tax evasion"; i.e., "allowing exchange of tax information and the assistance in recovery of taxes. . . ." As this section also includes "a potential increase in foreign investment" in these behavioural effects, we recommend inclusion of example treaty provisions supporting this outcome as well, including, but not limited to, the following: (1) non-discrimination provisions, (2) elimination of double taxation, (3) limitation of excessive withholding taxes, (4) codification of dispute resolution processes (*e.g.* mutual agreement processes), and (5) greater certainty of tax treatment of operations and transactions (*e.g.* what constitutes a taxable presence, taxation of employment, etc.).

P. 9 (A.3. Consideration of whether there are alternative ways to achieve the same policy objectives: Context and Essential Explanations, 2nd par.) – The paragraph should state that the specification of "tax issues for shipping or airline enterprises" is by way of example. Given that readers of this document may in many cases be unfamiliar with unique tax provisions, this may mislead them to conclude that these are the only sectors for which specific provisions are appropriate.

P. 10 (Same Section A.3., last par.) – In the discussion of "an alternative to treaties" aimed at "attract[ing] foreign direct investment," we suggest including some specific examples of "investment/cost-based incentives . . . ." Examples of these would include performance-based incentives which are linked to capital injection and investment expansion; e.g., investment allowances (such as Norwegian Special Tax), credits and accelerated depreciation.

P. 10 (Same Section A.3, same par., last sentence) – The identification of "stability clauses" and "binding investor-state dispute resolution mechanisms" as examples of "special tax regimes" by which "developing countries have been adversely affected" is inappropriate and misleading, as these types of provisions may have a beneficial impact through encouraging foreign direct investments. This is especially true for developing countries with extractives-based economies that are competing for limited investment capital by providing investors some certainty that the tax regime in place at the time the decision was made to invest continues throughout the project. This certainty is especially important in the extractives industry where the upfront investment is large, there is a long development period before any revenue is anticipated, and the investment is immovable.

The OECD itself has said that some preferential tax regimes that may be considered harmful in other instances may be appropriate for resource/manufacturing activities since these activities are non-geographically mobile and present an inherently lower risk of BEPS activity. Some specific country examples include: (1) Azerbaijan – ACG PSC – Tax Stability clause was key in developing resources in a frontier jurisdiction, (2) Indonesia – Tax stability has been helpful – Oil companies still paying at higher rates even though corporate rates have gone down, and (3) Malaysia – higher rate applies (except where incentives are given).

Section A.3, General Comment - Instead of having a multitude of "alternative instruments" substituting a tax treaty, it might be appropriate to include a relevant segment/section in a "generic" or "boiler plate" treaty that provides recourse to facets such as s the benefit of exchange of information or assistance in collection of taxes provisions etc. Such an approach would also be in alignment with the holistic objectives of the OECD in ushering in an MLI regime that would replace a raft of treaties already in existence. The objective should be minimizing documentation, thereby alleviating the compliance burden on both the taxpayer and the tax administration.

P.10 (B.1. Designing a tax treaty policy framework: Context and Essential Explanations) - In addition to a MAP based dispute resolution mechanisms involving competent authorities, it may also be worthwhile contemplating an introduction of an arbitration mechanism on the lines of the UNCITRAL Arbitration Rules Model ~~(UNCITRAL Arb. Rules).~~ Since the OECD is also exhorting both the taxpayers and tax administrations to take recourse to the principles of arbitration and mediation instead of resorting to legal wrangling, which might turn out to be a protracted and expensive exercise both in terms of time and costs, it might be desirable to introduce the arbitration approach into the tax treaties.

P. 11 (B.1. Designing a tax treaty policy framework: Guidance and Recommendations) - In developing a tax policy framework, the country should analyze its specific relationship with each counterparty rather than utilizing a ‘one size fits all’ for each counter party. For example a country should try to evaluate its economy’s current needs compared to the needs of each tax treaty partner prior to the negotiation process; e.g., is the relationship one of capital export or capital import and what tax policy priorities flow out of that difference?

P. 11 (Same Section B.1.) - The “development of a tax treaty policy framework” includes (under the aspects on which a country should “focus on defining a policy position”) the “right to comprehensively tax indirect transfers of immovable property . . . .” (Reference is also included thereafter to the recently launched 2020 Toolkit on “Taxation of Offshore Indirect Transfers.”) A criticism we have maintained throughout the drafting of this OIT Toolkit and reaffirm here is that this approach omits the option of *not* taxing such indirect transfers. (This approach is inapposite to that presented in the United Nations Handbook on Selected Issues for Taxation of The Extractive Industries by Developing Countries, contained in “Chapter 4: Indirect Transfer of Assets.”)

The omission of this option of not taxing these transfers could be detrimental to developing countries seeking to design a tax regime (including appropriate tax treaty provisions) who seek to encourage foreign direct investment, especially in the extractives sector where competition for investment capital is keen, up front investments are quite substantial, risks are significant, and timelines to economic returns lengthy. The uncertainties in future project economics inherent in implementing a tax on these transfers may enhance the economic risk such that investment proves unattractive. The potential impact of taxing these transfers on M&A outside of the jurisdictions and on internal restructurings is also worth noting. Companies may be reluctant to make significant investments in a country (*e.g.* India) if they face the prospect of taxation.

Consequently, we believe that the option of not taxing OIT's should be included here. By way of example, among countries with advanced tax regimes, the United States (under FIRPTA) does not reach foreign indirect sales of U.S. property held by a foreign corporation. Likewise, Norway effectively takes this approach with respect to oil and gas assets, demonstrating that it is not unreasonable for a country to decide not to tax OIT's (or even some direct transfers).

that the option of not taxing these may be best under its unique circumstances. Although realizing an acceleration of tax from an OIT might appear beneficial to a country, it would not be unreasonable for the country to recognize that the long-term consequences outweigh the short-term benefit. Therefore, the toolkit should note that a country might appropriately determine

P. 13 (C.4. Consulting business and relevant ministries and agencies: Context and Essential Explanations) – At the end of the first sentence, consider adding, "e.g., industry groups which represent primary economic activities within the country." This may provide some guidance in pursuing these consultations, as well as an avenue for these countries to consider where concerns of an appearance of undue influence by specific industry members may arise. Also please consider including consultations (where practicable) with other countries with similar economic bases that may already have established treaty networks.

P. 14 (C.5. Preparing the draft model used for a particular negotiation: Context and Essential Explanations) – Again, consider inserting "industry groups" after "business" for the reasons noted immediately above.

P. 16 (C.11. Studying the economy, culture and customs of the other country: Guidance and Recommendations) – It would be very useful to have an appreciation for the other country's history of frequency of tax legislative changes as well as its experience in successfully entering tax treaties with other countries. These elements would provide some indicia of the likelihood of coming to an agreement on treaty provisions as well as the anticipated timeframe for approval of the treaty within that country.

P. 18 (D.5. Discussions: Guidance and Recommendations) – After the first sentence, consider including, "[i]f the ramifications of a particular clause aimed at specific types of business are unclear, it may be useful to consult with relevant business/industry groups if and when feasible to do so."

P. 19 (D.7. Keeping an accurate record of what has been agreed to: Guidance and Recommendations) – It may be worth noting that the tax terminology may be subject to differing interpretations within each country. Therefore, key concepts should be understood and their meanings agreed in order to forestall subsequent disputes concerning these.

Submitted by Daniel A. Witt and Ronald J. Long; International Tax and Investment Center; USA; +1 202 530 9799; dwitt@iticnet.org; rjlong12@gmail.com

Nick Alexander Mora España

Translation of Comments by Nick Alexander Mora España

(1) Comments from Nick Mora Estana

PCT Secretariat:

My comments specifically refer to section A.1, Purposes of tax treaties.

Congratulations on the efforts made; a paradigm shift is occurring in the tax system. The new normal economic environment could heighten the need for more robust taxation; however, overall progressivity, in my opinion, should be addressed.

Multilateral treaties certainly protect the taxation of countries that are in agreement, but my concern is centered on progressivity: the need to reach agreements with countries that defend their own interests in the protection of foreign direct investment, and even more so today, given the 40 percent worldwide downturn. Indirect taxation in most cases represents a country's main source of revenue and is not consistent with the stated numbers.

In view of the above, certain questions rather than comments arise:

How do you deal with economies that encourage low-tax foreign direct investment in cases where their GDP depends on such protection?

Are there measures or actions that address progressivity for companies or individuals regarding income protected by these countries, even in some cases without justification (money laundering)?

Pardon my ignorance, but if repatriating such money to countries improves their quality of life through efficient governance, where is the money and to whom does it really belong?

Fair distribution and overall progressivity will lead to better conditions and quality of life.

My comments refer to the actions needed to exert legitimate pressure on those countries that have accumulated secret capital without legal justification and without fairly taxing its repatriation in the cases where it applies.

Best regards.

Nigeria

Nigeria's Comments on the Discussion Draft of the PCT Toolkit on Tax Treaty Negotiations

General Comment:

Nigeria commends the Secretariat of the Platform for Collaboration on Tax (PCT) for the Draft Document and the efforts being made to both develop and strengthen capacity in developing countries on tax treaty negotiations.

Nigeria is satisfied with the relevant technical and practical considerations provided in parts A to E.

However, Nigeria suggests that further work should be done to incorporate an overview of all the Articles of the Model Tax Conventions (the UN and OECD Models), how they relate and inter-relate, where they vary, what negotiators should watch-out for, and references to materials that can shed more light on the technicalities that are to be faced during negotiations.

PWC

Platform for Collaboration on Tax

By email to: taxcollaborationplatform@worldbank.org

24 September 2020

PwC's comments on the Draft Toolkit on Tax Treaty Negotiations

PricewaterhouseCoopers International Limited, on behalf of the Network Member Firms of PwC (PwC), thanks the Platform for Collaboration on Tax (PCT) for the opportunity to provide comments on the *Draft Toolkit on Tax Treaty Negotiations* in accordance with the revised deadline of 24 September.

We appreciate the initiative and efforts from the PCT in developing this practical toolkit aimed at providing capacity-building support to developing countries on tax treaty negotiation.

We limit our response to a few high-level issues based on our experience as an adviser to businesses, individuals and other taxpayers as well as a regular contributor to tax policy proposals and wider discussions. We have, in particular, drawn on the expertise of a number of former tax treaty negotiators, competent authorities and tax treaty team members, including those listed as contacts below.

The benefit of treaties

1. As a basic reminder, we reiterate that the broad objective of tax treaties is to enhance the development of economic relations between countries.
2. Negotiating a treaty has potentially broad implications and the practical impact of treaty provisions on taxpayers and tax administrations is critical.
3. Well-drafted treaties conforming to internationally accepted norms will help provide certainty and will promote trade and investment. Both the UN and OECD Model Commentaries note that withholding taxes levied in the State of source that exceed the amount of tax normally levied on profits in the State of residence may inherently have a

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detrimental effect on that promotion. The clear identification of the comprehensive nature of taxes covered, in concept (and by name in the case of current taxes), and broad access for different types of taxpayers resident in the respective jurisdictions are key components of this certainty and incentive. Anti-abuse measures are important and should be carefully crafted but need to be clear in principle and application.

Comprehensive tools, guidance, blueprints, etc

4. Gathering guidance, practical tools, blueprints, etc in one place in a regularly updated toolkit should benefit the parties seeking to use them and provide a tracking system for changing parameters.
5. The wider-ranging references to UN resources could helpfully be supplemented by more OECD links than are included in this draft. We applaud the attempts to include other links including some that appear aspirational, insofar as an appropriate list or template may not yet have been identified or could perhaps be generated from scratch.
6. Guidance would be helpful in how to deal with circumstances where existing UN and OECD Model articles or Commentary differ, particularly where the article is the same but the Commentary differs, with a view to rendering interpretative guidance where tax treaties are based on both Models but fail to identify which Commentary controls.

Capacity recognition and building

7. In deciding whether to enter into a treaty, a country should take into account its capacity to administer the treaty, both in terms of people and the legal/ administrative framework. A general understanding of tax treaties should be a necessary requirement of tax administration personnel alongside knowledge of the domestic tax system.
8. A country should be prepared to establish a methodology for continual consultation and cooperation with treaty partners, critical to the effectiveness of the treaty as a policy tool for economic development.
9. The draft mentions various resources within the international organisations for building capacity. However, there are others from the academic world that might also be considered.

Records of understanding

10. We encourage negotiators to keep thorough records of discussions that have led to the terms of a treaty. These will be fresh in their minds at the time of negotiation, may aid the formalities of approval and provide vital interpretational guidance on the treaty’s later application. This would be particularly important where the treaty derogates from the UN or OECD Model treaty.
11. The treaty parties might consider agreeing, and possibly publishing, contemporaneous notes and comments. Some examples of different types of understanding include the memorandum of understanding on the US-UK tax treaty and the technical explanation of the US-Canada tax treaty.

Dispute resolution

12. With sufficient capacity for dealing with disputes and the potential benefit of an extensive set of contemporaneous notes in resolving disputes (or preventing disputes from arising), countries should be prepared to see if they can resolve disputes unilaterally.
13. Where necessary, resolution of disputes under MAP and access to MAP is increasingly being improved following the BEPS recommendations and the MLI. Clarity between the parties to a new (or amended) treaty as to MAP, alternative mediation and binding arbitration in the event of dispute should be reflected in domestic legislation and guidance.

Interaction with trade and investment treaties

14. In many instances, countries conclude tax treaties and are party to trade and/or investment treaties. It is important that the interaction between the various treaties is addressed so that it is clear which of the treaties covers taxation measures and dispute resolution in tax matters.

Next steps

We have kept our comments in this letter very brief, but would be very happy to elaborate further or address wider issues should you wish to discuss our views.

Yours faithfully,

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Rajat Bansal, UN Tax Committee (personal capacity)

Comments on discussion draft : PCT's Toolkit on Tax Treaty Negotiations

-Rajat Bansal, UN Tax Committee Member

First of all, I extend compliments to Platform for undertaking this work as a capacity building support to developing countries in tax treaty negotiations. As noted at the beginning of the draft Toolkit, its one purpose is to make available, in an easily accessible manner, at one place, dispersed sources, which may be already available. Doing this through a web based product is the right approach.

2. My comments are as follows.

2.1 Section A.1: Purposes of tax treaties:

2.1.1 Amongst others, tax certainty and stability are mentioned here. It may be useful to explicitly mention allocation of taxing rights (distributive rules) between the treaty partner countries as one of the purposes.

2.1.2 It is suggested to omit ' .. or where there are more important priorities for the negotiating team' in second sentence of second paragraph, since it dilutes the main reason stated there i.e. pressure to enter into negotiations without compelling tax policy reasons.

2.1.3 In the Bell marked box, third para has a sentence "Availability should be measured as the opportunity cost of using these resources to undertake other endeavours". This can be omitted.

2.2 Section A.2 Consideration of potential costs and benefits

2.2.1 It is suggested to omit the last sentence of second paragraph i.e. "These administrative measures and the resources that they require will add to the resources required for the negotiation and updating of a country's tax treaties." Resources would of course be needed for the MAP, EOI etc functions; however, this is generally never considered as a reason to not enter into a new treaty or modify a treaty. In my experience as a Competent Authority, I have never seen this practically as a consideration.

2.2.2 The last two sentences of fourth paragraph could be simplified. These are as follows for ready reference:

'' This theoretical impact has analytical value even without taking into account the behavioural effects of higher withholding tax rates. For other aspects of treaty costs, including indirect costs of base erosion and profit shifting linked to treaties, taxpayer information can be analysed (Balabushko et al. 2017) and often administrative experience can at a minimum provide anecdotal evidence of aggressive tax planning strategies (and associated costs) that take advantage of specific treaties, although such an analysis would not take account of the effect of new treaty rules designed to address treaty shopping and treaty abuse."

The Toolkit is for developing countries and it will help them to write in a direct and simple manner.

2.2.3 The last sentence in the third para of Bell reads "However, some forms of source taxation are difficult to administer and are often borne by the resident payer of the income rather than by its foreign recipient." This in my view is not needed. Even where withholding tax is passed on to resident payer, it affects the price of transaction and there is thus incentive for shifting income abroad through debt financing or royalty payments.

2.2.4 In last sentence of fourth paragraph of Bell, it is suggested to delete '..given the heightened risks.", since the risks could be much more for partner country rather than the country with unstable domestic tax regime.

2.3 Section A.3. Consideration of whether there are alternative ways to achieve the same policy objectives:

2.3.1 In first paragraph, third sentence reads "It should also be noted that TIEAs do not allow for assistance in the collection of taxes and that many countries have reserved the right not to have the assistance in collection provisions of the MAAC apply to them." Instead of 'do not', it may be changed to 'may not' since many TIEAs do have provision on assistance in collection of taxes. The last sentence i.e. "Also, neither TIEAs nor the MAAC allow tax administrations to consult each other to address cases of double taxation that are typically addressed through the mutual agreement procedure of tax treaties." may need to be deleted since question of MAP is relevant only when there is taxation not in accordance with the Convention or treaty. If there is no treaty, need for MAP itself is not there. In other words, there is no need for mutual agreement procedure for a TIEA or MAC.

2.4 Section B.1. Designing a tax treaty policy framework

2.4.1 Third para in the Bell suggests that "In light of the above factors, a sensible starting position for the development of the tax treaty policy framework would be for a country to carefully consider all the provisions of the UN Model and the OECD Model (including the alternative provisions contained in its Commentary) and the interaction of those provisions with their own domestic and international tax policy, with a particular focus on defining a policy position on each of the following (with an inclination to protect source country taxing rights):". It may be impracticable for a country specially a developing country to consider all provisions of both Models as well as the alternate provisions in the Commentaries to develop a tax treaty policy, even if the same may be desirable. This can be made less onerous by diluting the language.

2.4.2 In the list of items following the fourth para, last one is "All the other BEPS tax treaty-related measures." Are we referring to minimum standards only or the provisions picked up for MLI or all BEPS recommendations. It needs to be clarified. Also, it may not be practicable for a developing country to all the BEPS tax treaty related measures in 15 Action Reports for the purpose of its starting position to develop a tax treaty policy framework.

2.4.3 In the list at fifth paragraph in the Bell, need to reconsider two ie ''The objectives of entering into the tax treaty, with confirmation that alternative instruments have been considered'' and ''An estimation of the potential revenue effect of the treaty for the country''. Alternate instruments may cater to very specific situations, for instance limited tax agreements on air services/shipping or TIEAs for exchange of information. However, to say that before entering a comprehensive tax treaty, rule out that alternate instrument will not work is not the way it operates in reality. In practice, where the other country does not have a well developed tax system , alternate instruments are considered. On second issue, it may not be practicable to estimate potential revenue effect. Most countries do not do it before deciding to open negotiations. They may though assess the volume of transactions.

2.5 C.3. Defining the roles of each member of the team:

Structures of teams vary widely as I have seen as my long experience as a Competent Authority with very large number of countries. Instead of saying "The team should include a team leader (head of delegation) with authority to make important decisions, a technical adviser specialized in tax treaties and/or domestic tax legislation; and a note taker (for internal purposes) with enough experience to understand, select and summarize complex arguments or proposals.", better to say "A typical structure of negotiating team could be…".

2.6 **C.4. Consulting business and relevant ministries and agencies:**

List of relevant ministries typically consulted are, Ministry of Legal affairs or Law, Foreign Affairs, Shipping, Air Transport, Petroleum, Commerce, etc. These can be added explicitly.

2.7 **Section D.2. Negotiation style:**

This part can be omitted. There can be no guidance in PCT Toolkit on this. There is no need either. In any case, negotiation style is a personality trait, more than anything else.

2.8 **Section D.5. Discussions:**

In third paragraph, in bullet items, MFN may be excluded. It is something that creates lot of unintended consequences for developing countries and should never be mentioned as a provision to be agreed, even though 'different views on advantages and disadvantages ' are referred to. Grandfathering clauses are also highly unusual.

Raúl Bonilla Díaz

From: Raúl Bonilla Díaz <raul.bonilla.diaz@hotmail.com>
Sent: Monday, September 7, 2020 2:24 PM
To: Platform for Collaboration on Tax <taxcollaborationplatform@worldbank.org>
Subject: Re: 7 Days Left: Public Consultation on the Toolkit on Tax Treaty Negotiations Open Until September 10, 2020

Dear Colleagues,

I hope you are well.

Please see below my comments in english and spanish.

Does this draft toolkit effectively address all the relevant technical and practical considerations as well as skills necessary to build capacity for tax treaty negotiations in developing countries?

Yes it does, in my opinion the toolkit is really useful, however, i suggest to create a tax treaty case law database per country.

In order to avoid or reduce future conflicts or claims, it would be useful that before tax treaty negotiations begins, the countries should exchange tax treaty case law related to other treaties signed by each country or related to cross border transactions.

This information might be useful for the countries because in that way a negotiator might have a better understanding of the tax policy and the way that the tax administration interprets other tax treaties.

In addition to that, it would be useful that between the tax treaty negotiations ends and the tax treaty is in force the tax administration should create a team focus on for example conflicts or characterization. This team should contact permanently its counterpart in order to solve any conflict that might rise as a consequence of tax treaty interpretation.

Estoy de acuerdo con el producto; sin embargo, sería útil contar con un base de datos de casos vinculados con la aplicación de tratados de cada país o con el tratamiento de operaciones transfronterizas.

Esta información sería de mucha utilidad para los países porque de ese modo un negociador tendría un mejor entendimiento de la política fiscal y de los criterios de interpretación de tratados o normas vinculadas con rentas transfronterizas.

Además, también sería de utilidad obligar a que entre el período en que se culminan las negociaciones y aquél en que los tratados entran en vigor las administraciones tributarias se vean obligadas a contar un equipo especializado que resuelva por ejemplo los conflictos de caracterización o similares. Este equipo debería estar en contacto permanente con su contraparte a fin de resolver cualquier conflicto que surja producto de la aplicación de los tratados.

Are there particular resources or tools, especially beneficial for developing countries, not covered in this toolkit that should be considered?

Please see my comment above. I thing that a tax treaty case law database might give a better understanding of how the tax administrations and tax courts apply tax treaty. This tool might help to reduce the uncertaintainty that exists sometimes when rather the tax administration or a taxpayer want to apply a treaty specially when it is neccesary to apply the internal law.

Por favor, ver comentario en la parte superior. Pienso que tener una base de datos de cada país de los casos resueltos vinculados con tratados tributarios podría ayudar a reducir la incertidumbre que existe algunas veces al interpretar los tratados tributarios más aún cuando por interpretación es necesario acudir a la norma interna.

Espero mis comentarios sean de ayuda.

Gracias por invitarme a participar.

saludos,

Raúl Bonilla

Sanjeev Sharma, India (personal capacity)

Comments on the Platform for Collaboration on Tax: Tool Kit[6]

Section A.1 Purposes of tax treaties

It may be useful to add a note on the purpose of renegotiation of a tax treaty. An existing treaty may not be in sync with its current treaty policy and domestic tax law. For example, many developing countries have their old tax treaties based on the OECD Model and are not consistent with source taxation and may want to renegotiate these treaties.

Section A.3 Consideration of whether there are alternative ways to achieve the same policy objectives

A TIEA may be a better instrument with a country not levying a corporate or personal income tax, and there are no risks for double taxation. But such a country may not agree for a TIEA for various reasons, for example, it already has a vast network of tax treaties and is a vital trading country and may insist on a comprehensive tax treaty. In such a case, special care needs to be taken on distribution rules for different types of income so that provisions do not lead to a reduction in tax base and provide opportunities for non-taxation and treaty shopping.

Sections B.1 and B.2

A developing country may not have a single defined tax treaty policy and may not develop a standard model treaty strictly based on either the UN or the OECD Model. Its policy may be flexible to follow OECD model with another developing country (for example a treaty with another developing country may not contain a technical service fee article or royalty article may not provide for source country taxation). Such a policy may help reduce the compliance burden for taxpayers and administrative convenience for tax administration. The choice will also depend on the flow of the volume of trade, capital, and technology. It may follow the UN model for a treaty with a developed country to maintain source taxation.

C.10. Preparing a comparison of the respective models and D.5 Discussions

Other than issues on distribution rules, sometimes point of disagreement may arise on the definition of terms used in the model proposed by the other party. It might be a policy to include a specific definition of a term by a country based on its domestic law and which might be consistently used by that country in its tax treaties.

Such a definition may be unknown to a country and may not have used that definition in its treaties. A call may be required to be taken whether such a definition may have any interpretation issues before the courts, and this would require consultation with authorities dealing with legal aspects.

Anything proposed by another party which is not consistent with the tax treaty policy of the country or not dealt in the domestic law would require detailed scrutiny and study.

The reasons for accepting any agreement on any issue for example definition of terms proposed by other party and agreed (which is neither in its tax treaty policy nor in the standard model, and

[6] Sanjeev Sharma, India

not in domestic law) should be a part of its internal document explicitly stating that the other party proposed it. These internal notes would demonstrate that any deviation from its policy was insisted on the other party and should not be seen as a change in its policy. Such a note may be part of a technical explanation referred to in **Section E.4**.

Solomon Islands

From: Joseph Dokekana <jdokekana@mof.gov.sb>
Sent: Wednesday, September 9, 2020 9:26 PM
To: Ashima Neb <aneb@worldbank.org>
Cc: Michael O'Shannassy <MO'Shannassy@mof.gov.sb>
Subject: Public Consultation on the Toolkit on Tax Treaty Negotiations.

Dear Ashima,

Thanks for the drafted toolkit for entering Double Tax Agreement. It was really good especially how to go about entering the DTA. We think it should also be more helpful to provide information on how to get out of a DTA, which may be old and no longer served the purpose of both countries.

We may also need toolkit for tax information Exchange Agreements how to enter into them etc. with practical tips and knowledge on TEA negotiations, conduct and negotiation styles.

Apologise if the issues may have already addressed in the toolkit.

Many thanks

Joseph Dokekana
Commissioner of Tax – Solomon Islands

Switzerland

From: Urs.Duttweiler@sif.admin.ch <Urs.Duttweiler@sif.admin.ch>
Sent: Monday, September 7, 2020 4:12 AM
To: Platform for Collaboration on Tax <taxcollaborationplatform@worldbank.org>
Cc: Sophie.CHATEL@oecd.org; Nestor.VENEGAS@oecd.org; Pascal.Duss@sif.admin.ch
Subject: Swiss Comments on the Draft Toolkit Designed to Help Developing Countries Build Capacity in Tax Treaty Negotiations

Dear Colleagues

Thank you very much for the opportunity given to comment on the draft toolkit designed to help developing countries build capacity in tax treaty negotiations. We think the toolkit is helpful for treaty negotiators with little or no experience in treaty negotiation, specially part B and following. Please find below our specific comments.

Structuring of investments via investment hubs

Text in the draft toolkit: "In developing countries, investments are often structured via investment hubs that tend to have low tax rates" (see last paragraph on page 6)

Our comments: In our view, structuring of investments via investments hubs is a general business practice, not just one concerning investments in developing countries. Non-European MNE groups very often establish a regional holding company or a principal company in a European country for their investments in other European countries.

Our drafting suggestion: "~~In developing countries,~~ **I**nvestments are often structured via investment hubs. ~~that tend to have low tax rates~~"

"Treaty shopping" through conduit entities

Text in the draft toolkit: "Revenue losses from treaties with these low tax hubs can be substantial due to "treaty shopping" with foreign investors routing investments through a conduit entity in the hub, or domestic investors "round-tripping" their investments via the hub" (see last paragraph on page 6)

Our comments: This sentence gives the impression that "treaty shopping" is only possible if the conduit entity is located in a state with low (income) tax rates. This is wrong. In most states, intra-group dividends are not taxed and other income such as interest and royalty income does generally not generate taxable profit in the state of the conduit company as the interest and royalties may be passed on as tax deductible expenses. "Treaty shopping" through the use of conduit entities can therefore also happen through the establishment of conduit entities in high tax jurisdictions.

Our drafting suggestion: "Revenue losses from treaties ~~with these low tax hubs~~ can be substantial due to "treaty shopping" with foreign investors routing investments through a conduit entity in **a treaty jurisdiction**~~the hub~~, or domestic investors "round-tripping" their investments via **a conduit entity in a treaty jurisdiction** ~~the hub.~~"

"Treaty shopping" as a form of treaty abuse

Text in the draft toolkit: "These strategies are the reason for the recent addition of strong anti-treaty shopping rules in both the OECD and UN Models." (see last paragraph on page 6) […] "For other aspects of treaty costs, including indirect costs of base erosion and profit shifting linked to treaties, taxpayer information can be analysed (Balabushko et al. 2017) and often administrative experience can at a minimum provide anecdotal evidence of aggressive tax planning strategies (and associated costs) that take advantage of specific treaties, although such an analysis would not take account of the effect of new treaty rules designed to address treaty shopping and treaty abuse" (see second paragraph on page 8)

Our comments: The strong anti-treaty shopping rules added in the OECD and UN Models only apply in case of treaty abuse. In our view, it is important to note that "treaty shopping" is a form of treaty abuse and to make clear that not every situation where an investment entity is interposed is harmful per se.

Our drafting suggestion: "These strategies are the reason for the recent addition of strong anti-treaty shopping rules in both the OECD and UN Models **preventing the granting of treaty benefits in abusive situations**. […] For other aspects of treaty costs, including indirect costs of base erosion and profit shifting linked to treaties, taxpayer information can be analysed (Balabushko et al. 2017) and often administrative experience can at a minimum provide anecdotal evidence of aggressive tax planning strategies (and associated costs) that take advantage of specific treaties, although such an analysis would not take account of the effect of new treaty rules designed to address ~~treaty shopping and~~ treaty abuse.

Behavioural effects of a tax treaty

Text in the draft toolkit: "These include a potential increase of foreign investment and reduction of tax evasion resulting from treaty provisions allowing the exchange of tax information and the assistance of recovery of taxes." (see second last paragraph on page 8)

Our comments: In our view, if two countries conclude a double taxation treaty, it can be assumed that this will lead to an increase in foreign investment. On the other hand, it must be taken into account that only relatively few double taxation treaties actually contain a provision on assistance of recovery of taxes.

Our drafting suggestion: ""These include a**n** ~~potential~~ increase of foreign investment and reduction of tax evasion resulting from treaty provisions allowing the exchange of tax information and **possibly** the assistance of recovery of taxes."

We trust our comments prove helpful to you. Please, do not hesitate to contact us if you have any questions or remarks.

Best regards,

Urs

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Tatiana Falcão and Bob Michel

PLATFORM FOR COLLABORATION ON TAX (PCT) - TOOLKIT ON TAX TREATY NEGOTIATIONS

Comments on the draft Toolkit on Tax Treaty Negotiations

Contribution by Tatiana Falcão[i] and Bob Michel[ii]

This is an independent submission to the PCT. The views expressed are solely those of the authors and do not reflect the views of any technical groups or institutions they might be affiliated with.

This submission is comprised of two parts. The first part discusses the terminology currently being employed in the PCT Toolkit on Tax Treaty negotiation, and suggests alternative language to address the variable issues arising out of the different "profiles" of "developing countries." The second part suggests an extension in the scope of the PCT Toolkit, to encompass not just the negotiation of tax treaties, but also its application by national tax officials and tax courts, and eventual renegotiation or termination in light of the modernization of rules, or of external third party advise. This is because an essential feature of having enforceable tax treaties is being able to keep them "alive" and current following the latest developments in the application of international tax rules.

Part 1: Toolkit for tax treaty negotiations v toolkit for tax treaty management

The toolkit builds on the UN Manual for Tax Treaty Negotiation, which was first developed in 1978 and most recently revised in 2019. The general premise in 1978 - and which is also underpinning the Toolkit - is to provide 'developing countries' with tools to 'expand their bilateral tax treaty network'.

We believe this premise is outdated, in two ways. First of all, we believe that the term 'developing countries' cannot be used in contemporary tax treaty policy discussions without the need for additional nuance. The world has changed significantly since the first version of the UN Model was developed in 1980 as a model for tax treaties between developed and developing countries. The dichotomies of 'developed v. developing country', 'OECD economy v. non-OECD economy' or 'residence v source country' has largely been eroded. The debate regarding the digital economy sharply reveals that also OECD economies face source country issues. The reliance on the Inclusive Framework for BEPS reveals that international tax policy can no longer be driven forward without the engagement of non-OECD economies. But most importantly, different profiles of countries which arguably can no longer be catered for by a single fits-all solution are currently covered by the 'developing country terminology failing to distinguish between the different profiles of countries fitting within that description.

The term 'developing countries' is not defined in the UN Model (2017), nor in the UN Manual (2019). At the onset of the UN Model, this term was arguably understood to cover any non-OECD economy. We believe however that based on particular countries' position regarding tax treaties, the following profiles of countries can be distilled:

1. **Offshore Financial Centers (OFCs):**

    Definition: Countries that provide financial services to non-residents on a scale that is incommensurate with the size and the financing of its domestic economy (IMF, 2007)

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Examples: Hong Kong, Singapore, Mauritius, Uruguay (Netherlands, Luxembourg, Switzerland, Cyprus)

Tax treaty network status: Tax treaties play an important role in the business model of OFCs. An attractive tax treaty network can also serve as a catalyst for a jurisdiction to become an OFC in its own right (*cfr.* Mauritius). Many OCFs have extensive tax treaty networks and pursue dedicated tax treaty policies.

1. **BRIC(S) countries:**

Definition: Countries with extensive domestic markets and capabilities to supply manufactured goods, services and raw materials. This feature allows them the ability to exert extensive geopolitical influence, which is often ridden by domestic challenges regarding equality and poverty eradication. From a tax treaty perspective, these countries often take on policy decisions that are typical of a 'residence' State if negotiating with a less developed economy, or take the position of source state if negotiating with a more developed economy.

Examples: Brazil, Russia, India, China

Tax treaty network status: given the BRICs economic profile, these countries are highly sought after for international tax treaty negotiation, providing them with high bargaining power. As a consequence, these countries have relevant treaty networks and – like the United States – are able to craft 'give or take' tax treaty policies which do not necessarily have to comply with the existing tax treaty models on all aspects.

1. **Low and Middle Income Countries (LMIC)**

Definition: 'Middle-income range' countries (besides the BRICS), with lesser developed industrial base or industrial diversification, transitional economies.

Example: most South American countries and Middle-Eastern countries

Tax treaty network status: often tax treaties in force with the most important trading partners, countries in the same region, or former colonial powers; mature tax treaty network base on first generation tax treaties signed between the period of 1970-2000 which require updating, given the recent economic development.

1. **Least developed countries (LDC)**

Definition: countries with the lowest level of socioeconomic development, often poverty ridden, weak human resources and high economic vulnerability

Example: Angola, Burundi, Liberia, Mali, Bangladesh, Eritrea, Cambodia, Sri Lanka

Tax treaty status: Half of the 47 LDCs recognized by the UN currently have less than 3 tax treaties in force. Only 3 out of 47 LDCs (*i.e.* Bangladesh, Laos and Senegal) have more than 10 tax treaties in force. In other words: LDCs are blind spots in the global tax treaty network.

It should be noted that as of 2016, based on the suggestion by Khokhar and Serajuddin (2015), the World Bank has started to phase out the use of the term 'developing world' in World Bank data publications and databases because the developing versus developed world categorization has become less relevant. Instead, the World Bank has would started reporting data aggregations per region and income groups.

We believe the same should apply to international tax policy instruments like the Toolkit on Tax Treaty Negotiation which is said to represent a joint effort to provide capacity-building support to 'developing countries'. We assume that the term 'developing countries' is used in the Toolkit (and in the UN Manual and Model) to target 'Low and Middle Income Countries (LMIC)' and the 'Least Developed Countries' (LDCs). As indicated above, these two groups of countries have different needs with regard to tax treaty capacity building.

Generally speaking, the first group of countries, the LMICs, has a mature network of treaties but these treaties are often first generation treaties, meaning they have often been signed three or more decades ago, and do not always reflected the current needs and level of development of these countries. These countries require tools to modernize their existing tax treaty networks .

With regard to the second group of countries, the LDCs, little progress has been made since the release of the UN Manual (1979): after 4 decades, many LDCs have few to zero relevant tax treaties. Often, if these countries have tax treaties in place, these are signed not with OECD countries but with OFCs like Mauritius, Singapore, Macau or Seychelles, often serving as 'conduit OFCs'. To properly connect these countries to the international tax regime, more is needed than a mere restatement of the UN Manual. We believe the toolkit should provide novel tools to be employed by tax treaty negotiators, tailored to the needs of LDCs.

Part 2: A Toolkit on the Negotiation, Application and Termination of Tax treaties.

The Toolkit should reflect the simple fact that the basic premise on which the original UN Manual has been drafted, namely the premise of a tax treaty representing a single 'meeting of minds' between two states, has fundamentally been altered throughout the updates of the models in last decades. The application of a modern tax treaty is not unilateral and is not merely an exercise of revisioning the intentions of the drafters of the contract. The most recent version of the OECD and UN Models contain substantive language requiring extensive enhanced cooperation during the lifespan of a tax treaty between the tax authorities of the two contracting states. Notably, the UN and OECD Models require extensive competent authority engagement to: (i) settle company dual residence issues (art. 4(3)), (ii) exchange foreseeably relevant information (art. 26(1), and (iii) assist in the collection of taxes (art. 27), to name a few examples. None of these tax treaty related interactions between countries were foreseen when the Manual (1979) was drafted, nor was the steep rise of countries reliance on taxpayer MAPs and relevance of interpretative MAPs to diffuse tax treaty interpretation or application controversies. Countries currently hindered by a limited treaty network and inexperience negotiating new treaties should be made aware of the new level of commitment they will be required to rise to through the signing of a bilateral tax treaty. At the same time, the same countries should be made aware that through this commitment they can steer and control the application of a tax treaty in the way intended when the treaty was signed.

In general, the evolution of the models shows that the emphasis in the training and capacity building currently required has partly shifted from the creation of a tax treaty ('how to negotiate a suitable tax treaty'?) to the application of a tax treaty ('how to properly apply a tax treaty'). We believe the toolkit's section 'after the entry into force' should therefore be significantly expanded and elaborated on.

We therefore suggest for the Toolkit to be comprised of three parts, which reflect the natural life cycle of a tax treaty, namely: (i) Creation of a tax treaty; (ii) Application of a tax treaty; and (iii) Renegotiation or Termination of a Tax Treaty. Currently the Toolkit only comprises the first part. Furthermore, the Toolkit should be renamed '*Toolkit on Tax Treaty Management*':

The structure should be as follows:

1. *CREATION OF A TAX TREATY*
    i. Current toolkit restatement of the UN Manual (2019)
    ii. Additional tools for LDCs (*see* n. 1, below)
2. *APPLICATION OF A TAX TREATY*
    i. Safeguarding the correct application of a tax treaty (*see* n. 2 below)
    ii. Monitoring the impact of the treaty and its adequateness
3. *RENEGOTIATION OR TERMINATION OF A TAX TREATY*
    i. Renegotiation procedures (see n. 3 below)
    ii. Termination considerations

b. Creation phase - additional tools for LDCs.

Given their unique qualities, typically characterized by low levels of economic development and limited knowledge and resources to negotiate, apply and interpret tax treaties, it is our understanding that LDCs would benefit from additional guidance regarding the preparation of alternative provisions. The lack of progress since the inception of the UN Model in 1980 regarding the development of a basic tax treaty network for most LDCs makes one believe that these guidelines should go beyond a mere restatement of the traditional approaches enshrined in the OECD and UN Model. The following guidelines could be considered with the view of exploring the design of new tools for LDCs:

a. Interaction between domestic and International tax rules

The OECD and UN Models are essentially templates for negotiation from which states can draw from. Consideration should be made that States are free to devise and tailor tax treaty rules to better suit their interests, as long as they are acceptable by the other contracting state. It is not because a certain modification is not contained in the OECD or UN Commentary that this modification cannot be considered.

b. Tackling the principle of reciprocity in tax treaty negotiation

Both the UN and OECD Models are based on an inherent assumption of formal reciprocity. For example: State A and State B agree to lower the withholding tax to a certain level. This formal reciprocity translates into substantive reciprocity if the flows of income across the border between the states is equal. If the flows are highly unequal, formal reciprocity has no meaning and can be disposed of.

It is unusual, but not unheard of, for tax treaties to foresee unilateral (nonreciprocal) obligations. In the past, certain OECD economies have signed tax treaties with lesser developed states allowing for clauses to apply in a non-reciprocal way. For example, in 2012, only 2.7 percent of the treaties signed between two OECD member states contained nonreciprocal obligations, as compared with 5.3 percent in treaties between an OECD and a U.N. member state.

[1] This makes sense because it allows a country to pursue an identical policy as a source state or a residence state across multiple bilateral tax treaties.

There are several examples in treaty practice in which developed countries (to put it broadly) concede to an uneven allocation of source taxing rights, particularly when entering into a treaty with a developing country. Such was the case in many Canadian tax treaties of the first generation signed with developing countries around 1980. For example, in the 1982 Cameroon-Canada tax treaty, Canada's withholding tax allocation for dividends, interest, and royalties is 15 percent, whereas Cameroon's is 20 percent. The same is true for the 1992 Canada-Zimbabwe tax treaty on dividend withholding (15 percent Canada, 20 percent Zimbabwe) and the 1999 Algeria-France tax treaty on interest withholding (10 percent France, 12 percent Algeria). This practice of splitting the provisions reflects the idea that withholding tax rate negotiations in treaties between OECD economy and LDC or LMIC are often one-sided affairs, given that the former often does not even levy significant withholding taxes on the income under its domestic law. The driving down of the rate is thus a revenue sacrifice merely on the side of the developing country.

c. Employing bilateral tax treaties as redistributive instruments

If treaties were to incorporate redistributive elements, so that the two Contracting States could agree to simultaneously waive the right to tax in one country in order to aid resource mobilization and to finance development in the other, bilateral treaties could come to incorporate development features and really be used as instruments to finance development in LDCs and LMICs. Under this theory, a high level of asymmetry in development would confer the developing state the right to levy more tax, to offset unequal levels of development. A consequence (and really, the main impediment to this approach) is that the principle of formal reciprocity of legal obligations is sacrificed for the sake of redistribution.

d. Sunset provisions

Projecting revenue and economic impact with regard to tax treaty provisions is a difficult task, also for the most developed countries. To avoid flying blind and to be locked in into certain provisions which turn out to present unexpected negative effects, LDCs could be advised to consider 'sunset clauses' which allow the LDC to actively terminate a certain clause after a minimum period of time after the treaty enters into force.

e. Parallel (and bulk) Tax Treaty Negotiations

Another tool to streamline the development of an LDC's bilateral tax treaty network could the practice of parallel tax treaty negotiations. The purpose of this practice is double. First, it eliminates needless amounts of resources spent on multiple individual tax treaty negotiations. Secondly, it relegates the competitive forces and will prevent LDCs from accepting a watered-down consensus on the taxing rights they should retain on a per treaty basis.

Parallel treaty negotiations can be envisioned in two ways:

1. [OECD1/OECD2 v LDC] Similarly situated OECD countries could agree to sign an identical tax treaty with a particular LDC. The bulk negotiations would reduce the amount of resources spent by the LDC on

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1. According to the research conducted by Bob Michel in 2012, there is almost 100 percent reciprocity in treaties negotiated between two OECD member states. Nonreciprocity occurs twice as much in treaties signed between states with asymmetrical levels of development. (Bob Michel, "The Principle of Reciprocity in International Tax Treaties," presentation in Amsterdam at IBFD Conference in Honour of Prof. Avv. Guglielmo Maisto (May 11, 2012) (speaker's conference notes).

serial negotiations with individual treaties. The fact that OECD countries agree to lock their individual bargaining power is believed to result in less unbalanced negotiation outcomes.

a. [OECD v LDC1/LDC2] At the same time, similarly situated LDCs could consider parallel negotiations with a single OECD state. The pairing of resources and bargaining power is believed to be beneficial.

2. Using the Tax Treaty Network as a means of Overseas Development Assistance

Finally, OECD countries should consider integrating ODA and LDC tax treaty development. An LDC-ODA tax treaty could for instance entail asymmetrical division of administrative burdens on exchange of information and assistance in collection (*i.e.* the OECD country carries the cost of requests addressed to the LDC but not *vice versa*). As pointed out above, nonreciprocal commitments are more pronounced in bilateral agreements involving countries with asymmetrical levels of development.

We propose consideration for the use of asymmetric taxing rights allocation as a tool to foster development. Provided this tool does not have a significant budgetary impact on donor countries, there should not be much political opposition because it does not concern the transfer of resources — it concerns the waiving of taxing rights. From an academic perspective, this is a proposition that is in line with the inter-nation equity principle introduced in the 1970s by Richard and Peggy Musgrave.[2]

g. Revenue sharing mechanisms

One of the main arguments put forward for low income countries to steer clear from introducing withholding taxes on passive income or on services, and thus to forego tax revenue derived from this economic activity, is the increased compliance cost and, as such, the reduced attractiveness as an destination of foreign investment. A possible solution to deal with this issue might be for OECD countries to consider the development of (temporary) macro-economic revenue sharing mechanisms to temper the impact of source taxation on economic neutrality. For instance, an OECD country and a LDC could agree that the taxing rights on passive income should be shared but that the taxing right of the source state like in the Models, is limited. However, instead of the LDC being responsible for the collection of tax under the taxing right assigned to it in the form of obliging resident payors to withhold tax, the OECD country could agree to collect for the first 10 years the LDC revenue instead and share the tax revenue on the balance of payments. Resident taxpayers in the OECD country should be obliged to report income received from the LCD in question. An agreed fraction of the tax revenue collected by the OECD country would be shared with the LDC, e.g. 60% of a gross withholding tax of 15%. The shared revenue would then be used to build capacity whereas the collection is temporarily outsourced to the OECD country.

The Swiss Rubik Agreements or the EU Savings Directive (2003/48/EC) are examples of instruments between OECD economies in which revenue sharing systems were used to substitute the allocation and enforcement of taxing rights in tax relations. The principles underlying these systems should be further explored for the purpose of further developing LDC tax treaty networks.

1. Richard A. Musgrave and Peggy B. Musgrave, "International Equity," in *Modern Fiscal Issues: Essays in Honor of Carl S. Shoup* 63 (1972).

2. Application phase: Safeguarding the correct application of a tax treaty

Recent practice in a number of non-OECD economies shows that the fact that countries are perfectly able to negotiate and conclude tailor-made tax treaties does not always translate in an equally smooth application of these treaties in practice. This discrepancy is often caused by the fact that the state body applying the tax treaty (*i.e.* the tax authorities and the tax courts) are not in sync with the treaty negotiating body with regard to the meaning of certain tax treaty provisions. As a consequence, controversies are created in practice with regard to issues which should not be contentious, if seen from the perspective of the OECD and UN Models.

For instance, in Brazil an extensive body of case law exists regarding the long standing issue of whether for the purpose of the Brazilian tax treaties, gross payments derived for services provided by non-residents are to be considered as 'business profits' under article 7.[3] Given that these payments are paid on a gross basis, the inclusion is controversial under Brazilian domestic law which considers 'profits' to only encompass net payments. This led the Brazilian tax authorities and courts to conclude that the fees fell within the scope of article 21 ('other income') which in most Brazilian tax treaties allows for unrestricted source taxation. This interpretation is clearly contrary to the OECD and UN Models, and undeniably was also not envisioned by the drafters of the individual treaties. The lack of proper application made more than one tax treaty partner of Brazil threaten with treaty termination if the deviant interpretation would not be dropped, which eventually occurred in 2014.

A similar issue has occurred in Indonesia where resident taxpayers who hire technical and transport services from foreign service providers are denied access to the relevant tax treaties because they failed to produce certificates of residence of the recipients on the moment they paid the fees and withheld no or lower tax in line with the Treaty. Corrective assessments are then issued to assess the foregone withholding tax. An extensive body of jurisprudence exists in which the tax court of Indonesia confirms the generally accepted view under the OECD and UN Models that eligibility to treaty benefits can be attested after the facts.[4]

It is believed that both these type controversies could have been avoided by having the tax treaty negotiators externalize some of the implicit assumptions on which the tax treaty in question is based. Some of these assumptions might be contained in the OECD or UN Commentary, whereas other assumptions might be part of the unwritten practices of international tax law. The Toolkit should however emphasize the need to draw up 'supplementary means of interpretation' in the form of 'technical explanations' or a 'memorandum of understanding', which make these assumptions explicit. As an authoritative means of interpretation within the interpretation rules enshrined in the Vienna Convention, it is believed these instruments would avoid many controversies. A unilateral administrative guideline can also serve the purpose, be it with less authoritative value, if the issue mainly concerns the reconciling of an agreed treaty term meaning with the application of domestic law.

1. *See*, for example, Brazil: Supreme Court of Justice, 26 May 2020, 1.618.897 - RJ (2016/0208110-5), *Alcatel-Lucent Submarine Networks*, Tax Treaty Case Law IBFD; Brazil: Superior Court of Justice, 17 May 2012, No. RE 1.161.467 – RS, *Copesul*, Tax Treaty case Law IBFD.

2. *See*, for example: Indonesia: Tax Court, 14 February 2015, No. PUT-59570, *Newmont*, Tax Treaty Case Law IBFD; and Indonesia: Tax Court, 28 January 2019, No. PUT-080089.13, *Zinkpower*, Tax Treaty Case Law IBFD.

3. Renegotiation/Termination phase

In the last decade, the international tax world has witnessed an unseen spike in the number of tax treaty terminations. It is believed that tax treaty terminations represent a failure of tax diplomacy between countries and risks disrupting stable business and investment relations between the former treaty states, especially if the lag between termination and the signing of a new treaty is significantly long, which it often is.

Many of these terminations involve a LMIC or a LDC. Notable cases are the termination in 2020 by Zambia and Senegal of their respective tax treaties with Mauritius. In 2012, Mongolia terminated its tax treaties with the U.A.E, Kuwait, Luxembourg and the Netherlands. The pattern of these terminations is often the same: the LMIC or LDC becomes aware of the fact that its particular tax treaty with an OFC or an OECD country (often an OECD country with OFC characteristics) is prone to being abused and results in unfavorable revenue repercussions because of unfavorable income allocation rules and/or a lack of adequate anti-abuse rules.[5] The Treaty partner refuses renegotiation of these issues and the *ultimum remedium* is employed.

The rise in self-awareness of LMICs and LDCs with regard to their tax treaty policies should be commended. We believe however that tax treaty termination should be avoided as the counterpart of this awareness and that the Toolkit and the PCT has an important role to play to canalize this development and stimulate awareness in other LMICs and LDCs. Unfortunately as it is now, the toolkit makes no reference to tax treaty termination.

The case of the Mongolian treaties is of interest here. The Mongolian Government decided to terminate the tax treaties in the aftermath of a technical assistance report by the IMF on '*Safeguarding Domestic Revenue – A Mongolian DTA Model*'.[6] Albeit the IMF report did in no terms advise Mongolia to terminate tax treaties – it urged the country to renegotiate certain tax treaties – it did base its advise on the premise that Mongolia should steer clear from certain OECD Model provisions in tax treaties with developed countries, and fully embrace the UN Model. However, Mongolia took it one step further and terminated the tax treaty entirely, denoting a clear miscommunication, and failure to understand the advice it received.

One important observation comes out of the above anecdote. The Draft Toolkit, which is aimed at LMICs and LDCs like Mongolia, remains neutral in a country's choice between adhering to the OECD Model or the UN Model, when in fact it is clear that the only Model written having in mind the interests of LMICs and LDCs is the UN Model. The UN Model reproduces the OECD Model in several areas where it is understood that the impact for LMICs and LDCs is not different from OECD Member States. Therefore, by recommending the use of certain UN Model provisions that envisage the interests of LDCs and LMICs the toolkit would be safeguarding the interest of those states while at the same time providing uniformity in the practical application of treaties for the parts where the UN advise is in line with the OECD Model rules. Model neutrality in this case, might ultimately bring in a new layer of confusion to the policymakers towards which the toolkit aims to assist.

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1. In certain cases, other state organs or stakeholders become of aware of the imbalance before the new tax treaty is ratified, resulting in the postponement or the permanently holding off on its ratification. Recent examples are the High Court of Kenya's annulment of the ratification procedure of the new Kenya Mauritius Tax Treaty (2012). (*See* Kenya: High Court, 15 March 2019, Petition 494 of 2014, Tax Treaty Case Law IBFD). Treaties signed by Mauritius with Gabon (2013) and Nigeria (2012), respectively, have not been ratified by the latter countries for similar reasons.

2. IMF (2012), Geerten M.M. Michielse, *Safeguarding Domestic Revenue – A Mongolian DTA Model*, June 2012, available at: https://www.imf.org/external/pubs/ft/scr/2012/cr12306.pdf

We strongly urge therefore to expand the Toolkit, rebranded as a Toolkit on Tax Treaty Management, by adding the following elements:

1. The Preface of the UN Manual (2019) emphasizes that domestic resource mobilization, including tax revenues, is central to achieving sustainable development. SDG 17 calls on the international community to foster domestic resource mobilization, including to assist developing countries to improve their capacity for tax revenue collection. The attainment of SDG 17 [target 17.1] is the ultimate objective of the Toolkit and is also the objective aspired in the UN Model. As such, the Toolkit should avoid model neutrality and expressly endorse the UN Model as the model to be followed in tax treaty negotiations with developing countries. The Toolkit should emphasize that OECD economies maintaining tax treaties with LMICs and LDCs that ignore crucial provisions in the UN Model in favor of OECD Model provisions risk failing to live up to their commitment to the SDGs.

2. Development of an institutionalized framework of technical assistance for '*safeguarding domestic revenue – domestic resource mobilization through tax treaties*', allowing standardized review of LMIC and LDC tax treaty networks. Currently, these reviews occur on an *ad hoc basis* (one example of which is the IMF report on Mongolia), or are conducted by NGOs. Developed countries have little incentive to review the tax treaties they conclude with developing countries with the views to provide a fairer treatment in the allocation of taxes to these States, and given the budgeting restrain countries are undergoing at the moment, that is unlikely to change.[7] Therefore it is up to international organizations to undertake that function. The review framework should be open to all LMICs and LDCs that are member of the OECD/G20 Inclusive Framework on BEPS and/or the Global Forum on Transparency and Exchange of Information for Tax Purposes. We believe that these countries' commitment to the international tax community's anti-BEPS and pro-tax transparency efforts should be matched by the latter's fullest commitment to domestic resource mobilization in lesser developed countries.

3. The Toolkit should comprise steps to use the output of the review in a way which stimulates the identifying and subsequently the renegotiation of problematic tax treaties, rather than leading to termination. Negotiating and signing international agreements is a fundamental aspect of a state's sovereignty. As recent practice in the field of tax transparency and the implementation of BEPS-standards has shown, this sovereignty does not prevent a mechanism of peer review and reputational pressure from nudging states to exercise their (tax) sovereignty in a way that is perceived as fair and acceptable by the international community of states. This mechanism should also be used to scrutinize tax treaties with developing countries.

4. Developed country commitments to adhere to the outcome of the review process should also be paired with tools regarding bulk treaty amendments (*cfr.* infra), allowing simultaneous updates of developing country treaties with multiple developed country treaty partner states.

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1. For instance, in a Parliamentary Question in 2015 on the topic whether Belgium should conduct a review of its expansive tax treaty network with developing countries, the Government responded that the developing countries were best positioned to watch over their own national interests and that the Belgian tax authorities had no means available to conduct a suitable survey. (See: Belgium: Parliamentary Questions (Vr. en Antw. Kamer 2014-15) 18 June 2015, 411, 062 p. 257-262 (available at: www.lachambre.be (last accessed: 1 September 2020)).

i. Tax treaties signed with LDCs should contend an option for non-reciprocal application of certain tx provisions in order to allow the incorporation of redistributive elements into the bilateral tax treaty and in that way foster development through the expansion of the tax treaty network.

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Tax Justice Network

TJN comments on PCT's draft Toolkit on Tax Treaty Negotiations

- **Purpose of international tax policy**: When considering the reasons why countries (re)negotiate tax treaties (point A, pages 6-10), the PCT Toolkit fails to mention the substantive goals that should be innate to contemporary tax policy making. Indeed, the Toolkit regrettably fails to highlight the problematic nature of tax policy where it is designed with neutrality in mind. The resulting impact of such neutrality is, often, to exacerbate inequalities between and within countries, and undermine a global system based on social and economic justice. More specifically, it would be indispensable to mention the World Bank's post-2015 development agenda, that clearly supports "developing countries in mobilizing domestic resources for development, by boosting taxation capacity, harnessing natural resource revenue, improving expenditure efficiency, and curbing illicit financial flows" (World Bank, 2013). More recently, the Addis Tax Initiative – to which the IMF, the OECD and UN DESA are supporting organisations – also provides a strong basis to work towards Sustainable Development Goals, and "embrace policies and practices that foster fair, efficient and transparent tax systems, and effectively allocate the equitable distribution of tax burdens and benefits" (ATI declaration). TJN considers that PCT omission of key concepts such as Sustainable Finance and Domestic Revenue Mobilisation is particularly worrying, in a context where tax treaties contribute to the weakening of tax rights in developing countries, tax-free looting of natural resources, and rampant tax avoidance.
- **Relative benefits of FDI**: In the consideration of potential costs and benefits, reference is made to a "benefit" of increasing "direct inward investment" without specifying that not all foreign investment is beneficial to the host country (PCT Toolkit, pages 7-8). Transactions accounted as foreign direct investment may not correspond to any substantial change in real economic activity (for instance in the case of mergers and acquisitions) (Head & Ries, 2008; IMF, 2014; Reurink & Garcia-Bernardo, 2020). Moreover, even when effectively creating new economic activity in the host country, FDI can lead to worsening of labour conditions and environmental degradation (Durand, 2007; Jorgenson, 2007; Long et al., 2017; Maconachie et al., 2015).
- **Importance of positive spillovers**: TJN welcomes the fact that the PCT Toolkit stresses the importance of positive spillovers, such as increased employment and income "that would not otherwise have occurred" (PCT Toolkit, Page 8). As the toolkit notes, some tax treaties act very much like tax incentives, that simply reduce the tax chargeable as a result of an investment that would have occurred otherwise. On the contrary, "cost-based" tax incentives in domestic law can be used to achieve positive spillovers, even in the absence of a tax treaty (PCT Toolkit, Page 10).
- **Unilateral measures against double taxation**: TJN welcomes the fact that the PCT recognises that "[m]any cases of residence-source juridical double taxation can [...] be eliminated through domestic provisions (ordinarily in the form of either the exemption or a credit method) which operate without the need for tax treaties." (PCT Toolkit, Pages 9-10) Indeed, it is important to counter the narrative that "only" tax treaties can solve double taxation, when specific provisions in domestic law can relieve most if not all double taxation (see Dagan, 2020).
- **Importance of treaty networks**: Although the PCT Toolkit mentions the negotiating country's treaty network - in the context of the benefits of having a "stable" treaty

network (id. page 8), or reviewing possible alternative provisions (Id. p 14) - it does not stress the importance for a jurisdiction to analyse its own treaty network in order to assess the costs and benefits of a specific treaty. Indeed, as forthcoming TJN-ICTD research shows, the profit-shifting risks of a particular treaty are most effectively analysed in the context of other treaties available at a jurisdiction. It is essential to analyse each treaty in relative terms, assessing whether the provisions contained in a treaty deviate from the provisions found in the other treaties available in a jurisdiction. If a specific treaty has a provision that deviates from other treaties (reducing source tax rights), it is very likely that the treaty is being used for “treaty shopping”, as it contains a loophole. For instance, if a country has 9 treaties with broad permanent establishment definitions and 1 treaty that excludes services PE, it is more likely that the latter treaty is being systematically used by foreign services companies, regardless of where they are established geographically. However, if a country has 4 treaties with broad PE definition and 6 treaties excluding services PE, the “treaty-shopping” relevance of each of each of those 6 treaties is lower. Cancellation or renegotiation of any one of those 6 treaties would not close the loophole. It is thus very important to not only consider each treaty in “absolute” terms, but also analyse treaties in “relative” terms, evaluating treaty networks. Moreover, in point C.10 (indicating the importance of making a comparative assessment of the negotiation treaty models), the Toolkit should recommend that each country conducts an analysis of the impact of potential treaties in each country’s treaty network. As stated above, profit shifting results from the interaction of different treaties across jurisdictions, and thus, it is not sufficient to compare the model treaties submitted by each negotiating party. Parties should consider treaty provisions in the context of the other treaties available in each of the negotiating jurisdictions (see Tax Justice Network, 2019; TJN-ICTD forthcoming).

vii **Profit shifting risks of service payments**: Although the PCT toolkit mentions Services PE, and potential WHT on technical services among the "policy positions" a country should establish (id. Page 11); it does not mention services payments as an "important element[...] of global profit shifting dynamics" (id. Page 8). Specifically, we believe that various provisions related to service payments in the OECD model convention (Art. 5, absence of Art. 12A, Art. 14 and 16) effectively facilitate global profit shifting.

viii **No treaty might be better than a bad treaty**: TJN welcomes the statement that "countries would benefit from identifying existing treaties that cause substantial revenue losses [...] – and renegotiating them, or seeking to have their application modified through the MLI – rather than entering into new tax treaties." (Id. page 8) Indeed, it would be important to underline that no treaty might be preferable to a bad treaty, mostly when unilateral double taxation avoidance mechanisms are in place.

ix **Better understanding of negotiating partner’s tax system:** In relation to point C.9 (stressing the importance of understanding the other country's tax system), TJN regrets that the PCT Toolkit does not clearly reference freely available legal data sources such as the Financial Secrecy Index, or the Corporate Tax Haven Index - where standardized and objective assessments are presented for a vast number of countries, with full specification of references and authoritative sources.

x **Trust and accountability**: TJN welcomes the statement that domestic laws can "be designed to be more transparent and easier to monitor, with an increasing number of countries regularly publishing tax expenditures and subject to peer reviews" (PCT Toolkit, page 10). However, when considering "trust" in negotiations (PCT Toolkit, page 18), it is not sufficient to build trust between negotiating parties (executive branch of both jurisdictions). The Toolkit should stress the importance of building trust and accountability within a country, recommending the publication of cost-benefit analysis conducted for each treaty, with corresponding econometric assumptions. This appears necessary to ensure informed decision making by lawmakers (legislative branch), and active involvement of civil society.

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Tax Justice Network Africa

10.09.2020
To: The Secretariat
The Platform for Collaboration on Tax

Dear Secretariat,

RE: Submission on Draft Toolkit on Tax Treaty Negotiations

Tax Justice Network Africa (TJNA) welcomes the opportunity to provide input into the Platform for Collaboration on Tax's (PCT) draft Toolkit on Tax Treaty Negotiations (the Toolkit). TJNA considers this consultation an important step in supporting efforts to reform the international financial architecture and build negotiation capacity in developing countries.

We are pleased to note that the Toolkit has been developed building on the existing UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries. We are of the view that such a Toolkit will play a key role in mitigating corporate tax avoidance and evasion which is largely perpetuated by poorly negotiated bilateral tax treaties. This in turn will contribute to increased retention of much-needed tax revenue in developing countries.

We present our submission below for your consideration.

Qn1: Does this draft toolkit effectively address all the relevant technical and practical considerations as well as skills necessary to build capacity for tax treaty negotiations in developing countries?

To a large extent the tool is fit for purpose. Given the peculiarity of developing countries' taxation challenges, we note that the authors of the Toolkit indicate that the Toolkit does not establish an international policy standard but rather acts as a guide. The Toolkit, however, could benefit from the following inclusions:

Provide guidelines on navigating political economy considerations: The Toolkit highlights the general purposes of tax treaties and specifies what considerations should be undertaken as countries enter a treaty negotiation. The considerations, however, do not mention how political economy issues can affect treaty negotiations and how to potentially address them. In most developing countries, the treaty negotiation process is not only technically complex but is also heavily influenced by political considerations. The Toolkit could therefore benefit from guidelines that indicate how to cushion the treaty negotiation process against political interference.

Provide guidelines on integrating tax treaties with other relevant treaties: The Toolkit could benefit from more information on how the proliferation of other treaties such as bilateral investment treaties and trade agreements can influence tax treaties. Specifically, where a developing country belongs to more than one economic bloc, the interaction of trade, taxes and investment policies has a significant bearing on tax treaty negotiation processes. In some countries, negotiation teams for treaties in these three areas tend to come from the same ministries and the Toolkit could provide guidance on how to navigate this situations.

Consultations with businesses, ministries and different agencies: The Toolkit provides guidance on the need to consult different stakeholders in line with para 94 of the UN model. Similar to the UN model, the tool narrows consultations to only include businesses, ministries and agencies with information on the economics of the negotiating country. However, our research and evidence points to the fact that the impacts of poorly negotiated bilateral tax treaties extend beyond these categories. The Toolkit would therefore benefit from the inclusion of other stakeholders such as civil society, think tanks and academics as part of the consultation process.

Qn2: Are there particular resources or tools, especially beneficial for developing countries, not covered in this toolkit that should be considered?

We are happy with the adequacy of the resources provided, specifically the reference made to the regional model treaty developed by the African Tax Administration Forum.

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The Instituted of Chartered Accountants of India (ICAI)

ICAI/ CITAX / 2020-21 / Rep - 5 **30th August, 2020**

Madam/ Dear Sir,

Re: Submissions on the PCT's draft Toolkit on Tax Treaty Negotiations

The Institute of Chartered Accountants of India (ICAI) is a statutory body established by an Act of Parliament, viz. The Chartered Accountants Act, 1949 for regulating the profession of Chartered Accountancy in the country. The Institute, functions under the administrative control of the Ministry of Corporate Affairs, Government of India. The ICAI is the second largest professional body of Chartered Accountants in the world, with a strong tradition of service to the Indian economy in public interest.

ICAI functions through various standing and non-standing Committees of ICAI. One of the important non standing Committee of ICAI is Committee on International Taxation (hereinafter referred to as Committee). The Committee examines the Tax Laws, Rules, Circulars, Notifications, DTAA etc. relating to International Taxation which may be enacted or issued by the Government of India or other institutions from time to time and send suitable representation. One of its terms of reference is to make representation/suggestions on draft OECD/UN papers on different subjects.

We refer to the announcement dated 31.07.2020 wherein the Platform for Collaboration on Tax has invited public comments on the draft Toolkit on Tax Treaty Negotiations. Tax Treaties play an important role in international cooperation on tax matters. While the treaties encourage exchange of skills, technology and promote investment, they also seek to reduce cross-border tax avoidance and evasion through exchange of information and mutual assistance in the collection of taxes. The UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries (the "UN Manual") provides a detailed guidance on all aspects of tax treaties including, how to be prepared for and conduct negotiations.

The draft toolkit on tax treaty negotiations provides considerable support to the developing economies with respect to implementation of the guidance in the UN Manual. It describes practical aspects of how tax treaty negotiations are conducted in all its phases (preparation, conduct and follow-up). Treaty negotiation has to be carried out by a competent team of a country, which should develop negotiation strategy keeping in mind the positions of the other country in respect of various provisions of the proposed treaty, stand taken by both the countries in other treaties, tax laws of both the countries, economic needs of the country and the aspirations of the taxpayers of the country.

Hence, the toolkit is an excellent capacity-building support to the developing nations on tax treaty negotiations.

ICAI is pleased to share its suggestions on the draft toolkit published by The Platform for Collaboration on Tax to make it more comprehensive and effective for the developing countries. Please find the same as an attachment to this mail.

We look forward in continuing to assist in further discussion on this, and any other related topic.

Thanking you,

With Warm Regards

CA. Atul Kumar Gupta
President, ICAI

SUBMISSIONS OF ICAI
Discussion Draft: Toolkit on Tax Treaty Negotiations

1.	Experienced and Efficient Tax Treaty Negotiation Team

As the Tax Treaty Negotiation Team undertakes wide responsibilities with respect to treaty negotiations, it should have expert-level knowledge of tax treaties and domestic tax legislations of both the countries, the socio-economic environment of both countries, and the key domestic tax legislative features of both the countries etc. The Team should have up-to-date information about the judicial pronouncements in respect of cases involving tax treaties.

In order to have a well-rounded competent team, expert from various fields may be included for developing treaty negotiation strategies. This team may consist of legal expert, economist, one or two tax officers dealing with audit of tax treaty cases on regular basis, professionals (such as Chartered Accountants and/or experts in international taxation). This team may be involved in developing tax treaty negotiation strategies in consultation with the concerned ministries and departments, tax department, and tax professional organisations. This team may work with the team in the Ministry of Finance/Tax Department involved in negotiation of tax treaties and may have a long tenure of at least 5-6 years. The long tenure will enable the team to carry out research on an ongoing basis and be involved in developing treaty negotiation strategies in a more focused manner. Experts in other areas may be included as and when required. The team for negotiating a tax treaty should include experts from the bigger team.

2.	Memorandum of Understanding/Technical Explanation to the Tax Treaty

Many a time litigation revolves around possible intentions of a provision in a tax treaty if it differs from that in the OECD or UN Models. Genesis of the controversy lies in absence of publication of technical explanations or memorandum of understanding following finalisation of a tax treaty. If the negotiating team takes copious notes of the discussion during negotiations and the tax authorities publish a technical explanation or memorandum of understanding after the tax treaty is published, this will go a long way in reducing litigation in the matters of international taxation.

The above will provide the much-needed certainty to the investors or providers of services from the treaty partner countries.

The memorandum of understanding or technical explanation may be shared with the treaty partner to avoid any misunderstanding. However, this should not stop publication by the tax authorities in their respective countries.

3.	Alternative Options

A model draft of the treaty for negotiation with the other country may be prepared by the Treaty Negotiating Team with alternative options. This may be done after carrying out extensive research to identify the possible divergences of views between the two countries on the major provisions of the treaty and possible alternative options acceptable to both. The Team may discuss the options with the concerned ministries and departments within the government before commencing the negotiation of the treaty.

4.	**Domestic law definitions impacting treaty Interpretations – Article 3(2) of the model treaty**

Paragraph 2 of Article 3 of OECD Model Tax Convention on Income and on Capital suggest to use the definition under the domestic Tax laws or other laws if the term is not defined in the Double taxation of avoidance Agreement.

Paragraph 2 of Article 3 of OECD Model Convention is reproduced for a ready reference.

> *As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires or the competent authorities agree to a different meaning pursuant to the provisions of Article 25, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.*

Similar provision is also included in the Paragraph 2 of Article 3 of United Nations Model Double Taxation Convention between Developed Countries and Developing countries, which reads as follows:

> *As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.*

It is suggested that wherever any term is used, which may not be in the Models and the Commentaries thereto, the term may be defined in the Exchange of Letters/Notes/Protocol to avoid any conflicts and improve transparency and good faith. Further, such terms may be explained in the Memorandum of understanding/technical explanation published by the countries. Examples of such terms include “may be taxed” appearing in the article on business income; and “immovable property” appearing in the article on immovable property, etc.

X-X-X

The Slovak Republic

From: Kuchar Jakub <jakub.kuchar@mfsr.sk>
Sent: Thursday, September 17, 2020 9:50 AM
To: Platform for Collaboration on Tax <taxcollaborationplatform@worldbank.org>
Cc: Herkova Jana <jana.herkova@mfsr.sk>
Subject: Feedback on draft Toolkit on Tax Treaty Negotiations - Slovak Republic

Dear colleagues,

Slovak Republic would like to make a general suggestion to Section C.2. (Contact and logistics).

We do not think that face to face meetings are always the most efficient way to negotiate a treaty. There are circumstances in which it is difficult to organize face to face negotiations due to practical or financial impediments. Especially small or developing states do not have to have sufficient personal and financial capacities to undertake several rounds of face to face negotiations. On the other side, developments in telecommunication technologies make it possible to carry out bilateral negotiations via e-mails, teleconference calls and other similar means. Recent global pandemic has shown that it is even possible to have important multilateral discussions (e.g. Pillar One and Pillar Two discussions) via electronic means. As pandemic related restrictions made it in many cases impossible to travel abroad, it does not mean that treaty discussions should be ceased and it would be desirable to choose alternative ways to negotiate. We therefore propose to include brief information that under certain circumstances it may be at least equally efficient to carry out treaty negotiations (or at least part of it) through electronic means.

Thank you for your consideration.

Kind regards,

Jakub KUCHAR

State Advisor | Direct Taxes Department

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The Tax Administration of Columbia (DIAN)

Comments Discussion Draft: Toolkit on Tax Treaty Negotiations

The Tax Administration of Colombia, Dirección de Impuestos y Aduanas Nacionales – DIAN, would like to congratulate the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD), the United Nations (UN) and the World Bank Group (WBG) for all the work and result reflected in the Toolkit on Tax Treaty Negotiations. This Toolkit may indeed support the training required by tax administrations to design international tax treaty policies and by negotiation teams. It also may be an important guideline during the whole negotiation and post-negotiation processes.

Please find below our comments to the text.

Section A.1. Purposes of tax treaties.

In this section we encourage to add some comments and guidelines regarding the protocols and appropriate channels that jurisdictions should use, implement and apply to communicate their interest in starting treaty negotiations with other jurisdictions and to arrange the initiation of negotiation rounds.

In addition, it would be useful to give more detailed guidelines and comments on the analysis that a country should undertake and the matters that should be covered in order to decide to start a negotiation with another country.

We want to call your attention to a formal mistake in the second paragraph in the second box in page 6 on guidance or recommendations where the word “that” should be deleted:

“A country’s decision to negotiate a tax treaty should be ~~the~~ based on an analysis of the relevant economic factors, a review of the tax regimes of both countries (with the primary objective of identifying risks of…”

Section A.2. Consideration of potential costs and benefits.

This section mentions that integration with a country’s domestic international tax policy is one of the most important issues to be considered in the analysis before deciding to negotiate a tax treaty. In that regard, we encourage the inclusion of broader recommendations to recognize that countries may have amendments to their tax regimes, which may be more evident currently as a consequence of the pandemic, and how this circumstance may impact the design of tax treaty policies and treaty negotiations.

B.1. Designing a tax treaty policy framework

Considering the different issues covered in the section on tax treaty policy frameworks, it may be important to have guidance and to share experience regarding the convenience and usefulness

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of working together with other governmental agencies (i.e. agencies involved with trade, investment, etc).

C. Preparing for tax treaty negotiation

We consider important to complement the section corresponding to contact and logistics to address the possibility of virtual meetings. Although we agree that face to face meetings are the most efficient way to conduct treaty negotiations, virtual meetings may be an option where travel costs are an obstacle to negotiations. Currently, due to the restrictions imposed by the pandemic, finding alternatives to not stop negotiations have been required.

D. Conduct of negotiations

In regards to section D. of the ToolKit, in particular to the blue/red template, we think that further clarifications on how the blue/red template should be handled may be included, considering the advances on the existing tools such as Word or Google documents, etc., which may provide additional tools to easily manage track changes in documents during the negotiation. In addition, these tools may be useful even more during virtual meetings.

Therefore we suggest to include further technical explanations on how to administer the blue/red template in order to facilitate these tasks and also to make easy to handle and keep track of the different versions of documents that are prepared during each negotiation by both teams.

During this phase it may be also important to give some guidance and share experiences on alternatives to solve situations in which a negotiation may be stuck and possible ways to move forward.

E. Post-negotiation activities

Important issues are covered in the section regarding post-negotiation activities and one of them is that regular assessments of the results should be made. In this regard w think that it would be useful to give more guidelines on how to carry on such assessments, which indicators may be considered and which governmental agencies should be in charge of the task.

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The United Kingdom

From: Alistair Lobo <alistair.lobo@fcdo.gov.uk>
Sent: Thursday, September 24, 2020 1:13 PM
To: Platform for Collaboration on Tax <taxcollaborationplatform@worldbank.org>
Cc: daniel.berry@hmrc.gov.uk; Joshua.Grey@hmtreasury.gov.uk; Luis Almeida <luis.almeida@fcdo.gov.uk>; Antonia Strachey <antonia.strachey@fcdo.gov.uk>; Angela Bellmooney <angela.bellmooney@fcdo.gov.uk>
Subject: 240920 - Comments on Draft Tax Treaty Negotiations Toolkit

OFFICIAL

Dear PCT Colleagues,

With many thanks to colleagues cc'd in particular, please find our collective comments on the Tax Treaty Toolkit below.
These have been compiled across relevant colleagues in HMG (from HMRC and HMT, as well as the FCDO); and we hope that they help.
As ever, many thanks for the process of consultation and the opportunity to input.

Best wishes

Alistair Lobo
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Foreign, Commonwealth & Development Office
UKaid from the British people

Does this draft toolkit effectively address all the relevant technical and practical considerations as well as skills necessary to build capacity for tax treaty negotiations in developing countries?
Are there particular resources or tools, especially beneficial for developing countries, not covered in this toolkit that should be considered?

Overall comments

- The toolkit summarises a great deal of content in a relatively short manner very successfully. There is clear signposting and linkages to the other relevant resources. The toolkit provides a good high level overview of what might be required, which is generally accessible.
- We acknowledge that overall it is difficult to strike the balance between concise and too unwieldy, however, it is worth revisiting how the toolkit can go further in some areas to ensure it is most useful for countries facing the greatest resource constraints.

Areas where the toolkit could be strengthened

- **Go further to ensure that it meets the goal of accessibility.** For example, it could further reduce technicalities (be they terms or concepts), and where absolutely necessary spell these out further in a glossary or footnotes.
- **Point to additional resources.** One area, highlighted as an example as we feel that is important to bolster, is the recommendation on the analysis of tax regimes. The toolkit recommends an analysis of tax regimes in both countries, however, for LICs this seems like a high bar to reach. It would be beneficial for the toolkit to point to resources out there which could help them to do this. Examples that we are aware of include the IBFD

database, and country overviews provided under open access by some of the large accountancy firms. It would be helpful to have a section which points to these.

- **Describe the TA that is available to countries who might need more specific supports.** Examples include: workshops for negotiating tax treaties, or TA programmes to build capacity within developing countries to implement regimes which address aspects of transfer pricing. Where included, this should be as representative of the support available as possible. Undertaking this exercise would be useful in and of itself to consider where support on offer is complementary, and where it is duplicative.

Comments on recommendations

- **Cost and Benefit Analysis:** The toolkit recommends that countries should identify treaties that are causing big revenue losses and little offsetting inward investment and prioritise renegotiating these before drawing up new treaties. The document suggests that the general approach for countries could be to analyse tax treaties in the way that tax expenditures are analysed e.g. 2015 PCT toolkit. The toolkit goes on to cite academic articles which can help design a method to estimate direct tax losses from existing treaties. This seems highly unrealistic advice for low capacity contexts, with the big hurdle of accessing relevant information for making decisions in partner country tax administrations. The document also notes that there are difficulties in isolating treaty effects (footnote page 8). It would be useful to bring this into the body of the text and acknowledge that are a wide range of views on this (in case it is taken as read that the document summarises the key literature).
- **Alternative Approaches Analysis:** it could really help partner countries to have a decision tree to illustrate when they a) might better seek a DTA or when b) they might be best served by domestic reforms/ a bilateral tax information exchange agreement instead.
- **Use of Videoconferencing:** The toolkit recommends against using videoconferencing for starting negotiations. This should be reconsidered in the COVID-19 context – while we acknowledge the recommendation that it would not necessarily be the preferred approach, it would be more helpful here to have resources or advice to help countries to adapt given the current context.

Specific points on substance

- **Spell out issues with competing political interests.** For instance: a ministry of economy or a ministry of foreign affairs may have more incentives to want a DTA than a ministry of finance.
- **Explain in more depth issues with the use of DTAs in attracting FDI.** This could in particular be strengthened on page 8 to expand on the issues. The toolkit reads: "Treaties are frequently primarily used as a tool to attract investment into developing economies (Zolt 2018, see toolbox) 3 . Challenges to measuring treaty effects may thus be similar to analysing other types of tax expenditures and could be informed by approaches summarized in the 2015 PCT toolkit "Tools for the assessment of tax incentives").
- **Bring important aspects of the UN Manual on DTAs into the doc** The toolkit points to the UN Manual on Double Taxation Treaties, and there is some overlap. There would be value in bringing some of the aspects covered in the Manual into the body of the toolkit, given their importance; for example, how can the toolkit do more to signpost for officials from LICs how they should organise their treaty planning work.
- **Profit shifting issues currently too simplified.** The toolkit mentions the potential exacerbation of profit shifting where source taxation is reduced. It could be added that the impact of this issue can be tackled through the application of transfer pricing rules (to highlight that there are mitigating measures that can be put into place) but that the sophisticated application of transfer pricing rules may be very difficult in lower capacity contexts. There might even be value in cross-referencing other toolkits. We acknowledge that this is an extremely technical area, particularly for LICS, so a further caveat of 'withholding taxes are, however, not a fix-all, and may be more appropriate in low capacity contexts because they are comparatively easy to enforce (when compared with TP rules) ' could also be added.

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Going forward

- **Monitoring:** Will the PCT monitor how, and how often, the toolkit is used?
- **Feedback:** Will the PCT continue to take on feedback after use?
- **Resources:** The centralised resource detailing upcoming training on tax treaties, and the links to further reading, both seem invaluable resources. It would be helpful for these to be updated and strengthened regularly.