



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Direct taxation, Tax Coordination, Economic Analysis and Evaluation
Company Taxation Initiatives

Brussels, 18th October 2017

Doc: Platform/32/2017/EN

PLATFORM FOR TAX GOOD GOVERNANCE
Follow-up of the Communication on the External Strategy:
Toolbox spill-over effects of EU tax policies on developing
countries

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INTRODUCTION

In its Communication on the External Strategy for Fair Taxation¹, the Commission suggested that Member States should apply a balanced approach to negotiating bilateral tax treaties with low-income countries, taking into account their particular situation. The Commission also announced that it would launch a debate with Member States, within the Platform on Tax Good Governance, on how to ensure fair treatment of developing countries in bilateral tax treaties. This initiative builds on the momentum created by the Addis Ababa Action Agenda and the 2030 Agenda for sustainable development to reconsider aspects of international tax treaties.

While the negotiation of double tax treaties with developing countries is the sovereign competence of Member States, it is important to ensure consistency between tax and development policies. In this context, Member States could take steps to re-consider their tax policies with developing countries, in order to reduce spill-overs and ensure consistency with development needs. Such possible revisions would be in line with the provisions concerning Policy Coherence for Development (TFEU, Article 208) as reiterated by the European Consensus on Development².

Developed countries may sometimes not be aware of the impact that Double Tax Treaties (DTAs) have on the domestic public finance of developing countries, or of the most appropriate measures to support their domestic public finance. However, it has to be recognised that, among developing countries, such impact may differ, as such countries may belong to the same development group according to official statistics. Granting taxing rights to developing countries could allow them to better cover their public financing needs. Appropriate policy in this area would support the EU's wider development goals.

Recently, the impact of Member States' tax policies - including tax treaties - on developing countries has been investigated in reports commissioned by tax administrations of two Member States (IRL, NL), by international organizations (OECD, UN, IMF) and by NGOs (in particular ActionAid).

The Commission services launched a first debate at the June 2016 Platform on Tax Good Governance³, on how to ensure fair treatment of developing countries in bilateral tax treaties. With a view to sharing their experience and feeding the debate, representatives of Ireland, the Netherlands and ActionAid presented the main results of their studies and actions in this area. As a possible outcome of the discussion, the Chair of the Platform on Tax Good Governance proposed to develop a toolbox based on the experience gained in this area.

A second exchange of views on this topic took place at the June 2017 Platform meeting, where a first draft of the toolbox was presented by the Commission and comments were received from both Member States and non-Member states stakeholders. This new version of the toolbox takes stock of the inputs received and could be a starting point for other Member States to examine their own double tax convention network and achieve a more balanced approach towards developing countries.

The purpose of this document is to assess possible elements of such a toolbox and ask the Platform members for their opinion on the appropriateness and completeness of the toolbox and its answers.

¹COM (2016)24, Communication of the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation.

²<http://www.consilium.europa.eu/en/press/press-releases/2017/05/pdf/European-consensus-on-development>.

³http://ec.europa.eu/taxation_customs/business/company-tax/tax-good-governance/platform-tax-good-governance_en.

The enclosed toolbox includes:

- An outline of the main issues;
- A list of relevant questions Member States should consider when reviewing their tax treaty policies with developing countries;
- A first annex with references to relevant studies/reports:
 - (1) Member States' as well as third countries' studies;
 - (2) Commission/ European Parliament papers;
 - (3) Reports/ papers from international organisations (IMF, OECD, UN, WB);
 - (4) Reports by NGO's.
- A second annex with summaries of a number of relevant reports, in particular:
 - (1) IBFD 'Possible Effects of the Irish Tax System on Developing Economies';
 - (2) IBFD 'Tax treaties between the Netherlands and developing countries';
 - (3) IMF 'Spill-over in International Corporate Taxation';
 - (4) UN 'United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries';
 - (5) Action Aid 'Mistreated'.

TOOLBOX

In the External Strategy, the Commission recalled the new EU approach for supporting domestic public finance in developing countries. The "Collect More-Spent Better" strategy⁴ outlines how the EU intends to assist developing countries over the coming years in building fair and efficient tax systems, including by tackling corporate tax avoidance.

The External Strategy also suggested that Member States should apply a balanced approach to negotiating bilateral tax treaties with low-income countries, taking into account their particular situation. Tax treaties are usually aimed at preventing double taxation, allocating taxing rights and promoting foreign direct investment (FDI), with the purpose of fostering economic and political links between countries. Recently, tax treaties have also started to play an increasingly important role in addressing tax evasion, promoting transparency and allowing exchange of information in tax matters. These functions can be imbalanced if the parties involved present different economic features, i.e. unequal level of economic development.

Institutions such as the IMF and the United Nations, among others, are increasingly questioning whether double taxation treaties between developing and developed countries in their current form support sustainable development, given the economic asymmetry between the parties involved.

Whereas tax treaties between developed and industrialized economies are broadly symmetric, with a similar amount of cross-border activity in each direction, bilateral flows between a developing and an industrialized economy are most likely to be asymmetric. It usually involves a larger flow of capital towards the developing country and a larger flow of capital revenues towards the industrialized economy.

Those asymmetries may lead to significant negative spill-overs. Generally, 'spill-over' refers to the impact that one jurisdiction's tax rules or practices may have on another's. Two main types of spill-overs can be identified: 1) base spill-overs, which affect directly the tax base under which a country levies a tax and 2) tax rate spill-overs, which arise from the tax rate applied. For developing countries, spill-overs have a more pronounced impact on specific elements of their tax treaties network, such as the right to levy withholding taxes. These elements are critical for domestic revenue mobilization.

⁴ COM (2015) – Collect More, Spend Better – Supporting developing countries to better mobilise and use domestic public finances, Discussion Paper.

Domestic revenue mobilisation is by far the most important source of the fiscal space required to achieve sustainable development. On average, developing countries raise less than 20% of GDP in taxes, compared with 30-45% in OECD countries. Around half of all low- and lower-middle-income countries still have tax-to-GDP ratios below 15%. Studies comparing tax efforts (a country's actual tax-to-GDP ratio compared with a potential tax to-GDP capacity based on the country's economy) suggest there is considerable room for improvement in many developing countries.⁵

Capacity building for developing countries can help them to cope with spill-overs, but this is not enough on its own and cannot be considered as the only solution for this issue. The existence of imbalanced bilateral tax treaties, which results in lost revenue and base erosion (e.g. through treaty abuse) is particularly damaging for developing countries. Moreover, re-balancing tax treaties with developing countries has to be considered in the broader context of the Sustainable Development Goals and the commitments that Member States and the European Union have undertaken in this regard. Such actions cannot be taken in isolation but go hand in hand with the new global approach for boosting domestic public finance in developing countries.

Developing countries are highly dependent on source based taxation compared to more advanced economies. Therefore withholding taxes on outbound payments are an essential component of their tax income, and are generally easier to administer and collect. However, tax treaties can reduce the capacity of developing countries to levy withholding taxes.

Beyond withholding taxes, other issues of relevance for developing countries in double tax treaties include the definition of a permanent establishment, capital gains, fees for technical services, transfer pricing or the absence of anti-abuse clauses. The studies and reports outlined in Annex I may be a good source of information for Member States, when undertaking impact assessments and/or reviewing their tax policies towards developing countries.

Tangible results on many of these issues have already been achieved through the implementation of the OECD BEPS Action Plan. However, relying on OECD work alone might not be sufficient, given that a considerable number of developing countries are still not part of, for example, the Inclusive Framework on BEPS nor signatory of the Multilateral Instrument (MLI), which is the main tool to implement BEPS Actions swiftly and effectively. The MLI is, in effect, limited to so called 'Covered Treaties' (i.e. treaties that both signatory parties have notified the OECD to update using the MLI) and can be subject to options and reservations. On top of that, the MLI only marginally impacts withholding taxes, which is one of the most critical aspects for developing countries.

The following section aims at identifying the relevant issues when negotiating DTAs with developing countries or when considering renegotiating them. The relevance of these issues and the solutions proposed will depend on the specific situation of the developing countries concerned. A tailor-made approach is also necessary due to the fact that, among developing countries, the degree of development can differ (e.g. upper-middle income countries and low-middle income countries) or because of the economic activities performed (e.g. when a developing country is also a financial centre). Furthermore, some countries might require economic assistance for meeting international taxation standards. A more detailed assessment of the advantages and disadvantages of the possible options should be encouraged and performed, in order to meet development goals and ensure a balanced allocation of tax revenues.

RELEVANT QUESTIONS FOR CONSIDERATION BY MEMBER STATES

When reviewing their policy in relation to DTAs with developing countries, Member States could consider the following questions. (Each question includes references to relevant documents where more detailed information can be found):

⁵ COM(2015) – Collect More, Spend Better – Achieving development in an inclusive and sustainable way, Working Stuff Paper, p. 6.

- 1) *Do my DTAs with developing countries reduce their capacity to levy withholding taxes in a disproportionate way? Is the benefit of the reduced withholding tax (in terms of additional foreign investments) really sufficient to compensate for the loss of tax revenues?*

Allocating taxing rights is one of the primary aims of DTAs. However, a balanced approach on the taxes levied by the source country should be applied, as developing countries rely mostly on that type of income. In this respect, the withholding tax rate should allow for an appropriate distribution of taxing rights between the residence and the source country. In cases where an excessive tax burden is applied through withholding taxes which have a detrimental effect on cross-border trade and investment and result in double taxation, mechanisms for the relief of double taxation by the resident state might be considered, to the extent that such taxes levied in the source state exceed the amount of tax normally levied on profits in the State of residence.

It should also be borne in mind that DTAs which provide for low withholding taxes do not always increase tax revenues in the developed countries (i.e. residence countries). This is particularly the case where (i) the residence country applies 'tax sparing/matching credit clauses', which allow the taxpayer to deduct a higher tax rate from the tax bill despite the reduced tax rate in DTAs or (ii) the residence country disallows the imputation of the foreign withholding tax.

In addition, the literature⁶ shows that a reduced withholding tax rate may result in a treaty override in the source country, which is a frequent source of legal uncertainty for business and investments.

See: COM(2016)24; IMF (2014); NORAD (2009); VIDC (2014); Action Aid (2016).

- 2) *Should the notion of permanent establishment be adjusted to accommodate the particular needs of developing countries?*

The following issues may justify adjusting the notion of permanent establishment (PE) in DTAs with developing countries:

- 1) The period of time required to qualify business activities in a source country as PE might be excessively long (e.g. construction sites, extractive activities, etc.);
- 2) The definition of the status of PE might be too narrow, with classes of activities being excluded from such definition (e.g. loans, marketing, specific agents' activities, etc.). Although the BEPS actions are not designed to reallocate tax sovereignty, particular relevance to such aspects is given by BEPS Action 7, which foresees an extension of the OECD MC definition of PE to so called 'Commissionaire' activities. However, exceptions introduced by single negotiating practices can frustrate the benefits of the envisaged update.
- 3) The profits attributed to PEs might be limited, for example because of an exemption for such profits or the application of the functionally separated entity principle, which restricts the activities attributed to PEs to those strictly carried out by PEs themselves. This approach may conflict with domestic rules of many developing countries. Often, they still apply the relevant business activity principle, which takes a wider approach to defining PEs' activities, and therefore try to exercise 'force of attraction' in respect of such profits.

⁶ Reference to this topic is made, among others, in IMF Policy Paper "*Spill-overs in international corporate taxation*", IBDF "*Tax Treaty Override and the Need for Coordination between Legal Systems: Safeguarding the Effectiveness of International Law*", ActionAid "*Mistreated*".

If provisions such as those described above are included in a DTA, this may prevent source countries from levying taxes on PE activities, limiting the possibility of taxing domestic activities despite a substantial economic presence in the source country.

See: IBFD (2015); UN (2015)⁴; Action Aid (2016).

- 3) *Could a new article on "Fees for Technical Services" in tax treaties ensure fairness and new tax resources for developing countries?*

Fees for technical services refer to payments for any service of a managerial, technical or consultancy nature which are not provided by an employee of resident companies of contracting states or through PEs. Provisions may be introduced for levying taxes on activities whose economic benefit is *de facto* only for the source state but that are operated in the residence country of a company or in a third country and aimed at responding to rapid changes in modern economies, particularly with respect to cross-border digital services and e-commerce. This issue is also taken into account by BEPS Action 1, which underlines how critical the exact qualification of such income may be (e.g. the same kind of service can be treated as royalties, fees for technical services or business profits). The introduction of such a clause in DTAs could be helpful for allocating tax rights on economic activities substantially carried out in a state, with a consistent approach in line with substance criteria. It could also provide certainty for businesses, by clarifying their tax treatment for such services in advance. Such clauses have recently been discussed in the UN Committee of Experts on International Cooperation in Tax Matters and a new provision covering this matter should be included in the UN Model Convention, when it is next updated by the end of 2017.

See: UN (2016); IBFD (2015)

- 4) *Does the DTA's provide for a fair allocation of capital gain tax rights by source countries?*

Capital gains may be generated by different economic transactions, i.e. sales of immovable properties or assets, shares, exploitation rights, financial instruments, etc. Most DTAs with developing countries provide for source taxation for the first category of transactions only (sales of immovable properties), which is also tackled by BEPS Action 6 as regards anti-abuse measures. Business may take advantage of the limited range of transactions included in an agreement, shifting their capital gains to other sources which are not covered by DTAs. It would be important to ensure that capital gain provisions include a broad scope of economic transactions.

See: UN (2015)⁴; Dutch Ministry of Foreign Affairs (2013); Eurodad (2013).

- 5) *Which measures could be introduced to simplify the administration of transfer pricing?*

The implementation of transfer pricing rules and the use of transfer pricing documentation are essential to assess the taxable basis of multinational enterprises (MNEs) and to tackle aggressive tax planning. Dealing with such documents requires investment in terms of time and resources, which are not always available to developing countries. Different approaches could be undertaken in order to facilitate transfer pricing issues for developing countries. These could include (1) developing more detailed provisions for the 'arm's length principle' in DTAs or guidance on how it should be applied in concrete situations, (2) improving public data availability for comparability studies and capacity building of tax administration and (3) introducing appropriate anti-avoidance rules. These measures are in line with BEPS Actions 8-10 and can be complemented by BEPS Action 13 for Country-by-Country

reporting minimum standard and by Action 6 for anti-abuse measures. OECD's new Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations⁷ also continue to develop such a strategy.

See: IMF (2014); IMF/OECD/UN/ World Bank (2011); OECD (2014).

6) *Should DTAs without a proper anti-abuse clause be re-negotiated?*

The improper use of tax treaties to exploit differences in tax legislation between two contracting states is a concern for every country. It can give rise to double non taxation and lead to a direct loss of tax revenues. In this regard, the use of conduit countries (i.e. a DTA triangulation with a country with the only aim to exploit a more favourable tax treatment under such DTA) is particularly relevant and harmful. BEPS Action 6 provides for an agreed minimum standard to be included in DTAs in order to avoid so called 'treaty shopping' practices, recognising that specificities may have to be taken into account while negotiating such treaties. Due to their weak administrative capacities, developing countries may be more vulnerable to treaty shopping. Accordingly, the introduction of an anti-abuse clause in DTAs might be highly relevant for them and the flexibility agreed at OECD level could be used to engage in a deeper dialogue on this matter with affected countries. The introduction of general Treaty abuse Tests such as the Principal Purpose Test in the OECD MC, along with envisaged targeted provisions related to specific abusive practices (dividend transfer transactions, taxation of shares of companies, exemption from taxation to PE, etc.) are also valid tools for developing countries. As suggested by BEPS Action 6, interaction with domestic legislation should also be taken into account and might be particularly critical for developing countries.

See: UNCTAD (2015); UN (2015)⁴; SOMO (2013).

7) *Would it be feasible to introduce a dispute resolution mechanism in DTAs with developing countries?*

Dispute resolution mechanisms are increasingly being introduced within Member States' bilateral treaty networks and have also been agreed at EU level. BEPS Action 14 has also boosted this process, extending dispute resolution procedures, including mutual agreement procedures and arbitration, among OECD Members and, at a later stage, to Members of the Inclusive Framework on BEPS. Although such mechanisms are designed to pave the way for more predictable solutions in terms of time and results, it seems that according to current negotiation practices, many developing countries tend not to include dispute resolution mechanisms in their treaties⁸. Their main arguments refer to the usually high costs of dispute resolution mechanisms and the need for expertise in the field, which their administrations may be missing. These points do not compromise the usefulness of dispute resolution mechanisms, which can contribute to enhancing fairness in international taxation and legal certainty for taxpayers and tax administrations. In this regard, it might be useful to consider the work of the UN Tax Committee on a handbook for dispute resolution, since

⁷ http://www.oecd-ilibrary.org/deliver/fulltext?itemId=/content/book/tpg-2017-en&mimeType=freepreview&redirecturl=http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en&isPreview=true

⁸ More information regarding the adoption of DRMs by developing countries will be soon released by the OECD in the framework of the the peer review and monitoring process of BEPS Action 14, as countries member of the IF on BEPS have committed to communicate this information under this process.

this would be intended to address the needs of developing countries⁹. Furthermore, as domestic legislation could, in some case, disregard such practices or forbid them, it might be relevant to clarify in advance with the country concerned which options are the most suitable (e.g. clauses that limit the scope of mutual agreement and dispute resolution procedures, etc.).

8) *Would developing countries benefit from a specific, supportive approach while negotiating DTAs?*

Developing countries often have a limited administrative capacity in general, which also extends to the tax area. Whereas Member States can already be involved in or support capacity building programmes and trainings, an important role can still be played during negotiation rounds of DTAs. In this regard, it would be helpful to provide transparent information concerning general negotiation practices and features of the domestic legislative framework of the negotiating partner. More comprehensive information would empower developing countries to undertake a meaningful dialogue *inter pares*, reducing the technical knowledge gap with developed countries and raising awareness of the exact impact of DTAs on their tax revenues. Assistance could be also provided by the OECD and the UN.

⁹ Different options and approaches are under discussion at the UN Committee of Experts on International Cooperation in Tax Matters. The possible solutions envisaged are meant to face the lack of resources of developing countries. See http://www.un.org/esa/ffd/wpcontent/uploads/2016/10/12STM_CRP4_Disputes.pdf

ANNEX I

1: Member States' as well as third countries' reports

- 1) **IBFD (2015): " Possible effects of the Irish Tax System on Developing Economies" (IR)**
http://www.budget.gov.ie/Budgets/2016/Documents/IBFD_Irish_Spillover_Analysis_Report_pub.pdf

A summary of the report can be found in Annex II

- 2) **IBFD (2013): "Onderzoek belastingverdragen met ontwikkelingslanden" (NL)**
https://www.eerstekamer.nl/overig/20130830/onderzoek_belastingverdragen_met/document

A summary of the report can be found in Annex II

- 3) **Dutch Ministry of Foreign Affairs (2013): IOB Study: Evaluation issues in financing for development, analysing effects of Dutch corporate tax policy on developing countries**
<https://www.government.nl/documents/reports/2013/11/14/iob-study-evaluation-issues-in-financing-for-development-analysing-effects-of-dutch-corporate-tax-policy-on-developing-countries>

- 4) **NL (2013): Government's response to the IBFD report**
<https://www.government.nl/documents/parliamentary-documents/2013/09/09/government-s-response-to-the-report-from-seo-economics-amsterdam-on-other-financial-institutions-and-the-ibfd-report-on-develop>

- 5) **NORAD - Norwegian Government (2009) "Tax Havens and Development"**
https://www.regjeringen.no/contentassets/0a903cdd09fc423ab21f43c3504f466a/en-gb/pdfs/nou200920090019000en_pdfs.pdf
<https://www.regjeringen.no/globalassets/upload/ud/vedlegg/utvikling/tax-havens-short.pdf>

2: Commission/ European Parliament papers

- 1) **COM (2016)18 – Platform for Tax Good Governance, Follow-up of the Communication on the External Strategy: Tax Treaties between Member States and Developing Countries**
http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_inf_o/good_governance_matters/platform/meeting_2016/20160614_paper_tax_treaties_developing_countries.pdf
- 2) **COM(2016)24 – Communication on an External Strategy for Effective Taxation**
<http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-24-EN-F1-1.PDF>
- 3) **COM (2015) – Collect More Spend Better – Achieving development in an inclusive and sustainable way**
https://ec.europa.eu/europeaid/sites/devco/files/pol-collect-more-spend-better-swd-20151015_en.pdf
- 4) **COM(2015) – Collect More Spend Better – Supporting developing countries to better mobilise and use domestic public finances**
https://ec.europa.eu/europeaid/sites/devco/files/com_collectmore-spendbetter_20150713_en.pdf
- 5) **European Parliament resolution of 8 July 2015 on tax avoidance and tax evasion as challenges for governance, social protection and development in developing countries**

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0265&language=EN>

- 6) **European Parliament resolution of 26 February 2014 on promoting development through responsible business practices, including the role of extractive industries in developing countries**
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0163+0+DOC+XML+V0//EN>
- 7) **COM(2010) 163 – Communication Tax and Development, Cooperating with Developing Countries on Promoting Tax Good Governance in Tax Matters**
[https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/com\(2010\)163_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/com(2010)163_en.pdf)
- 8) **COM (2010) – SEC(2010) 426: Staff Work Document accompanying the Communication from the Commission Tax and Development Cooperating with Developing Countries on Promoting Good Governance in Tax Matters**
[https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/sec\(2010\)426_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/sec(2010)426_en.pdf)
- 9) **COM(2009) 201 – Communication Promoting Good Governance in Tax Matters**
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0201:FIN:EN:PDF>
- 7) **EP - Committee on Development (2011) “Report on Tax and Development – Cooperating with Developing Countries on Promoting Good Governance in Tax Matters” (Rapp.: Hon. Eva Joly)**
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2011-0027+0+DOC+PDF+V0//EN>

3: Papers by International Organisations

- 1) **IMF (2014): "IMF Policy Paper, spill-overs in international corporate taxation"**
<http://www.imf.org/external/np/pp/eng/2014/050914.pdf>

A summary of the report can be found in Annex II
- 2) **IMF/OECD/UN/ World Bank (2011): "Supporting the development of more effective tax systems"**
<https://www.oecd.org/ctp/48993634.pdf>
- 3) **OECD (2014) “Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries”**
<http://www.oecd.org/tax/part-1-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf>
<https://www.oecd.org/g20/topics/taxation/part-2-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf>
- 4) **UN (2016) “Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries”**
http://www.un.org/esa/ffd/wp-content/uploads/2016/05/manual_btt.pdf
- 5) **UN (2015)¹ “Addis Ababa Action Agenda of the Third International Conference on Financing for Development”**
http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf
- 6) **UN (2015)² “Resolution adopted by the General Assembly on 27 July 2015: Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)”**
<http://www.undocs.org/A/RES/69/313>

- 7) UN (2015)³ **“Post-2015 Development Agenda entitled ‘Transforming our world: the 2030 Agenda for Sustainable Development’, adopted by the United Nations General Assembly in September 2015”**
http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E
- 8) UN (2015)⁴ **“Protecting the Tax Base of Developing Countries”**
<http://www.un.org/esa/ffd/wp-content/uploads/2015/07/handbook-tb.pdf>

A summary of the report can be found in Annex II
- 9) UN (2014) **“Papers on Selected Topics in Negotiation of Tax Treaties for Developing Countries”**
http://www.un.org/esa/ffd/wp-content/uploads/2014/08/Papers_TTN.pdf
- 10) UN (2013) **“Handbook on Administration of Double Tax Treaties for Developing Countries”**
http://www.un.org/esa/ffd/wp-content/uploads/2014/08/UN_Handbook_DTT_Admin.pdf
- 11) UN (2011) **“United Nations Model Double Taxation Convention: 2011 Update”**
http://www.un.org/esa/ffd/wp-content/uploads/2014/09/UN_Model_2011_Update.pdf
- 12) UNCTAD (2015) **“International Tax and Investment Policy Coherence – Chapter V”**
http://unctad.org/en/PublicationChapters/wir2015ch5_en.pdf

4: Papers by NGO's

- 1) Action Aid (2016): **"Mistreated"**
http://www.actionaid.org/sites/files/actionaid/actionaid_-_mistreated_tax_treaties_report_-_feb_2016.pdf

A summary of the report can be found in Annex II
- 2) Action Aid Dataset of tax treaties signed by low income countries in Asia and Sub-Saharan Africa
http://www.actionaid.org/sites/files/actionaid/aa_treaties_dataset_feb_2016.xlsx
- 3) Action Aid (2014) **“Policy Brief on Double Taxation Agreements”**
http://actionaid.org/sites/files/actionaid/policy_brief_on_double_taxation_agreements.pdf
- 4) Eurodad (2015): **" Fifty Shades of Tax Dodging"**
<http://www.eurodad.org/files/pdf/5630c89596bec.pdf>
- 5) Eurodad (2013): **“Double Taxation Agreements in Latin America - Analysis of the Links among Taxes, Trade and Responsible Finance”**
<http://www.eurodad.org/files/pdf/524d3b7c8e8ed.pdf>
- 6) SOMO (2013) **“Should the Netherlands Sign Tax Treaties with Developing Countries?”**
<http://www.hollandquaestor.nl/documents/pdf/publicaties/overige/somo-rapport-should-the-netherlands-sign-tax-treaties-with-developing-countries.pdf>
- 7) VIDC (2014) **“A Legal and Economic Analysis of Double Taxation Treaties between Austria and Developing Countries”**
http://www.vidc.org/fileadmin/Bibliothek/DP/Neuwirth/Studie_Doppelbesteuerungsabk/BraunFuentes_AustrianDTTs_Layout_final3.pdf

ANNEX II

Ireland - IBFD Spillover Analysis

Possible Effects of the Irish Tax System on Developing Economies

While the analysis shows that FDI and trade flows between Ireland and developing countries are small at present it could be expected that these will grow over time, and the effects of tax treaty provisions will become more relevant. At present Ireland has only a limited number of tax treaties with developing countries. All Irish tax treaties with African and selected tax treaties with Asian developing countries concluded before 1 September 2014 have been included in this analysis.

The use of tax treaties in international tax planning is well known as well as the impact tax treaties can have on tax revenue foregone in developing countries. Chapter VI of this spillover analysis contains a thorough analysis of the relevant provisions of tax treaties concluded by Ireland with a number of developing countries and a comparison of tax treaties concluded by selected developed countries with the same developing countries. It has been found that only a small number of tax treaties included in the analysis contains anti-abuse provisions other than the beneficial ownership test. The public consultation submissions raise concerns that the lack of more robust anti-avoidance provisions in many tax treaties may contribute to the implementation of tax avoidance schemes and therefore the loss of tax revenue.

According to the report, the allocation of taxing rights under a multilateral tax treaty (as is suggested by Oxfam) will not be the way to go forward. Bilateral tax treaties offer possibilities to address undesirable use of tax treaties (i.e. treaty shopping) by including tailor made anti-abuse provisions. It seems that a multilateral tax treaty may offer more planning opportunities than bilateral treaties do. It is also important that many bilateral tax treaties contain more anti-abuse provisions than are currently included in both the OECD and United Nations Model Conventions that only contain the beneficial ownership test in Art. 10 (dividends), 11 (interest) and 12 (royalties).

In this respect, in addition to the General Anti-avoidance rule recommended by the European Commission, one could think about adopting the anti-abuse provisions that are included in the report on BEPS Action Point 6 (Prevention the Granting of Treaty Benefits in Inappropriate Circumstances) in tax treaties. However, it is questionable whether tax administrations of developing countries would be able to apply in practice complex LOB-provisions as included in that BEPS report. Therefore, it may be useful to develop and include a “LOB light” provision in tax treaties with developing countries and to provide assistance with capacity building in this respect.

We can agree with the suggestion made by Oxfam that developing countries should make a careful cost benefit assessments before concluding tax treaties. It is also important to have a similar assessment for tax incentives and other tax expenditure introduced in domestic legislation of those countries.

The Netherlands - IBFD Survey

Tax treaties between the Netherlands and developing countries

The Minister for Foreign Trade and Development Cooperation and the State Secretary of Finance have commissioned a survey on the risks on unintended use of bilateral tax treaties with developing countries. The basic assumption is that tax treaty policy should not be harmful for developing countries.

To this end the tax treaties with Bangladesh, the Philippines, Ghana, Uganda and Zambia have been checked. Compared with other countries¹⁰ the tax treaties concluded by the Netherlands do not contain lower source taxes on dividends, interest and royalties. The Netherlands has not concluded more treaties with developing countries than France or the UK. However, the Netherlands has concluded more tax treaties than other countries which are popular in international tax planning structures such as Ireland or Luxembourg. This might be an explanation for the presence of many holding and conduit companies of MNCs in the Netherlands in relation to developing countries.

There are other tax related and non-tax related circumstances that are relevant for the attractiveness of the Netherlands as a country for holding and conduit companies. The tax related factors are:

- the participation exemption;
- no source tax on interest and royalties;
- the APA/ATR (ruling) practice.

Many of the treaties with developing countries do not contain anti-abuse rules. It is suggested that the Netherlands could propose to include these rules in treaties with developing countries. However, the tax administration in developing countries might not be sufficiently equipped to be able to apply these rules. Therefore, capacity building is needed.

Due to the lack of data on the income flows between the Netherlands and the said developing countries it was not possible to ascertain possible quantitative indications of the unintended use of a tax treaty. The amounts of revenue loss in developing countries as calculated in other report and surveys (by NGOs and research centres) are based on assumptions and hypotheses. Therefore, they cannot be substantiated on the basis of the data available.

Policy briefing by the Minister for Foreign Trade and Development Cooperation and the State Secretary of Finance in response to the IBFD survey

The Netherlands will propose to insert anti-abuse clauses in the existing and future treaties with developing countries. The Netherlands will invest even more in capacity building of tax administrations. Tax evasion or tax avoidance is not only due to the unintended use of tax treaties. It is more important that national rules are clear and upheld. Technical support from the Netherlands can make a valuable contribution to this end.

¹⁰ The tax treaties of Belgium, China, Germany, France, Ireland, India, Mauritius, the UK and Switzerland with said developing countries (if there is one) have been used as a benchmark.

IMF Policy Report

Spill-over in International Corporate Taxation

The IMF report explores the nature, significance and policy implications of spill-overs in international corporate taxation—the effects of one country’s rules and practices on others. It complements current initiatives focused on tax avoidance by multinationals, notably the G20-OECD project on Base Erosion and Profit shifting (BEPS). The paper draws on the IMF’s experience on international tax issues with its wide membership, including through technical assistance (TA), and on its previous analytical work, to analyse spill-overs and how they might be addressed. In doing so, it goes beyond current initiatives to look at a wide set of possible responses.

These spill-overs can matter for macroeconomic performance. Capital account data are impossible to understand without referring to taxation, and there is considerable evidence that taxation powerfully affects the behaviour of multinational enterprises.

New results reported here confirm that spill-over effects on corporate tax bases and rates are significant and sizable. They reflect not just tax impacts on real decisions but, and apparently no less strongly, tax avoidance.

The analysis also finds that spill-overs are especially marked and important for developing countries. These countries typically derive a greater proportion of their revenue from corporate tax; TA experience provides many examples in which the sums at stake in international tax issues are large relative to their overall revenues; and the empirics reported here suggest that spill-overs are especially strong for them.

Limiting adverse spill-overs on developing countries requires not just capacity building, but also addressing weaknesses in domestic law and international arrangements. The paper makes specific suggestions in areas that Fund TA has found to be especially problematic for developing countries. Sight must not be lost, however, of the need for capacity building and reform in less high profile but critical tax areas.

Wider reforms to the international tax system that have been proposed address some spill-overs under current arrangements, but would bring their own difficulties. ‘Formula apportionment’ for instance, which has been widely canvassed, involves significant risk of distortion, and may not benefit developing countries.

The institutional framework for addressing international tax spill-overs is weak. As the strength and pervasiveness of tax spill-overs become increasingly apparent, the case for an inclusive and less piecemeal approach to international tax cooperation grows.

United Nations Handbook on Selected Issues in

Protecting the Tax Base of Developing Countries

One of the most significant policy challenges facing developing countries is establishing and maintaining a sustainable source of revenues to fund domestic expenditures. While this problem has many facets, one of the most important is protecting the domestic tax base. In recent years, increasing attention has been paid to the fact that many multinational enterprises (MNEs) appear to have been able to pay effective tax rates well below what one would expect from the headline rates in the countries in which they operate.

While the OECD/G20 work is important, and substantial efforts were made to take the viewpoints of developing countries into account in formulating its analysis, it was clear from the beginning that some kind of independent examination of the problems of tax avoidance and the resulting profit shifting and base erosion from the perspective of developing countries was required. This is true for a number of reasons. First, most developing countries are primarily (though not exclusively) concerned with the reduction in source-based taxation, rather than the shifting of domestic income of locally owned companies to low- or no-tax jurisdictions. Second, the corporate tax on inward investment typically accounts for a greater share of total revenue in developing countries than in countries with more developed tax systems. In addition, the potential responses to base erosion and profit shifting are limited to some extent by the administrative capacity of developing countries.

Protecting the domestic tax base against base erosion and profit shifting is necessary if developing countries are to attain revenue sustainability. Capacity development in this area is essential to move toward that goal. The OECD work has much to offer to developing countries in terms of identifying issues and suggesting possible techniques to deal with the problem of base erosion and profit shifting, but it is important to keep in mind the special needs and perspectives of developing countries regarding these issues: among others, the state of development of the tax system, the administrative resources available to deal with these matters, the nature of the trade and commercial relations with trading partners, and regional considerations. Each country must evaluate its own situation to identify its particular issues and determine the most appropriate techniques to ensure a sound tax base.

In light of the importance of the issue of base erosion and profit shifting for developing countries and the necessity for further study and examination, the United Nations Committee of Experts on International Cooperation in Tax Matters (United Nations Committee of Experts) established the Subcommittee on Base Erosion and Profit Shifting Issues for Developing Countries, which was mandated with informing developing country tax officials on these issues and facilitating the input of developing country views and experience into the work of both the United Nations Committee of Experts and the wider work of the OECD Action Plan on BEPS. In addition, the Financing for Development Office (FfDO) of the United Nations Department of Economic and Social Affairs undertook a project to supplement and complement this work from a capacity development perspective. This project focused on a number of issues of particular interest to developing countries and which include, but are not limited to, the matters covered by the OECD.

ACTIONAID

Mistreated

The report is based on a dataset - which is public - of more than 500 treaties that low- and lower-middle income countries have signed since 1970. Each treaty has been screened against 26 specific criteria. The dataset was developed by an independent consultant.

The report identifies the most restrictive treaties and ranks "wealthier" countries according to the number of their restrictive treaties concluded with developing countries but also ranks developing countries with the highest number of restrictive treaties that risk severely limiting their taxing power. ActionAid also published an interactive map on their website.

While Italy and UK feature on the top of the list, the most affected developing countries are Bangladesh, Mongolia, Pakistan, Ethiopia, Sri Lanka, Zambia, Ghana and Vietnam.

The report finds that treaties that lower-income countries have with OECD countries take away more taxing rights than those with non-OECD countries. It also highlights the negative role played by countries such as Mauritius which is qualified as a tax haven.

According to the report, developing countries would lose billions. As an example, Bangladesh is losing approximately US\$85 million every year from just one clause in its tax treaties that severely restricts its right to tax dividends. In 2004, Uganda signed a tax treaty with the Netherlands that completely takes away Uganda's right to tax certain earnings paid to owners of Ugandan corporations, if the owners are resident in the Netherlands.

The report highlights three tax rights where lower-income countries need a drastically better deal in their tax treaties with wealthier countries, i.e. (1) too restrictive PE definition (e.g. duration of construction sites); (2) withholding tax - the dataset reveals a trend whereby the rights of lower-income countries to levy WHT on royalties and dividends have been declining over time; and (3) Capital gains tax.

ActionAid calls for governments to reconsider their restrictive treaties. They also invite MNE's to be transparent about their interactions with developing country governments regarding their treaty terms.

Although it is not explicitly referred to in the report, ActionAid also considers arbitration as a major concern for developing countries.

In general, ActionAid's key areas of focus are: tax treaties, tax incentives, global governance (Addis, etc), transparency (in particular CBCR), ATAD and the External Strategy.