

PANEL I : Tax Treaties: opportunity or source of inequality?

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Topics

1. DTA and developing countries
2. How Anti-BEPS Actions have been implemented in developing countries so far and how should developing countries benefit from them? Main focus treaty abuse
3. Recommendations and conclusions

1. DTA and developing countries

Advantages

- Treaties are regarded as an instrument to attract investment and to provide double taxation relief, to prevent tax avoidance (new developments -double non-taxation)
- Treaties can provide certainty in the way that the investment will be taxed since it provides specific rules to allocate the taxing rights
- Treaties contribute to enhance transparency and exchange of information in tax matters (new multilateral developments) and to provide assistance in tax collection

Disadvantages

- Limit the application of the source-based approach
- Lack of certainty with regard to the cost versus benefit of concluding tax treaties

1. DTA and developing countries

Developed countries

- Discussion Dutch Parliament (the Netherlands): Introduction of treaty anti-abuse measures (i.e. main purpose test) with several countries including African countries to prevent treaty shopping

Developing countries

- Understanding of the policy choices and the reasons why the choices are needed for the country, e.g. MFN clause in tax treaties
- Requires political commitment (to sign tax treaties with the countries where investment is being located)
- Require training of tax treaty negotiators and of dispute resolution bodies!! Long-term investment in education and training

International organizations

UN: Papers on selected topics in negotiation of tax treaties with developing countries. Limited reference to treaty abuse

1. DTA and developing countries

Link between treaties and responsible investment

- Tax treaties not only for purposes of obtaining the tax treaty benefits, but also to ensure responsible investment. ESG to promote Environmental, Social and Governance factors which are also present in investment (*PRI Principles for responsible investment*:
<https://www.unpri.org/about/what-is-responsible-investment>)

- Responsible investment addresses the governance factor

Therefore, the investor:

- should not engage in aggressive tax planning
- should ensure that the right amount of taxes is being paid, and
- should not engage in corruption

This clause adds to the new BEPS approach on prevention of double non-taxation

2. BEPS and tax treaties

BEPS to prevent tax base erosion and profit shifting by multinationals

- 4 Minimum Standards (113 countries Inclusive Framework March 2018)
- 10 Best Practices
- 1 Multilateral Convention (78 signatories)

Implementation of BEPS

Countries are making different choices in the implementation of BEPS

See I.Mosquera. Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative. Bulletin for International Taxation, 2018 (Volume 72), No. 3

Changes of BEPS (and MLI) to tax treaties

- Dual resident entities
- Permanent establishment
- Domestic linking rules
- Prevent treaty abuse provisions and avoidance of double non-taxation
- Effective dispute resolution mechanisms (including arbitration)

NOT: allocation of taxing rights between residence and source!!

3. BEPS and developing countries: Treaty abuse

- “Complex menu of options” due to the opt-in; opt-out clauses: PPT (with or without discretionary relief), Detailed LOB, PPT as interim measure, Supplement PPT with simplified LOB
- Difficult to manage due to capacity constraints and tax treaty policy choices
- Mismatching of choices may result in multiple mini-treaty negotiations
- Changes in tax treaty policy e.g. from PPT to simplified LOB with PPT (e.g. some Latin American countries)
- Some examples:
 - The Netherlands and Singapore PPT with discretionary relief
 - Colombia PPT as interim measure but intend to apply PPT with simplified LOB
 - Argentina PPT with simplified LOB
 - Costa Rica PPT
 - Burkina Faso and Cameroon: No option and then?
 - Senegal: Reservation to apply PPT if there is main purpose test

3. BEPS and developing countries: Treaty abuse

- One of the principal purposes vs. main purpose, sole purpose
 - e.g. commercial reason and tax reason: PPT applies if “one of the principal purposes” is a tax reason
 - Large tax benefit in taxation does not mean always application PPT –if in accordance to the object and purpose of the treaty
 - LOB test may pass, but under PPT not
 - PPT discretionary relief (or not) may raise competition among countries since the tax administrations will have a discretionary power
- Some scholars: Recommend to choose for artificiality (objective –wholly artificial arrangements) instead of reasonable test (subjective) test. Desirable?
- Tax Administration and Taxpayer: Burden of proof.
 - Subjective element: **Reasonable** to conclude having regard to all relevant facts and circumstances that “one of the principal purposes...”
 - Objective element: **Establish** that granting of a benefit in accordance with the object and purpose of the relevant treaty provisions.

3. BEPS and developing countries: Treaty abuse

- Object and purpose of (i) provision in the treaty? AND (ii) treaty in general?
- Provision in the treaty: Use PPT to solve sloppy drafting or bad treaty negotiation?
- GAAR in some countries only for sloppy drafting if the outcome was so unlikely that no legislation was introduced to prevent to counter such outcome
- GAAR in all cases also in case of sloppy drafting
 - Will countries if fail to apply PPT, still use GAAR to deny treaty benefits?
- GAAR only if authorized in the DTT (analysis in accordance to the object and purpose of the treaty)
- GAAR even if not authorized in the treaty (e.g. Argentina), and how the analysis will take place?

3. BEPS and developing countries: Treaty abuse

- Not clear the relationship PPT and GAAR
- PPT not easy to interpret in practice
 - Leeway to interpretation by the tax administration and tax court (raise competition in the application of the PPT)
 - No certainty for taxpayer. Rules should be clear transparent: Availability, clarity, simplicity and reliability
 - Repair of sloppy negotiation or drafting of treaty provision that will be also influenced by the title and preamble of the treaty
 - Would have been useful to use the test of artificiality (objective) instead of the reasonable test (subjective)?

4. Conclusions -Recommendations

- International tax standards have changed through BEPS, but not yet clear how these new standards will benefit developing countries?
 - more uncertainty and compliance cost for companies
 - tax competition for developing and developed countries vis-à-vis countries not implementing the BEPS minimum standards (inclusive framework 113, MLI 78, 193 countries in the world)
- Not clear how the EU standard of good governance in tax matters will be implemented in respect of third countries. Including developing countries?
- Research on the differences in the implementation of the minimum standards is needed.

See GLOBTAXGOV project 12 countries research.

EU-ERC funded research project (2018-2023): GLOBTAXGOV: A New Model of Global Governance in International Tax Law Making

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