Edition 6 2024

CARIBBEAN TAX LAW JOURNAL

International Fiscal Association
Curaçao-Aruba-Sint Maarten

INDEX

Published by
IFA Branch Curaçao-Aruba-Sint Maarten
Stichting Caribische Belasting en
Europawinkel

Editor-in-Chief
Germaine Rekwest

Editors
Leopoldo Parada
Shu-Chien Chen
Wessel Geursen
Hans Ruiter

Design
Isabelle Kuipers

Thanks to our partners
Grant Thornton Aruba
Grant Thornton Curaçao
HBN Law & Tax Curaçao

Contact
info@ifa-cas.com
www.caribbeantaxlawjournal.com

ISSN NUMBER
2949-9356

International Fiscal Association
Curaçao-Aruba-Sint Maarten

LETTER FROM THE EDITOR

Leopoldo Parada

Dear readers,

It is undeniable that we live in exciting times. On mid-August the United Nations (UN) Ad Hoc Committee approved the final draft of the Terms of Reference for a United Nations Framework Convention on International Tax Cooperation, which purpose is to establish the institutional structure to achieve a more transparent, simple, and inclusive international tax cooperation, representing the consensus of the international community, particularly among developing countries and emerging economies.[1] Not much longer — indeed only a few days before these editorial was finished— the Court of Justice of the European Union surprised both tax commentators and practitioners announcing that Ireland provided illegal State Aid to the Irish subsidiaries of Apple in that country, a decision that overturned the previous position held by the European General Court.[2] Moreover, and if this was not enough, countries around the world —especially developing countries and emerging economies— keep struggling to decide on whether endorsing the idea of a global minimum effective corporate income tax rate is the right path to be followed, particularly considering the tax policy trade-offs associated to such a decision.

In this scenario of changes, some would argue that a new architecture of the international tax system is on the way. Others, perhaps less optimistic, would just say that this is simply a temporary trend that is about to pass. Whatever side one decides to take (if any), there are no doubts that many reasonable questions deserve some analysis at this point of time. Some of them attend to the legitimacy in the international tax rule-making process and the apparent shift in the global tax governance from the OECD to the UN. Others, perhaps more immediate, refer to the direct reactions that developing countries and emerging economies can strategically adopt in a world than tends to limit the use of tax incentives, forcing them to compete with grants and subsidies, as well as to find alternative paths to address still pressing issues related to the digitalisation of the economy. Our authors address some of these questions, aiming to shed some lights in times where clarity is more than desirable.

In this number, Sam van der Vlugt explores the relationship between legitimacy and international tax rulemaking and what this means for assessing the legitimacy of the norms produced. Ultimately, he aims to offer some clarity for a term that, although crucial, it has been poorly understood in the latest developments of international taxation. Natalia Quiñones addresses the role of colonisation as an element that has largely determined the tax relationship between the Global North and the Global South. She argues that countries in the Global South are generally driven by more beneficial tax systems due to inherited economic models from their colonial powers that now seems to shame them in categories like "tax havens". As such, she argues that the new rise of a Global South cooperation in international tax policy at the UN should not be taken as a coincide but rather a reaction that provides also a valid opportunity not only to decolonise the international tax system, but also to address the challenges brought by mobility and new technologies in this part of the world. Valentin Bendlinger turns back the attention to a common suspect, i.e., the OECD Pillar 2, highlighting some technical shortcomings and ambiguities of the OECD proposal and its effectiveness. However, he does not focus on a simple technical critique and raises a more fundamental question: does the OECD Pillar 2 end tax competition or it promotes it? Through a series or arguments, the author demonstrates that perhaps the OECD Pillar 2 is more than the end of the so-called "race to the bottom" in corporate income taxation, but the beginning of a "race towards the minimum". Jie Wang provides a fresh approach to the issue of nexus and taxation of business profits in a digitalised economy. He explores Taiwan's unilateral approach to taxing the digital economy through a puzzle-solving process based on real-world cross-strait business practices in the online gaming industry, offering insights that are perfectly applicable to other online industries around the world, including those in Caribbean countries. Finally, Germaine Rekwest offers us an early analysis of the recently signed Double Tax Convention between the Kingdom of the Netherlands, in respect of Curaçao, and the Republic of Suriname. She highlights some technical element of the treaty, reinforcing also the consistent tax treaty policy adopted by Curaçao in the latest years, and which includes future negotiations with countries like Cyprus and Mauritius.

This number of the Caribbean Tax Law Journal provides us with a wide spectrum of topics, refreshing points of views, and convincing arguments. This is only possible due to our authors, peer reviewers, and editorial team. Thank you very much to all of them.

To our readers, simply enjoy this number!

Leopoldo Parada

[1] UN, Chair's Proposal for Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation on 16 August 2024, A/AC.295/2024/L.
[2] Judgement of the Court (Grand Chamber) of 10 September 2024, Case C 465/20 P, European Commission v Ireland and Apple Sales International, ECLI:EU:C:2024:724.

A MINIMUM TAX THAT ISN'T: IS THERE A REAL PURPOSE FOR PILLAR TWO?

By Dr. Valentin Bendlinger, MSc, LLM (NYU), Senior Consultant at ICON Wirtschaftstreuhand GmbH in Austria and lecturer at the Institute for Austrian and International Tax Law at Wirtschaftsuniversität Wien (WU) in Vienna, Austria.[1]

The OECD's Pillar Two project has shaped the global tax community in recent years. Hardly any other topic has been discussed and debated as intensively and emotionally as the global minimum tax. In May 2019, as a pre-doctoral researcher, the author of this article started analysing Pillar Two. At that time, the OECD had released only a single policy note and a work program.[2] It's likely that even the authors of those reports did not anticipate how rapidly the global minimum tax would evolve into a concrete reality within five years. By December 2023, when the author published his book on Pillar Two, he already sensed that it was becoming outdated.[3]

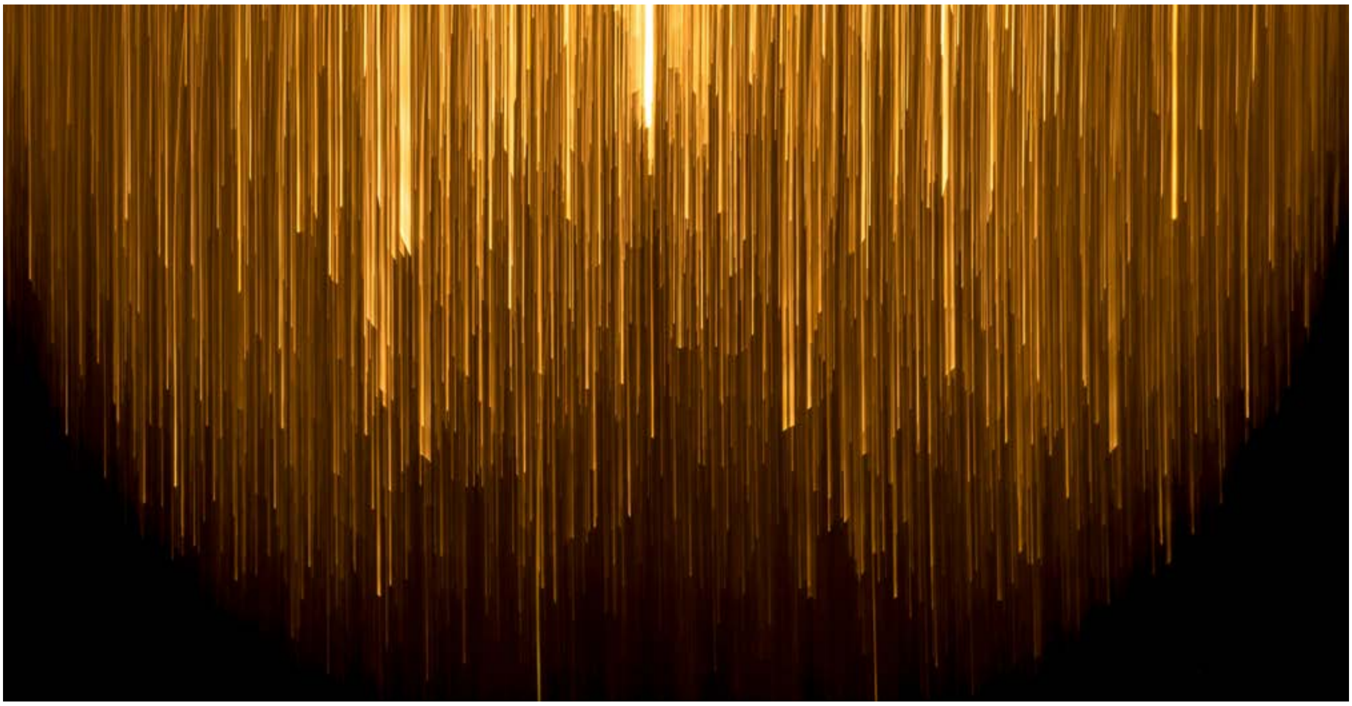
Against many odds, Pillar Two has become effective in the EU and many other jurisdictions for fiscal years beginning on or after the 31st of December 2023, and the first Pillar Two returns are due in mid-2026.[4] However, a significant regulatory change leaves more traces the faster it happens, and now that the waters around the Pillar Two project are calming down for the first time, these traces are becoming visible. The real challenges of Pillar Two implementation are becoming apparent. This is particularly true for the Caribbean, with many different tax jurisdictions less reliant on public revenues than large Western economies. Some of them are keen to attract foreign direct investment despite remote geographical locations and economic difficulties via targeted tax incentives. Therefore, how to react to a new framework that aims to take local tax incentives away? How can small jurisdictions, like Small Island Developing States (SIDS), still attract large MNE Groups to invest locally?

There has been a lot of literature on the question of how small taxing jurisdictions and tax havens should react to the upcoming global minimum tax.[5] In my opinion, a rational reaction requires a technical understanding of the rules and a sense of the system's weaknesses. Nevertheless, this article does not aim to summarize technical details. The systematics of Pillar Two are well known and do not need to be recalled once again. This article does not aim to discuss how jurisdictions or MNE Groups can plan around Pillar Two either. This contribution intends to highlight what this author views as the technical shortcomings and ambiguities of the OECD's global minimum tax and their potential influence on its effectiveness. The article concludes by exploring the following question: Does Pillar Two serve a real purpose?

IS PILLAR TWO A MINIMUM TAX ON PROFITS?

Pillar Two aims at MNE Groups exceeding an annual revenue threshold of EUR 750 million read from the Group's consolidated financial accounts. The MNE Group is then split into legal entities and PEs to compute accounting figures of taxes and income, which are aggregated on a jurisdictional basis. Finally, Pillar Two divides the taxes and income per jurisdiction to calculate an effective tax rate that is to be compared to the minimum rate of 15 %. If the effective tax rate is below the minimum, the difference to the minimum will be levied as a so-called 'Top-up Tax'.

This has led the OECD and public media to promote Pillar Two as a successful "Global Deal to End Tax Havens" as large MNE Groups will have to pay at least 15 % of corporate tax from now on, regardless of how they structure their businesses. However, the right question is regularly overseen: Is it a 15 % minimum rate on what?



The amount of tax liability is the result of a multiplication of a tax rate and a tax base and the definition of the latter, is the true merit of the global minimum tax. Article 3 of the OECD GloBE Model Rules defines the tax base of the global minimum tax which is basically equal to "the Financial Accounting Net Income or Loss" adapted for exhaustively listed adjustments of common differences between accounting and tax profits.[6] Thus, in principle, the minimum base is accounting profits. However, this is only part of the truth.

The profits subject to Pillar Two are reduced by a "Substance-based Income Exclusion" (SBIE), that is, a free amount computed from a payroll and a tangible asset component. The global minimum tax only subjects the profits exceeding the SBIE to the minimum tax rate of 15%. Consequently, if the SBIE exceeds the profits received in the tested jurisdiction, these profits are not subject to a minimum tax, irrespective of the effective taxation of those profits in the respective jurisdiction. There would be no 'Top-up Tax' even if the jurisdiction would not levy corporate tax at all, or even gives tax refunds. The SBIE takes a fixed percentage of payroll and so-called 'Local Tangible Assets' that the MNE Group can set off from its jurisdictional 'Net GloBE Income' of a specific Fiscal Year. However, what can be concluded from this design? The SBIE in its current form reveals the assumably most interesting flaw of what is called the global minimum tax or Pillar Two: [7]

First, the SBIE seems to incentivise less efficient businesses over more efficient ones. The higher the profits compared to payroll and 'Local Tangible Assets' within a specific jurisdiction, the more likely GloBE Income will exceed the SBIE. In other words, the higher a business's rate of return on payroll and tangible assets, the more likely it will be subject to a 'Top-up Tax'.

Second, the SBIE can be used fraudulently by multinational corporations, as can be shown hyperbolically: If a corporation wants to avoid 'Top-up Tax' in a low-tax jurisdiction, it could simply employ a local manager, raise his or her payroll and buy her or him a Porsche. The management fee is a payroll, and the Porsche is a local tangible asset, and both increase the minimum tax-free amount that we call the SBIE. Of course, this would not be rational business as the SBIE is limited to a small percentage of both payroll and book values of tangible assets. However, the example shows that the SBIE is a strange alien.

The OECD knows the SBIE is prone to abuse. Indeed, a good example is that the OECD has explicitly excluded investment property from the scope of the tangible asset carve-out to avoid that investment in such properties enables MNE Groups to reduce their 'Excess Profits'. However, this example demonstrates that the mere existence of the SBIE is clearly at odds with the rationale of a global minimum tax. What is the point of implementing an impressively complex set of rules to establish a minimum tax if the minimum, e.g., due to the SBIE, can be equal to zero?

DOES PILLAR TWO END TAX COMPETITION OR PROMOTE IT?

The OECD always promoted Pillar Two to establish an end to the "race to the bottom". That is, to prevent jurisdictions from competing among each other using tax incentives for the gain of investment. Pillar Two is supposed to work like a "tax cartel" among jurisdictions: All agree on a certain price for business making, so nobody needs to grant a rate below 15 %. The more jurisdictions decide to implement a minimum tax, the less attractive it is to shift profits to low-tax jurisdictions, as the MNE Group is at risk of having to tax the same profits anywhere else. It is certainly true that Pillar Two's "diabolic machinery" affects tax competition.[8] However, it is undoubtedly that Pillar Two does not signify the end of tax competition. Moreover, under some circumstances, one could fairly conclude that it ends up promoting it. There are different reasons for this.[9]

First, every tax has its scope, and so does Pillar Two. In other words, Pillar Two does not pose any limits for jurisdictions to compete by way of tax measures concerning corporate taxpayers that are, for whatever reason, not within the scope of its framework. Above all, this includes individuals irrespective of any revenue threshold and all MNE Groups that stay below the EUR 750 million threshold. Moreover, there are also 'Excluded Entities' which are either completely or partly outside the scope of Pillar Two. These entities do not need to provide any evidence that their profits are taxed at any minimum and, thus, jurisdictions might still compete to attract such entities.

Second, every tax has its exemptions, and so does Pillar Two. Nearly every corporate income tax system provides for certain tax exemptions or specific deductions like free amounts to incentivise certain activities of corporate taxpayers specifically. Within the context of Pillar Two, such a deduction is, as has been demonstrated already, the SBIE. The same is true for 'International Shipping Income' enjoying a general exemption under the Pillar Two regime. Thus, Pillar Two does not limit tax competition with respect to profits covered by the SBIE or falling within the definition of 'International Shipping Income'.

Third, every piece of tax legislation leaves loopholes for interpretation, and so does Pillar Two. It is true that Pillar Two's set of rules is highly comprehensive and has already closed many conceivable gaps. However, Pillar Two exceeds any notion of complexity, and it is well known that complex provisions are necessarily more complicated to interpret. It is impossible to list all the interpretation problems here. Still, there is no question that both national tax administrations and MNE Groups will interpret the provisions of Pillar Two as much as possible to their respective advantage. For example, those jurisdictions that wish to attract foreign direct investment will subject the SBIE to the broadest possible meaning vis-à-vis other jurisdictions to prevent collection of 'Top-up Tax' by way of IIR and UTPR. Similar problems are likely to arise for 'Qualified Refundable Tax Credits' (QRTCs), enabling jurisdictions to give a tax credit to corporate taxpayers by allowing them to include such credits as income within the Pillar Two base in the denominator of the ETR fraction instead of reducing the amount of 'Adjusted Covered Taxes' in the numerator, which mitigates the reduction of ETR caused by such QRTCs. The question of interpretation arises with every piece of law and Pillar Two is not an exception.

Fourth, and finally, it is not absurd to think that Pillar Two rather than limiting tax competition, it may end up promoting it. According to Devereux, Vella & Wardell-Burrus,[10] for example, since the SBIE allows for any tax rate on profits that are covered within the amount of SBIE, Pillar Two might even create an incentive to reduce the nominal CIT rate as low as zero, at least for those profits covered within the SBIE. Evidently, reducing the CIT rate necessarily includes the risk that any profits not covered within the SBIE might be subject to a 'Top-up Tax' collected by jurisdictions that implemented Pillar Two. However, jurisdictions could still implement a QDMTT skimming off the 'Top-up Tax' on those profits that are not covered within the SBIE of an 'MNE Group' within a specific jurisdiction.

IS THERE A PURPOSE FOR PILLAR TWO AFTER ALL?

As demonstrated already, Pillar Two is less of a minimum tax than it is supposed to be. One of the author's most appreciated tax law professors, Daniel Shaviro, has pointed out the essence of a minimum tax, explaining that a minimum tax is a comparison between the rate achieved and a politically agreed minimum that is said to be "sufficient".[11] Therefore, there might be good arguments in favour of minimum taxes, including a raise in tax revenues, the tackling of abusive structures, and the reduced incentive to shift anything artificially. However, there are also major counterarguments.

If the world is satisfied with the current international tax framework, there would not be a need to test the tax level against an artificial minimum in the first place. The fact that Pillar Two exists demonstrates a political dissatisfaction with the current tax system. Yet, instead of rethinking and renegotiating the current tax system, the OECD decided to place a highly complex and challenging-to-maintain framework on top of the current tax system. Even worse, the new framework is far from flawless. As demonstrated already in this article, Pillar Two is not the end of tax competition. On the contrary, it might be well the beginning of the "race towards the minimum of 15%", triggering even more pressure on the developing world to provide for even more favourable corporate tax environments.

If a minimum tax is already difficult to justify from a purely academic perspective, even if it was implemented in a consistent manner, a minimum tax that isn't, is simply undefendable. This should not be read as a general blunt criticism against Pillar Two but rather as a plea for a more targeted and systematic focus on a coordinated and inclusive future international tax policy.

Valentin Bendlinger

[1] The author thanks Dr. Leopoldo Parada, PhD, LLM for valuable comments on an earlier draft of this article.
[2] OECD/G20 Inclusive Framework on BEPS, Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy (29 May 2019), available at https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.pdf.
[3] V. Bendlinger, The OECD's Global Minimum Tax and Its Implementation in the EU - A Legal Analysis of GloBE in the Light of Tax Treaty and EU Law (Kluwer 2023).
[4] Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, OJ L328 (2022) [hereinafter Pillar Two Directive (2022/2523)].
[5] M. Devereux, J. Vella & H. Wardell-Burrus, Pillar 2's Impact on Tax Competition, 26 Aug. 2022 SSRN, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203395; M. Devereux, J. Vella & H. Wardell-Burrus, Pillar 2: Rule Order, Incentives, and Tax Competition, 14 Jan. 2022 SSRN, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4009002; J. Englisch, GloBE Rules and Tax Competition, 50 Intertax 12 (2022).
[6] See Art 3.2. OECD GloBE Model Rules.
[7] See Bendlinger, supra n. 2, at sec. 4.5.2.
[8] R. Mason, A Wrench in GLOBE's Diabolic Machinery, 107 Tax Notes Intl. 1391–1395 (19 Sept. 2022).
[9] Bendlinger, supra n. 2, at sec. 4.5.6.
[10] Devereux, Vella & Wardell-Burrus, Pillar 2: Rule Order, Incentives, and Tax Competition, supra n. 4.
[11] D. Shaviro, What Are Minimum Taxes, and Why Might One Favor or Disfavor Them?, 40 Va. Tax Rev. 2 (2021).

International Fiscal Association
Curaçao-Aruba-Sint Maarten

NOT AN IFA MEMBER YET?

Don't hesitate and send an email to the branch secretariat at info@ifa-cas.com

IFA Branch Curaçao-Aruba-Sint Maarten

IFA Branch Curaçao-Aruba-Sint Maarten was established in 2002 to provide a platform for members, consisting of professionals from both public and private sector, to come together and discuss topical international tax and fiscal issues with the objective to advance international and comparative fiscal law. IFA Branch Curaçao-Aruba-Sint Maarten aims to contribute to international IFA research publications and conducting seminars across the Caribbean Region. The Branch provides a unique forum for practitioners, taxpayers, academics, government officials and the judiciary to network and interact.

Members will become a member of the worldwide central IFA network and will be invited to attend IFA meetings, eligible to author IFA branch reports and/or otherwise involved in the scientific work of IFA and receive news from the IFA branch and central IFA. For more information, visit our website www.ifa-cas.com.

WIN
WOMEN OF IFA NETWORK
INVITE YOU TO JOIN US AT THE EVENT:

International Fiscal Association
Curaçao-Aruba-Sint Maarten

Women of IFA Networking Brunch

Date & time
20 October 2024 | 10.30-12.00

Location
Serka Tanchi Restaurant
Rooi Catootjeweg 10
Curaçao

Exclusive in-person event with limited capacity

Sign up:
info@ifa-cas.com

WIN
WOMEN OF IFA NETWORK

To build an international and trusted referral network of Women in International Taxation

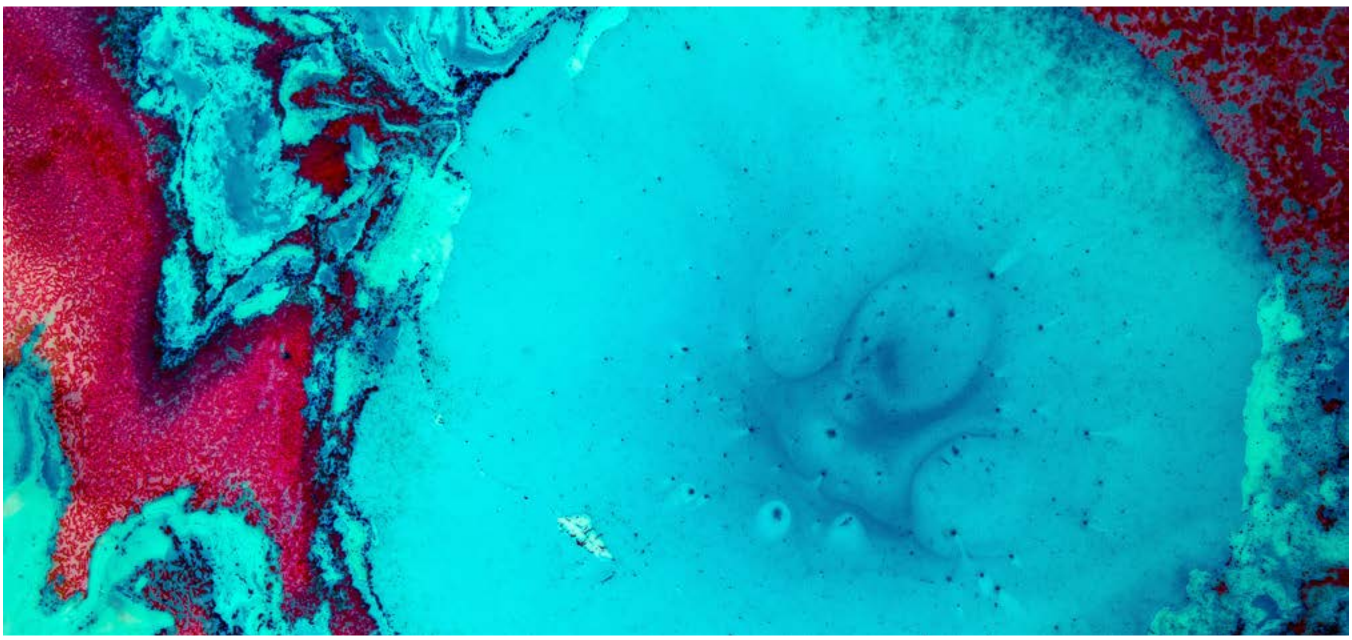
DECOLONIZING TAX RULES: A NEW ERA FOR TAX COOPERATION IN THE GLOBAL SOUTH

By Natalia Quiñones, LLM, Vice-president of the International Fiscal Association (IFA), former advisor to the Colombian Ministry of Finance for the PTLAC, and International tax partner at Quiñones Cruz in Bogotá.[1]

The international tax principles that we use nowadays for distributing taxing powers are based on rules designed by and for colonial powers whose businesses were expanding to colonial territories. More specifically, the residence and source principles were designed as proxies for nexus during a time when physical presence was required and permanence in a territory was granted if someone was serious about establishing a business or penetrating a market with existing products.

When it was first established, the distribution of the international tax pie was already biased towards residence countries. The determination that residence would be the main criterion to attribute taxing powers while source would be residual except in the case of real estate, already left less resources for what we call today "market jurisdictions". However, the piece of the pie assigned to source states has shrunk significantly in the past century, especially in the last 20 years, due to technological advances and changes in the way we do business internationally.

On one side, technology has made it possible to reduce the time required to perform significant tasks. For example, in the construction business, we can now build a complex structure in less than 10% of the average time that it took to build that same structure when the rules for the construction permanent establishment were designed. On the other side, digitalization offers endless possibilities of conducting business remotely, without any need for physical presence to reach customers and clients.



As physical presence and permanence in a specific territory were, and are still, necessary to levy source taxation in the presence of a double tax treaty. Unfortunately, because of colonialism, many countries in the global South have a tax treaty with a colonial power or other jurisdictions similar to their colonizer. It is not a coincidence that Spain has the largest treaty network in Latin America, or that Caribbean countries have a long-standing treaty relationship with their colonizer. As Marla Dukharan[2] recently pointed out, in the case of the Caribbean, the jurisdictions traditionally qualified as "tax havens" inherited this economic model from the same colonial powers that are now shaming them for promoting financial secrecy or acting as corporate tax havens. In more than half of the cases, Caribbean jurisdictions are not sovereign and still rely on colonial powers such as the British to review the design of their tax and regulatory systems.

The legacy of this colonial context is quite tragic. On one side, the rules are no longer useful to tax modern ways of doing business, given the rapid changes in technology and the deep impact that globalization has had in the economy. On the other side, the international tax architecture created within the colonial world left countries in the global South with little possibilities of levying taxes and attracting investment. With the current rules, we are now in a position where we have to choose whether we want to attract investment and give up revenues or to raise revenue and become unattractive to mobile capital, which has become more and more volatile with the passing of time.

Given the little possibilities left for autonomous domestic revenue mobilization in a globalized world, it makes sense that global South countries would seek to implement strategies to attract investment and jobs into their territories. However, the only portion of the two-pillar solution devised mainly by global North countries that is currently being applied everywhere is the so-called global minimum tax. These model rules, also known as Pillar 2, heavily interfere with the little policy space that global South countries had for achieving a minimum level of development and wellbeing for their citizens. Once more, following the colonial trend, the global North countries -most of which already are able to provide a very decent level of welfare for their citizens- get most of the revenue, while global South countries -which are still far behind in education, health, infrastructure and other development indicators- are left to rethink tax incentives and limit their options of attracting investment and jobs.

It is therefore not a coincidence that the new rise of a global South cooperation in international tax policy is arising precisely after the effects of Pillar 2 are felt across the globe. As the October agreements were published in 2021, the African Union started working on the resolution that was tabled in the United Nations General Assembly in 2022, demanding for the creation of a UN tax convention. In 2023, as the commentary on Pillar 2 was first published, the Secretary General issued his report on international tax cooperation at the UN, which was followed by another resolution of the General Assembly voted in November, establishing an ad-hoc committee to negotiate the terms of reference for a UN convention on international tax cooperation.

The rise of this movement spearheaded by the African Union inspired other regions like Latin America and the Caribbean to pursue further cooperation in international tax policy matters. The creation of the Platform for Taxation in Latin America and the Caribbean in July, 2023, is a testament to the strength that the movement is acquiring in our latitudes. Just the fact of having a common space to discuss international tax policy developments and keep countries updated on the impact that these developments have is already a very important progress for a region that was mostly competing rather than cooperating in the international tax scenario. In parallel, discussions at the Caricom level for the Caribbean also allowed for better flows of information and alignment, especially vis à vis the new UN ad hoc committee discussions.

The fruits of regional cooperation in the global South became more evident in the substantive meetings held by the UN ad-hoc committee, where both Latin American and Caribbean countries visibly supported each other and were able to vote the terms of reference as a block (with the exception of Argentina, which is not yet a member of the PTLAC, and Trinidad and Tobago- both abstaining rather than voting against the resolution):

UN WebTV, August 16th, 2024.

This paints a rather different scenario to the one we had when the African Union first introduced the resolution demanding to further tax cooperation in 2022. In October 2022, two resolutions tabled by the G77 and China, and the African Union, respectively, were rejected by the UN General Assembly. Those resolutions included a paragraph asking for the establishment of an intergovernmental tax body in the UN, as recommended by the FACTI panel in 2021. For this reason, the 2022 resolution that passed only mandated the Secretary General Report on the options to pursue international tax cooperation at the UN.

Furthermore, the resolution approved in 2023 passed in spite of 48 votes against, creating the ad-hoc committee and paving the way for the approval of the terms of reference for the UN tax convention. The fact that the number of votes against the resolution was significantly reduced in the vote held in August, 2024, has a lot to do with the perception that, at last, the global South is united in the pursual of global tax justice.

It is important to note, however, that there is still much more room for improvement in the global South cooperation, starting, precisely, with Caricom countries joining the PTLAC (which is free of costs and provides several webinars on new developments in international taxation with the support of ECLAC and the South Centre). Alternatively, Caricom countries could consider coming together more often with PTLAC countries to find commonalities and discuss any difference in order to find possible common solutions.

In all cases, the new stage for international tax cooperation at the UN provides our regions with valuable opportunities to make our voices heard in the shaping of the international tax rules. The terms of reference approved last August, for example, prioritized the taxation of cross-border services in paragraph 15,[3] and left an open decision for Member States to choose a second early protocol among 4 topics:

a. taxation of the digitalized economy;
b. measures against tax-related illicit financial flows;
c. prevention and resolution of tax disputes; and
d. addressing tax evasion and avoidance by high-net worth individuals and ensuring their effective taxation in relevant Member States.[4]

The first potential synergy between Latin American and Caribbean countries lies, therefore, in exploring the different solutions for the taxation of cross-border services, as well as in determining whether all countries can support a single topic for the second early protocol as proposed in the terms of reference.

Other joint discussions could address the process and architecture of the convention, including common positions on decision-making for the drafting of the convention and protocols, the creation of a Conference of the Parties and subsidiary bodies, and possible agreements on the resolution of disputes, both arising from the convention and protocols, and also arising from the application of existing tax rules, if there was an appetite for that.

Once the stronger bonds are established within the region, further cooperation with Africa and other global South countries could be explored, as it has been the object of several joint events between the PTLAC and the African Union. In this context, the decolonization of current tax rules and of the international tax architecture seems truly feasible in the short and medium terms, as the voices of the global South could significantly influence outcomes not only at the United Nations, as has been illustrated in this article, but also at the OECD and other relevant fora.

Ultimately, the Caribbean and Latin American countries could harvest their exceptional domestic tax talent in order to propose radical solutions that would not just decolonialize the rules and architecture, but that would really address the challenges brought by mobility and new technologies, achieving enough flexibility in the new rules so that future technologies and business models could still fit into the new tax paradigm.

Natalia Quiñones

[1] Natalia Quiñones can be contacted at nquinones@quinonescruz.com.
[2] Dukharan, M. (2024). In Pursuit of Social, Economic, and Tax Justice in the Caribbean. Historical Context and Contemporary Realities. Open Society Foundation. Available at https://marladukharan.com/special-reports/in-pursuit-of-social-economic-and-tax-justice-in-the-caribbean-historical-context-and-contemporary-realities/.
[3] Ad Hoc Committee to Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation (2024). Chair's Proposal for Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation. Available at https://financing.desa.un.org/sites/default/files/2024-08/Chair%27s%20proposal%20draft%20ToR_L.4_15%20Aug%202024____.pdf?_gl=1*130g1ko*_ga*MjE3NTUyNDE3LjE3MjU3NDI1NTg.*_ga_
[4] Ibidem, par. 16.

FORMATIVE YEARS OF A NEW GLOBAL TAX ARCHITECTURE: WHAT IS THE ROLE OF LEGITIMACY?

By Dr. Sam van der Vlugt, PhD, LLM, research associate on IBFD's Academic Team and an assistant professor at the Erasmus University of Rotterdam.

The reality for international tax law is that after the 2008 financial crisis its substantive norms are under permanent discussion. This fluidity of norms has entered a new dimension, with a new platform for norm production and the rise of the UN as an alternative to the OECD. Consequently, a field previously dominated by discussions on technicalities is now confronted with an era in which the production of the norms themselves is critically assessed. In fact, it has even attracted the attention of Nobel Laureates in other disciplines, who conclude that the system tax lawyers work with is 'fundamentally broken'.[1]

The despair is remarkable, especially considering the optimism surrounding the first steps more than a decade ago. A broad group of countries expectantly joined the OECD members, first as BEPS Associates, then with an invitation to sign the BEPS Multilateral Instrument, and finally through the Inclusive Framework ('IF') to build rules that would see the profits of large (digital) multinationals no longer go untaxed.

The main question in this contribution is how the relationship between legitimacy and international tax rulemaking has changed over time and may change in the future. What does this mean for assessing the legitimacy of the norms produced and the process wherein they are produced? The aim is to untangle both to achieve some clarity in this discussion and see what role legitimacy should play in future discussions on the global tax architecture.

WHAT HAS CHANGED AND WHAT IS NEW

As the stream of updates on the process is constant and could hardly have been missed by international tax lawyers, one can be brief in summarising the current developments and delve into deeper issues relatively quickly. Relevant for the following is to know that a dichotomy has surfaced in global tax governance, with a group of countries aiming to (partially) shift global rulemaking towards the UN, emphasising the need for a fair and inclusive process and an outcome that actively takes account of the need for resources of the developing world.[3]

The dichotomy identified is that with the latest rules of the OECD's BEPS project,[4] in the form of the global minimum tax of Pillar II,[5] this project of global tax governance has shifted from combatting abusive situations in international tax law to anti-competitive measures in a global economy.[6] Since the latter measures were promoted under a package that would also lead to greater revenue mobilisation, but the package did not deliver its promise of that revenue mobilisation, mainly because of the (current) non-adoption of Pillar I,[7] the legitimacy of the entire project is questioned.

We can identify two main problems that put the legitimacy of the OECD's project in question: (1) the outcome of the application of the rules that have actually been adopted by the participating countries, so Pillar II without Pillar I, which is not delivering on its promised outcome of mobilising more revenue; (2) the process seemed unable to remedy the imbalance of goals in the formulation of these rules in the stage of production.

WHAT IS LEGITIMACY IN INTERNATIONAL TAX LAW?

Legitimacy has a strong 'buzzword' pedigree; you cannot really do any harm by stating that you value legitimacy. It is not an understatement to say that it is a popular statement but also a somewhat hollow one, often misused in global governance, especially when combined with the adjective 'democratic.' Considering the state of democracy in the world today, combining the two is more to be seen as a moral disposition than any statement of fact relevant to the global context, at least if one aims to be inclusive and not pre-emptively exclude half of the globe.[8]

To avoid that trap in defining legitimacy for this brief column, a better definition can be found in the work of Bernstein: "what constitutes legitimacy results from an interaction of the community of actors affected by the regulatory institution, i.e. the public who grant legitimacy, with broader institutionalized norms—or social structure—that prevail in the relevant issue area."[9] This is a general description, but Bernstein also acknowledges that "interactions create different legitimacy requirements across different issue areas and forms of governance."[10] Nevertheless, it is important to acknowledge Bernstein's non-formalistic turn: it is not (solely) the legal set of rules that dictate the process that can give it legitimacy, but the (informal) interaction of actors and the affected. Bernstein's speaking of 'norms' instead of laws also points in that direction.

A subsequent logical question is: what are the specific legitimacy requirements for international tax law and governance, with the knowledge that we should search for it in the interaction between the community of actors affected by the regulatory institution with the broader institutionalised norms that prevail in tax rulemaking? Here, the democratic moral disposition creeps in for some states; with the people being the final democratic arbitrator in the (liberal-democratic) political process, they are the sacrosanct players in the community of affected actors. However, with the acknowledgement of the importance of that actor differing per jurisdiction, it is hardly a universal value that can be projected onto the entirety of the process. A process that aims for inclusivity cannot give centre stage to such a divisive factor.[11]

Propelling the actors and the affected to the legitimacy-granting authority in both the process and the outcome provides conceptual clarity. The actors are dictating the process, and this group consists of the states and the framework they utilise to achieve their goals. This framework can open doors to other actors, for example, through public consultation. The affected are more difficultly established, as the ones subjected to the rules are clearly identifiable within a legal situation; the effects of that subjectification can, however, have ramifications for a much broader group in a tax constellation. The primary function of taxation is to fill the state coffers to allow for public spending; by requiring a distribution of that collective burden, an increase of the burden on one group can have repercussions for the contribution asked of the others.

THE THEORETICAL DIFFICULTY OF MEASURING LEGITIMACY WITH THE AFFECTED

In the BEPS scenario, the prospect of having multinational companies pay more taxes obviously is enticing to (most of) the general public: it would, at least theoretically, shrink their tax bill. The subject itself, the multinational that would have to pay the tax, can be expected to be less happy with the prospect of being confronted with additional taxes and the compliance burden of another extremely complex piece of legislation. It shows that the legitimacy puzzle is rather enigmatic on the level of the affected and becomes perceptive very quickly. Because, except for the result (also sometimes called 'output legitimacy'), what can the affected actually make of the process in which the rules come to being (meaning both the transparency of the process and the possibility to comprehend the technical nature of what is being discussed)? Further, and scientifically even more problematic, how can we measure with the tools we have as legal scholars what we seek in this scenario? It shows that any perceptive value of legitimacy has little value for legal studies and is often speculative because equating legitimacy with belief can exclude the possibility of legitimacy beyond people's beliefs.[12] Less theoretically formulated: legal scholars simply miss the tools to assess legitimacy in this process and ask the wrong questions.

From a purely legal perspective, the subjects are not subjected to the rules formulated within global tax governance but to the national implementing measure. The other affected, i.e. the other taxpayers, are distanced from the international process because they are no 'actors' in the strict sense: they are only represented by their respective governments.[13] They can become an actor in the national constellation if they have any credible power over establishing the national tax policy to wield any influence (represented by a parliament) on the delegation of powers to the executive to negotiate rules that will indirectly influence them. This is a far-fetched and artificial constellation, especially now this group is only indirectly part of the community of interacting players and only indirectly subjected to the effects of the adoption of the norms if the lowering of their tax burden actually is achieved and the money is not used for increased spending (or is just used to take the edge off already existing budgetary gaps). All these variables already show that the correlation or the eventuality of any effect for those who are effectively, under the procedures used in international tax law-making, the tertiary party in this whole ordeal, the country's citizens, is difficultly established.

A final variable is again to do with the citizens as actors within this paradigm and the fact that they themselves do not represent a stable factor whatsoever. The primary way of measuring their preference is through elections, at least in half the world. Roughly half of those elections are free and fair, and even if one would assume that international tax policy plays a role in the voting booth, which I think we can credibly doubt, the preferences of those voters are highly volatile. In other words, where the public, as the authority that grants something legitimacy, can think one thing in one election, it can think the complete opposite in the next election. It is hard to propel such a volatile actor to the apex of one's considerations in assessing highly technical tax reforms.

The above is not to say that this author holds anything against legitimacy, or democratic legitimacy, on the contrary.[14] But, for tax lawyers, it is a deceitful category of reference in building any scientifically valid claims that must be approached with caution. Therefore, let us focus on a route that can more credibly establish legitimacy claims.

LEGITIMACY AND THE ACTORS IN INTERNATIONAL NORM-FORMULATION

There is very little evidence in international tax law, past and present, that refutes the suggestion that states effectively treat multilateral frameworks as marketplaces that merit a visit only based on the prospect of a beneficial exchange. This transactional nature of global tax governance is not easily surpassed. From a legitimacy perspective, the outcome thus is a prime indicator for the leading actor on the stage: the states that gather to strike new deals. Ultimately, the outcome is a legal deal, signed, ratified and implemented per the national legal procedures.

Typically, such a deal would be ratified by the national legislature if deemed beneficial to its dealings. In this instance, specific rules of Pillar II blur that process because they effectively force countries to either implement or lose revenue to others.[15] Statements that base the legitimacy of the project on the overwhelming adoption of Pillar II rules do not seem to take account of that reality, especially if compared with Pillar I, which will most likely not see the mass adoption required for its coming into force. It must be remembered that the rules were agreed upon as a package, and the non-adoption of one part of that deal actually puts the other part in jeopardy, too. In effect, the holistic view of the adoption of both Pillars as an indicator of the legitimacy of the rules as viewed through the eyes of states as a legitimacy-granting actor is rather bleak.

Without implying any intentionality on the side of the OECD itself, it did, however, become clear that a framework/platform that invites developing countries but is provided by an organisation that, in its general dealings, exclusively serves the interests of the developed world, has not been able to credibly establish itself as the governance platform that can cater the needs of those developing countries. The first statement, on the general exclusivity of the OECD, is demonstrated by its accession framework,[16] but also reported in the literature.[17] The second statement, the ability to cater for the needs of the developing world, can credibly be believed to correlate with the fact that a broad group walked out on the BEPS project and found a new framework in the form of the UN.

With developed countries turning their backs to the rules (Pillar I) and developing countries to the process (the move to the UN), a few questions can help prevent further misunderstanding in making sense of these developments in the future and their relation to questions of legitimacy. Firstly, in line with the idea of rules adoption and, thus, effects-based, it is imperative to ask what countries seek to gain from their participation in global tax governance. Judging from the Pillar II rules and the non-adoption of Pillar I, developed countries seemed to have joined the talks to limit tax-based competition. Suppose one agrees that the walkout of a large group of countries from the OECD project towards the UN correlates with the legitimacy of the process as perceived by the actors. In that case, one should ask why these states identify the UN as the forum where they can achieve their pursued goals. Judging from the constant emphasis in the UN process on the need for resources for development,[18] the logical conclusion is that the OECD deal seems to have underperformed in that respect.

CONCLUSION

The main question on which light was (supposed to be) shown was how the recent developments have informed the tax discourse on legitimacy and how that debate can better be structured. The above shows that legitimacy is no easily established value, mainly due to the limitations of the field of inquiry (tax law). As legitimacy has an empirical taste, the instruments of legal inquiry often lack the possibility to pick up its thread. Where the behaviour of actors does have legal consequences, and thus output that can be part of a legal argument, legitimacy is such an ill-defined term that, at the current point, its incautious use in the debate is probably doing more harm than good.

That conclusion might seem pessimistic; however, this author believes it is good first to define the terms on which discursive discussions in tax law occur before continuing the collective scientific pursuit to make sense of the world of international taxation.

Sam van der Vlugt

[1] Joseph E. Stiglitz, "The International Tax System Is Broken." Foreign Affairs, July 3, 2024. https://www.foreignaffairs.com/world/international-tax-system-broken.
[2] See for a good overview and summary of the stages of tax governance: Mosquera Valderrama, I. J., Global tax governance: legitimacy and inclusiveness: why it matters. Leiden, 2023. Retrieved from https://hdl.handle.net/1887/3621136 on 07-08-2024.
[3] United Nations General Assembly, 78th Session, Resolution 78/230. on "Promotion of inclusive and effective international tax cooperation at the United Nations", A/RES/78/230, 22 December 2023 & United Nations Secretary-General, Report of the Secretary-General on "Promotion of inclusive and effective international tax cooperation at the United Nations", A/78/235, 26 July 2023.
[4] Also referred to as 'BEPS 2.0'. See also: OECD, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy – 8 October 2021, available online at: https://www.oecd.org/en/about/news/announcements/2021/10/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.html (last accessed 11-08-2024).
[5] Ibid.
[6] Most convincingly argued in: Galendi Junior, Ricardo André, The Justification and Structure of the GloBE Model Rules, PhD thesis, Universität zu Köln, 2023. Accessible online at: https://kups.ub.uni-koeln.de/71906/ (last accessed 09-08-2024).
[7] The Pillar I rules are rather fuzzy, working with an 'Amount A' and an 'Amount B', the relevance of which is negligible here. The Amount A application is further in its process, but still far from becoming reality. The most comprehensive and concise summary of the rules is to be found in the Statement cited supra at fn 4: "There will be a new special purpose nexus rule permitting allocation of Amount A to a market jurisdiction when the in-scope MNE derives at least 1 million euros in revenue from that jurisdiction." Amount A "provides jurisdictions in which consumers and users are located (hereafter 'market jurisdictions') a new taxing right over a portion of the residual profits of the largest and most profitable multinational enterprises (MNEs) in the world." (An explanation found in: OECD, FACT SHEET AMOUNT A - Progress Report on Amount A of Pillar One, 11 July 2022, available online at: https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/cross-border-and-international-tax/pillar-one-amount-a-fact-sheet.pdf (accessed 08-08-2024).
[8] See also: Bastian Herre (2021) - "The 'Regimes of the World' data: how do researchers measure democracy?" Published online at OurWorldInData.org. Retrieved from: 'https://ourworldindata.org/regimes-of-the-world-data' on 01-08-2024.
[9] Bernstein, Steven. "Legitimacy in Intergovernmental and Non-State Global Governance." Review of International Political Economy 18, no. 1 (2011): 17–51.
[10] Ibid.
[11] Whereby it must be mentioned that this author is not in any way aiming to suggest that this is a preferable state, however, it is sheer realism that demands this position.
[12] See also: Dyzenhaus, David. 'The Legitimacy of Legality'. ARSP: Archiv Für Rechts- Und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy 82, no. 3 (1996): 324–60.
[13] In the case of individuals. An important difference again is whether that representation is democratic or not.
[14] In fact, it is only the restriction of scope of this brief column that is keeping the author from delving deeper into the ideas that would make the legal forum wherein tax norms are decided (the national parliament, either by itself or through delegation) more democratic, see: van der Vlugt, Sam. 'The Principle of Legality of Taxation as a General Principle of EU Law: National and Supranational Differences of Interpretation and Potential Difficulties'. EC Tax Review 32, no. Issue 5 (1 September 2023): 214–28. https://doi.org/10.54648/ECTA2023027.
[15] In what is branded as 'diabolical mechanics', see: Mason, R. 'A Wrench in GLOBE's Diabolical Machinery', 19 September 2022, Tax Notes, accessed online via: https://www.taxnotes.com/special-reports/digital-economy/wrench-globes-diabolical-machinery/2022/09/16/7f3pt (accessed on 22-11-2022).
[16] Statements such as 'the OECD need not be universal to be effective', and ', the OECD does not aim to become a universal organisation in terms of its size but rather to ensure that the OECD's standards and policies are applied and implemented on a global scale' do not help in that regard, see paras. 10 and 17 of: OECD, Framework for the Consideration of Prospective Members, Meeting of the OECD Council at Ministerial Level Paris, 7-8 June 2017.
[17] See: Brauner, Yariv, "Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument," Florida Tax Review, 2023: Vol. 25, Article 1.
[18] See supra at 3.

DE VAKSTUDIE – THE DUTCH CARIBBEAN ENCYCLOPEDIA

In the Netherlands, many tax professionals turn to "De Vakstudie", when it comes to looking up case law and literature on tax matters. De Vakstudie, by Wolters Kluwer, is a very extensive encyclopedia, divided into 16 different chapters. Chapter 16, the last part, but certainly not the least, contains information about Caribbean Tax Law. There is legal history, but also recent case law, commented on by a team of authors, all tax professionals who have earned their spurs in Caribbean tax law.

THE DTT WITH SURINAME: A NEW PATH IN CURAÇAO'S TAX TREATY NETWORK

By Dr. Germaine Rekwest, PhD, LLM, Head Tax Treaty Negotiations, Ministry of Finance Curaçao.

1. INTRODUCTION

On 1 July 2024, the tax treaty between the Kingdom of the Netherlands (the Kingdom), in respect of Curaçao, and the Republic of Suriname was signed by Minister of Finance, Javier Silvania (Curaçao) and Minister of Finance and Planning, Stanley Raghoebarsing (Suriname). This treaty — which still needs to be ratified by both countries— is part of the two countries' efforts to eliminate double taxation without creating opportunities for non-taxation.[1] The signing of this tax treaty follows several attempts of Curaçao in the past to conclude a tax treaty with Suriname and it is also the first tax treaty negotiated by the current government of Curaçao. To date, Curaçao has concluded a tax treaty with Malta (2015) and San Marino (2023). In its relationship with the other Kingdom countries, Curaçao has concluded Tax Regulations for the Kingdom, which hold a similar position as an international convention.

The signed treaty with Suriname is a convention for the avoidance of double taxation and includes the provisions necessary to meet the Base Erosion and Profit Shifting (BEPS) minimum standards to adequately combat treaty abuse and to improve dispute resolution, namely the title and preamble of the tax treaty, the inclusion of a general anti-abuse provision, and the access to a mutual agreement procedure. Curaçao's commitment to the negotiations with Suriname was based on the 2023 Tax Treaty Policy of Curaçao.

This contribution aims to flag a few provisions of the concluded tax treaty, including Dividends (Article 10), Entertainers and sportspersons (Article 16), the Entitlement to benefits (Article 28), and the Territorial Extension provision (Article 29). However, as a way of brief background, the importance of a tax treaty network for Curaçao and the key elements of its Tax Treaty Policy will be highlighted first.

2. CURACAO'S TAX TREATY NETWORK AND TAX TREATY POLICY

For several decades, Curaçao has had a tax policy that was mainly aimed at providing favorable tax facilities. The specific characteristics of Curaçao, particularly its small scale and limited domestic market, generally have a negative impact on the economy. Therefore, Curaçao has been for decades basing its economic model mostly on tax-related financial services. As a result of offering low tax rates to non-residents for non-local activities without substance or transparency or information exchange, Curaçao was long time considered to be a so-called "tax haven". Curaçao is now part of OECD's Inclusive Framework (IF) and has committed to the new OECD standards. Consequently, the possibilities for Curaçao to stimulate its economy with (new) preferential tax regimes, have become extremely limited, mostly because of the BEPS Project, including the introduction of a minimum profit tax for Multinationals, namely the OECD Pillar Two. Considering this, Curaçao has become more aware of the need to focus more on building a tax treaty network to attract foreign investors.

In the past, Curaçao has experienced some difficulties in the process of concluding tax treaties. One of the identified obstacles concerns the lack of a sustainable tax treaty policy prioritizing the conclusion of tax treaties at the Ministry of Finance. Shortly after the current Minister of Finance, Javier Silvania, took office, Curaçao designed its tax treaty policy. The 2023 Curaçao Tax Treaty Policy is mainly based on the provisions of the OECD Model Tax Convention, and, to a lesser extent, on the provisions of the UN Model Tax Convention. This "hybrid approach" adopted by Curaçao was aimed to achieve a successful outcome during the tax treaty negotiation.

Accordingly, and unlike most countries, Curaçao has published its tax treaty policy,[2] aiming to shed some light on what it seeks to accomplish during the negotiations for a tax treaty. Within the Dutch Kingdom, each of the Caribbean Kingdom Territories of Aruba, Curaçao, and Sint Maarten enjoys autonomy in matters of taxation. They can also independently negotiate tax treaties.

In addition, the tax treaty policy of Curaçao was designed based on several political and policy principles. In this regard, three aspects can be highlighted. First, Curaçao's commitment to meeting the minimum standards of the BEPS action plan to counter base erosion and profit shifting. Second, the fact that Curaçao considers of great importance both the enforceability of Curaçao statutory rules and regulations and the growing significance of effective dispute resolution. Third, and finally, the boost of economic activities in Curaçao, which will lead, among other things, better jobs and an accelerated economic growth.

3. FLAGGED PROVISIONS OF THE DTT WITH SURINAME

As noted, the tax treaty between Suriname and Curaçao introduces a series of Articles following the OECD and the UN model tax conventions. Among these provisions, it is important to highlight some of them since they reinforce the main features of this double tax convention as well as the commitment of Curaçao to align with new OECD standards.

Firstly, the tax treaty concluded with Suriname demonstrates to be in line with the minimum standard for the avoidance of tax treaty abuse, as Curaçao and Suriname have opted to include the Principal Purpose Test (PPT) in Article 28. This Article basically provides that a benefit under the treaty will not be granted in respect of an item of income if it is reasonable to conclude, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit.

A lot has already been written about the PPT since its introduction by the OECD. The PPT is doubtlessly broad and vague. Indeed, under the PPT, tax authorities may deny tax benefits, whilst objective and clear deciding factors are missing. In this sense, the tax authority is given a free hand to apply the rule. Consequently, the uncertainty of the PPT provision may lead to more tax disputes. Despite of being vague, the PPT is broadly accepted and implemented in tax treaties as an anti-abuse rule, and the signed treaty between Curaçao and Suriname is not different. To seek legal certainty and tackle the weakness of the PPT, three additional clauses have been added to Article 28 of the signed treaty.

The first clause provides that, at the request of the person involved, benefits can still be granted if and to the extent such benefits, or other benefits, would have been granted even in the absence of the relevant arrangements or transactions. To the extent there has been no abuse, it will be logical in such cases to grant treaty benefits. The second clause states that the authorities of contracting countries that intend to rely on the PPT will have an obligation to consult with each other. The communication between authorities promotes fair treaty application as intended. The third clause refers to the most-favored-nation clause (MFN clause) within the PPT provision. This provision, i.e., the MFN clause, empowers residents to substitute the existing anti-abuse measures outlined in the treaty with alternative provisions drawn from a treaty that Curaçao or Suriname maintains with a third country. This flexibility ensures that the chosen replacements align with the established criteria of Article 7, as detailed in the Multilateral Convention. By adhering to these rigorous standards, both jurisdictions provide options that seamlessly integrate more robust and relevant anti-abuse strategies that combat tax avoidance, while fostering a collaborative environment aimed at maintaining fair and efficient tax systems. Thus, this clause stands as a testimony to the proactive approach of both jurisdictions in adapting their treaty obligations to meet contemporary fiscal challenges, ensuring that benefits are both equitable and sustainable.

Secondly, the distribution of taxing rights over dividends is mainly based on Article 10 of the OECD Model Convention. However, the provision in the concluded tax treaty deviates from this model in a few areas. For instance, exclusive taxation is granted to the residence state for dividends received in participation situations or by pension funds. In addition, the source state has no right to tax if the company that is the beneficial owner of the dividends is a resident of the other state (the state of residence) and holds at least 10% of the (share) capital in the dividend-distributing body or is a recognized pension fund of a contracting state. Both provisions are in line with Curaçao's Tax Treaty Policy. The minimum holding period condition, which is also included in the OECD Model Convention, has been adopted. This means that the required holding percentage of 10% must be met for at least 365 days for the exemption from taxation by the source state. Moreover, Article 10 contains a provision on dividends received by emigrated substantial interest holders.

Thirdly, Article 16 concerns the income of entertainers and sportspersons and corresponds to a certain extent with Article 17 of the OECD Model Convention. It has been pointed out many times that the international tax rules for entertainers and sportspersons, based on article 17 of the OECD Model Convention, often lead to problems mainly because of the difficulties in obtaining a tax credit. As a result, entertainers and sportspersons will

face excessive taxation or even double taxation. This has been reportedly argued by various scholars and tax experts.[3] Being mindful of these obstacles, Curaçao and Suriname have included an entertainers and sportspersons article with a (limited) source state tax. Article 16 of the signed treaty states that the right to tax income derived from the entertainers and sportspersons will not exceed 15% of the gross amount of the payment. Furthermore, the right to tax the income belongs exclusively to the state of residence if the gross receipts from the relevant activities do not annually exceed USD 30,000 for the relevant tax year. This is substantively derived from paragraph 10.1 of the OECD commentary on Article 17 of the OECD Model Convention and in line with the 2016 US Model.

Fourthly, and finally, the tax treaty provides that the scope of the treaty can, under specific conditions, be extended to other parts of the Kingdom: Aruba, Sint Maarten, the BES-islands (Bonaire, Statia, Saba) and the Netherlands (Article 29). To that end, any extension will need to be executed through a separate treaty. It must be stressed that tax systems of the four countries within the Dutch Kingdom differ significantly from each other. As a result, a one-on-one extension of a Curaçao tax treaty directly to the other countries within the Kingdom will simply not be possible. However, a territorial extension provision in a tax treaty that Curaçao has concluded with a partner country may serve as a reason for that partner country to start negotiations with a country within the Kingdom. Yet, the Netherlands already have a tax treaty with Suriname (1975). For that reason, the extension provision in the Curacao-Suriname Tax Treaty is more likely to be applicable for Aruba, Sint Maarten and the BES-islands.

4. THE FUTURE OF CURAÇAO TAX TREATY POLICY

Curaçao is open to negotiate tax treaties with any country, taking into account the level of intensity of economic relations between the countries. Curaçao will also start negotiations with countries with which it wants to establish economic relations while encouraging mutual investments. It must be stressed that entering into negotiations with countries depends on various factors, such as whether the intended partner country has sufficient capacity and is able and willing to give priority to negotiating with Curaçao. The Ministry of Finance of Curaçao has published a negotiation plan for 2024 that indicates which negotiations Curaçao will primarily focus on. On the near future agenda in the negotiations of treaties for Curaçao, two countries are on the list: Cyprus and Mauritius.

5. FINAL REMARKS

Concluding the tax treaty with Suriname is a great accomplishment both for Curaçao and Suriname, and the result of a joint determination to strengthen their economic ties. The treaty reduces several significant fiscal and economic barriers, making the development of economic activities in both countries attractive. More importantly, in the current climate of concluding treaties not only to eliminate double taxation, but also to avoid the creation of opportunities for non-taxation or reduced taxation through tax evasion or avoidance, the signed treaty meets all international tax standards. For sure, this "hybrid" tax treaty shows that Curaçao is committed to pursue a win-win situation with trade partners.

Germaine Rekwest

[1] On 25 July 2024, the Double Tax Treaty Agreement has been published in the 'Tractatenblad' (2024, 90), the Official Gazette of the Dutch Kingdom. The common explanatory memorandum to the treaty is not yet published.
[2] https://minfin.cw/en/curacao-tax-treaty-policy/
[3] D. Molenaar, Artist Taxation, Social Security and VAT, SSRN Electronic Journal, 30 May, 2024, ISSN 1556-5068.

A TAIWANESE APPROACH TO TAXING DIGITAL ECONOMY: THE CASE OF CHINESE GAMING BUSINESSES GOING GLOBAL

By Jie Wang, PhD researcher at Erasmus University Rotterdam and a lawyer in China.[1]

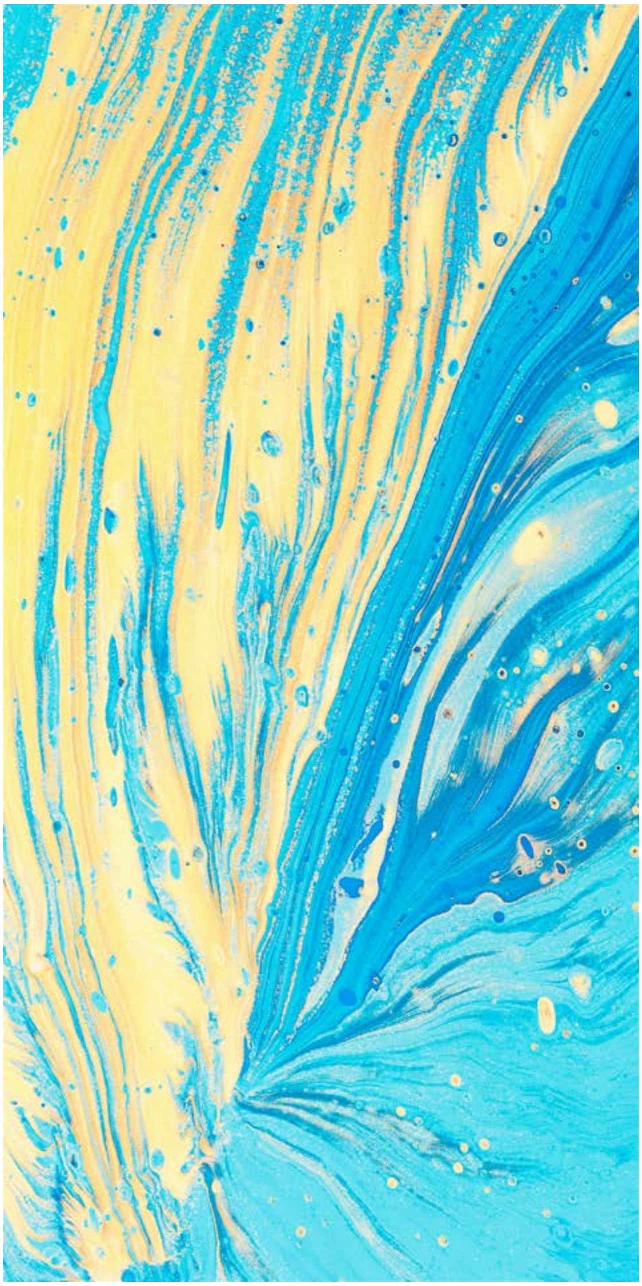
INTRODUCTION

The taxation of the digital economy poses significant challenges to the modern international tax regime. While digitalization has transformed business operations, tax collection methods have not yet fully adapted, particularly when digital businesses operate across borders. Typically, source states can only tax non-residents if they have a local permanent establishment (PE).

In response, the international tax community has made substantial efforts to reform tax rules, notably through the BEPS Project and the Two-Pillar Solutions. However, with Pillar One Amount A missing its deadline for formal ratification, the future of a multilateral approach to taxing the digital economy remains uncertain.

Amid the evolving global tax landscape, China's outbound investments, driven by the "going global" strategy, are expanding, with Taiwan as a key destination due to strong cross-strait economic and cultural ties, despite the lack of a bilateral tax treaty. This unique situation makes cross-strait tax dynamics particularly relevant for study.

This article explores Taiwan's unilateral approach to taxing the digital economy through a puzzle-solving process based on real-world cross-strait business practices in the online gaming industry. The insights gained are applicable to other online industries and may also be valuable for Caribbean nations, aiding them in navigating digital taxation complexities and developing sustainable tax frameworks.



1. THE PUZZLE CASE: THE EXPANSION OF CHINESE GAMING BUSINESS INTO TAIWAN'S MARKET

Let's start with the case below: A Chinese game company, G Co., and a Taiwanese company, T Co., signed a Joint Operation Agreement for a game on the mobile phone developed by G Co. T Co. handles local operations in Taiwan, including platform listing, marketing, after-sales services, and regulatory compliance, while G Co. manages technical operations and updates.[2] For the convenience of analysis, the illustrative case is referred to as "Puzzle Case".

In terms of revenue generation and distribution, the Game App generates income through in-app purchases. Assuming users spend a total of 100, T Co. will initially receive the revenue. After deducting all platform fees and applicable local taxes in Taiwan, T Co. will remit a net profit of 70 to G Co., as stipulated in the contract. The basic business structure of the Puzzle Case is illustrated in Figure 1.

Given the following tax and fee information, the Puzzle case must consider these necessary expenses:

- Taiwan's corporate income tax (CIT) rate is 20%;
- Mobile app distribution platforms, like Google Play, charge at least a 15% service fee;
- The VAT on most goods and services in Taiwan, including electronic software services, is 5%.

When a user spends 100 in the Game App, after deducting VAT, platform service fees, and CIT, how can T Co. guarantee G Co. a net profit of 70 (the "Puzzle") while still remaining profitable?

This article explores and solves this puzzle, highlighting Taiwan's unique digital economy taxation innovations.

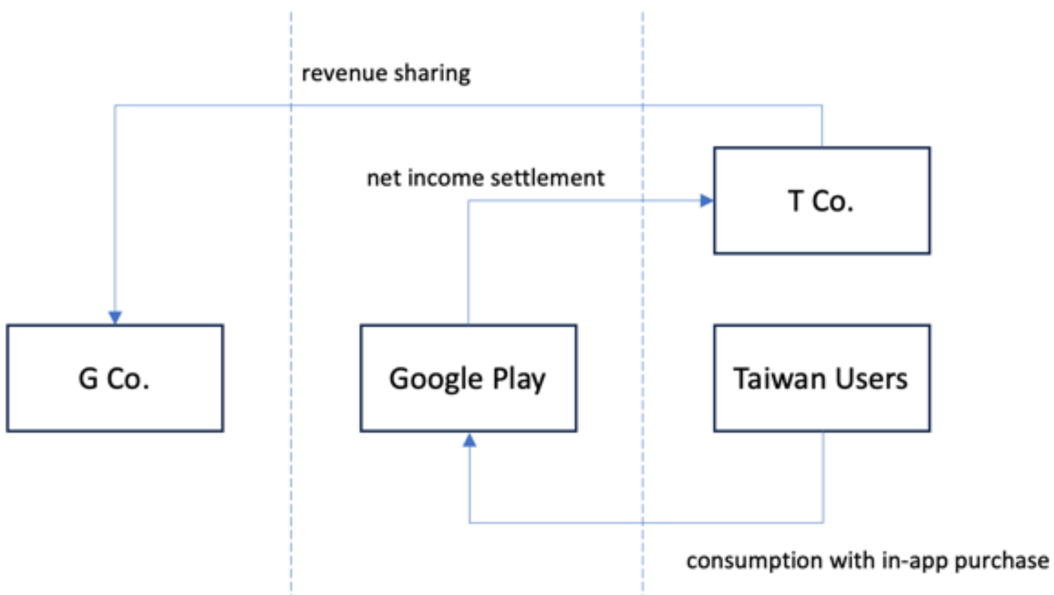


Figure 1: structure of Puzzle Case

2. TAX CALCULATIONS OF THE PUZZLE CASE: THE BUSINESS CHAIN

To unravel the tax Puzzle, it is essential to clarify the flow of funds within the business chain of the cross-border gaming industry. The chart below highlights three critical stages, illustrating how money spent by consumers through in-app purchases flows from the platform to the agent, T Co., and eventually to the Chinese developer, G Co. It also details the various expenses incurred throughout this chain.

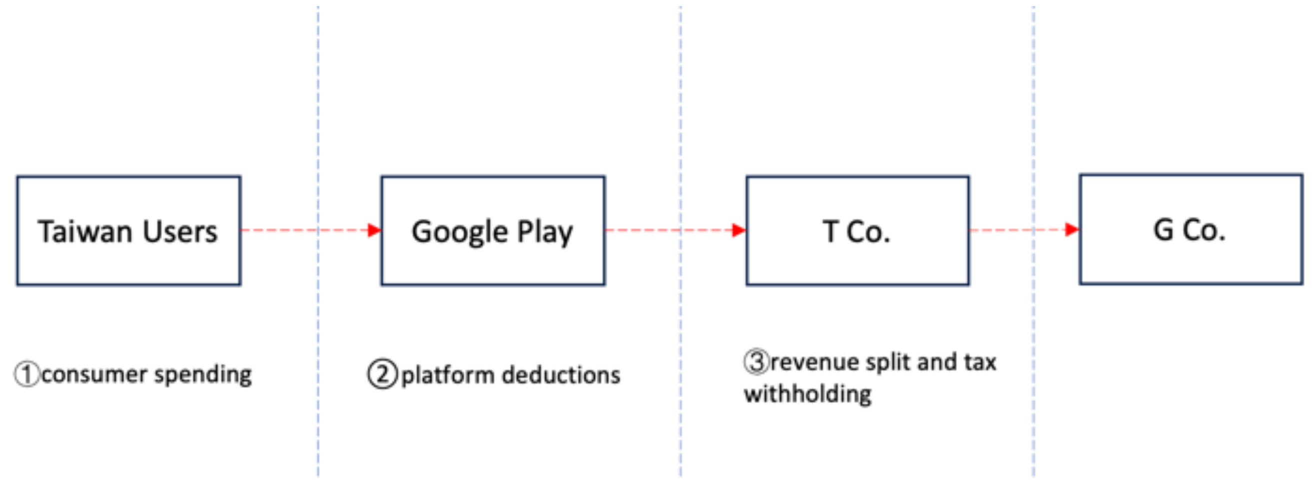


Figure 2: stages in the flow of money

	Money Collector	Items
1. consumer spending	Taiwan tax authority	VAT
2. platform deductions	Google Play	Service fee
3. revenue split and tax withholding	T Co.	Revenue split
	Taiwan tax authority	Potential Income tax

Table 1: tax and fees in the stages

When a Chinese gaming company engages local agents in Taiwan, the primary tax consideration is the potential CIT on profits remitted from Taiwan. Additionally, considering the app distribution platforms' role in VAT, the potential tax obligations and financial consequences for each party are outlined in the following table:

Parties	Parties Taxation Event	CIT/VAT/Fees Consequences
Google (Play)	Receiving consumer spending	Collecting VAT and service fees
G Co.	Receiving revenue split from T Co.	Potential Taiwan CIT obligations as non-resident

Table 2: taxes and taxpayers

Below is the calculation based on the table 2.

In Stage 1, the amount spent by consumers on in-app purchases is tax inclusive. Taiwan's regular VAT rate is 5%, meaning that when a Taiwan consumer spends 100, 100/(1+5%) = 95.24 is the pre-tax price, with the remaining 4.76 as the VAT amount.

In Stage 2, the platform of Google Play, deducts a service fee ranging from 15% to 30% in each specific case. For our purposes, we can calculate using a 15% fee (since a 30% fee would clearly contradict the puzzle fact that G Co. receives 70). This results in a fee of 14.29 (95.24*15%), leaving 80.95 (95.24*(1-15%)) to be remitted from the platform to T Co.

By Stage 3, it seems very close to solving the puzzle itself: how does Taiwan levy taxes on such payments and what is the amount of imposed tax? In other words, the question is how (much) Taiwan taxes income earned by non-residents from the sale of electronic products to Taiwan resident users.

3. CLARIFICATION: THE REGULAR WITHHOLDING TAX RATE IS NOT YET THE CORRECT ANSWER

In the discussion above, we mention that Taiwan would necessarily tax the income G Co. earned through its joint operation agreement with T Co. via levying a withholding tax, and this approach requires further examination.

(1) DETERMINATION OF SOURCE OF INCOME FROM ELECTRONIC SERVICES: WITHIN TAIWAN

Under international taxation principles, a country's right to tax depends on two factors: first, whether G Co. is deemed to have earned income from Taiwan, granting Taiwan the source taxing right; and second, how Taiwan classifies this income to determine the applicable tax rate.

Taiwan's income tax system taxes non-residents only on Taiwan-sourced income (TSI). According to Article 8, Paragraph 3 of Taiwan's Income Tax Act (ITA), remuneration for services provided "within" Taiwan is considered TSI. However, applying this general provision to digital economy scenarios, like the Puzzle case, is challenging.

In response to the challenges, of taxing the digital economy Taiwan's Ministry of Finance issued a specific regulation in 2009 that significantly refined the source rules under Article 8 of the ITA (the "Source Regulation"). This regulation has undergone four amendments since its release, with the latest revision in 2023[3]. Article 4 of this regulation provides further interpretation of Article 8, Paragraph 3 of the ITA.

Accordingly, remuneration for services provided "within" Taiwan requires that all or part of the services be carried out or provided within Taiwan; if the service is carried out outside Taiwan, such service must be jointly participated in or assisted by Taiwanese individuals or Taiwanese enterprises to qualify the service income as TSI.

Additionally, the specific business model by which a foreign enterprise provides electronic services in Taiwan also influences the source determination. Electronic services that must be downloaded via the internet to computers or mobile devices to be provided directly constitute services provided "within" Taiwan.

The aforementioned provisions regarding the source country of income from cross-border service provision are rather general, and extensive, in terms of authorizing the taxation of cross-border service provision.

The "Regulations on the Income Tax Imposed on the Cross-Border Sale of Electronic Services by Foreign Profit-Seeking Enterprises" (Decree No. 10604704390) since 2018[4], however, further narrows such taxing rights provided in the Source Regulation and provides a nuanced distinction: Income earned by foreign enterprises from providing electronic services does not automatically qualify as TSI.

Electronic services without a physical place of use (e.g. hotel accommodation (such as Airbnb) and car rental are services involving physical place of use, such as Uber) and involving the cross-border transmission of overseas-produced software via the internet to personal devices can only generate TSI if the provision of such services requires the participation and assistance of Taiwanese individuals or enterprises. However, if the electronic services are real-time, interactive, and continuous (such as online games, music, or films), the relevant income is considered TSI directly.

In the Puzzle case, based on the two provisions above, income from selling through the Game App to Taiwan users in the Puzzle Case also constitutes TSI. First, the Game App is downloaded from the internet to the user's mobile devices; second, the Game App is an online game, providing real-time, interactive electronic services from the foreign enterprise G Co.; third, although the game software is produced outside Taiwan, its provision to Taiwanese game-buyers (players) has received customer assistance from Taiwanese resident enterprise T Co.

(2) The Business Profit Approach Is Not Applicable: No PE In Taiwan

In the Income Tax Act (ITA), "income from business profits" and "service income" are categorized as two different types of income. However, under Article 10 of the Source Regulation, electronic services are still treated as business conduct, meaning the sourcing rules for both income types are the same when the foreign service provider has a permanent establishment (PE) in Taiwan. This is known as the business profit approach.

When a foreign service provider has a PE in Taiwan and the income is effectively connected to it, the business profit approach applies specifically to service income. This approach, which includes comprehensive sourcing rules, income calculation, and tax payment methods, aligns with traditional international tax principles.

The key question in the puzzle case is thus, whether T Co. constitutes a business agent for G Co (supposing that G Co. does not have a physical PE in Taiwan). The answer is negative, based on Article 10 of the ITA on the limited definitions of a business agent and that T Co. in the Joint Cooperation Agreement does not fulfill the definition of a business agent:

Article 10 of the ITA stipulates three scenarios of being a business agent:

(1) in addition to handling procurement matters, the agent also has the authority to regularly represent the business they represent in negotiating business and signing contracts;
(2) the agent regularly stocks products belonging to the business they represent and delivers these products to others on behalf of the business;
(3) the agent regularly accepts orders on behalf of the business they represent.

The cooperation between T Co. and G Co. does not fall under any of these three scenarios because these three types of business agent are concepts in the traditional economy.

Since T Co. does not a business agent under ITA, G Co. does not have a PE in Taiwan either. When G Co. does not have a PE in Taiwan, its tax obligations will not follow the business profit approach. Instead, the service income earned by G Co. will follow “the electronic service approach” which applies to the provision of “electronic services” by foreign entities to Taiwan.

In short, although income earned from the electronic service is a special type of service income, such income is subject to the special electronic service approach in the Puzzle Case. I will explain further in Section 4 below.

(3) 20% CIT RATE IS NOT YET THE CORRECT ANSWER TO THE PUZZLE

From the calculation in Section 2 above, after deducting certain taxes and fees through subsequent stages, the profit to be allocated to G Co. that accumulates to T Co. is 80.95 from a user expenditure of 100. In the Puzzle Case, T Co. promises to pay at least 70 in taxable profit to G Co and still make profits.

When T Co. is not deemed to be a PE of G Co. in Taiwan, G Co. is still responsible for corporate income tax on the Taiwan-sourced income received from T Co. According to the ITA, the regular withholding tax rate in Taiwan is the same as CIT tax rate 20%. If this regular CIT rate were applied, G Co. would only receive 80.95 * (1 - 20%) = 64.76. This amount does not meet the 70 agreed by the parties' Joint Operation Agreement in the Puzzle Case, so the regular CIT rate is not applicable to the Puzzle case.

If the regular CIT rate is not applicable, what the rate is applicable in the Puzzle case? The answer is explained in Section 4 below.

4. THE ANSWER: THE UNIQUE MECHANISM FOR CROSS-BORDER ELECTRONIC SERVICES

The solution to the Puzzle problem ultimately lies in Taiwan's unique taxation mechanism for Cross-border Electronic Services (hereinafter 'CEST'). This mechanism combines withholding tax system and formula-based tax assessment. The mechanism is consistent with the principles of economic allegiance and benefit principle and balances the potential conflict between tax collection efficiency and tax fairness.

The CEST regime comprises two components: source rules, as discussed in Section 3(1) above, and an estimation-based tax collection system, which includes two cumulative elements: (1) the estimated net profit ratio and (2) the Taiwan Contribution Rate.
It might be surprising for the readers when revealing the answer to the Puzzle case: in short, when applying the CEST mechanism to the Puzzle case, foreign companies without a PE in Taiwan, like G Co., can enjoy an effective tax rate as surprisingly low as 1.6% for the income

of providing electronic gaming services to Taiwanese consumers, as explained in three steps analysis below.
Since Taiwan has the right to tax foreign electronic service providers based on its source rules, the Taiwan tax authorities, under the CEST mechanism, are allowed to use the estimated net profit ratio ("ENPR") to (partly) determine the net taxable income of foreign enterprises (step 1); in addition to the estimated net profit ratio, the Taiwan profit contribution ratio ('TPCR', either 50% or 100% or as a ratio actually assessed and approved by tax authority based on the taxpayers' provided documents) is introduced (step 2); the two ratios are then multiplied by the regular corporate income tax rate (step 3) to decide the tax rate. The formula is therefore illustrated as follows: Tax rate on "Taiwan-sourced revenue"=estimated net profit ratio*Taiwan profit contribution ratio*CIT rate 20%

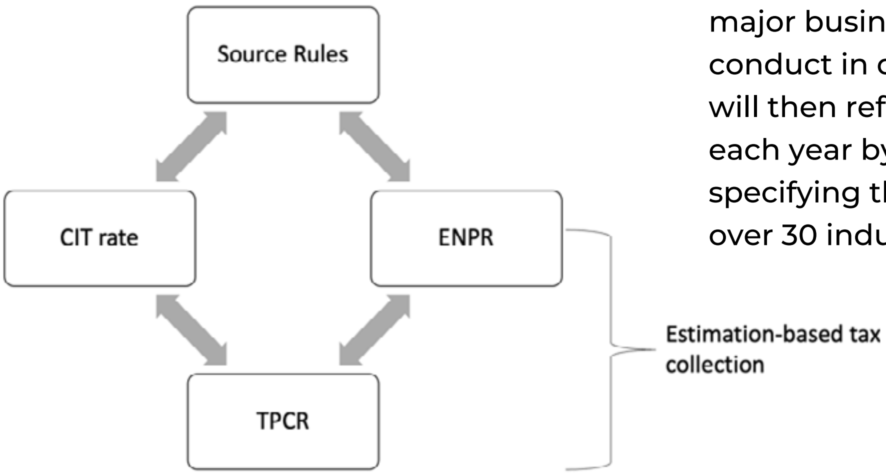


Figure 3: The CEST regime

(1) THE FIRST COMPONENT: THE ESTIMATED NET PROFIT RATIO FOR NON-RESIDENT ENTERPRISES

Income, as a proxy for individual well-being, is a net concept, making the tax base revenue minus costs. However, in cross-border transactions, non-resident enterprises often cannot fulfill registration and bookkeeping obligations in all market jurisdictions. As a result, gross income is taxed at a lower rate to approximate net income taxation. This simplified mechanism can make withholding tax seem separate from income tax, but it is not. Withholding tax essentially serves as an estimated alternative to income tax, particularly for non-resident enterprises in cross-border contexts where full information is unavailable.

In this vein, the ENPR component depends on whether the foreign enterprise can provide evidence (books and documents of the revenue and the deductible costs) for Taiwan tax authority's approval. If the tax authority approves, the actual net income calculated by the provided evidence will be used. If there is no approval from tax authorities but the documentation simply establishes what type of the major business models that the business conduct in question falls into, the ENPR will then refer to the index published each year by Taiwanese tax authorities, specifying the Industry Profit Standard of over 30 industrial sectors.[5]

In the latest index published in 2023 by Taiwanese tax authorities, the Industry Profit Standard for the Distribution of Gaming Software is 16%.

(2) THE SECOND COMPONENT: TAIWAN PROFIT CONTRIBUTION RATIO

The second component is "Taiwan Profit Contribution Ratio", which is the second method used by the Taiwanese tax authorities to estimate how much contribution of a non-resident taxpayer's cross-border electronic service can be attributed to Taiwan when there is no PE in Taiwan.

The TPCR mechanism examines three factors of the transaction: the transaction flows, the location of service provision, and the location of service use. Based on the distribution of these factors inside and outside Taiwan, it determines the contribution ratio of the transaction income to Taiwan as 50%, 100%, or the actual TPCR supported by documents provided by the taxpayers. To be specific, the TPCR rule can be structured into 3 tiers as follows.

Obviously, in the Puzzle Case, the transaction flows are carried out both in and outside Taiwan. The place of provision of the gaming service is difficult to pin down, yet the bottom line is clear: both G Co. and T Co. play a role in the operation of the game, which is enough to rule out the application of the Tier 2 of the TPCR rule. Disregarding the applciability of Tier 1 considering its high requirement, the 50% in Tier 3 thus applies.

(3) UNVEILING THE ANSWER BY OPERATING THE CEST

Based on the above analysis, the Taiwan tax rate on the revenue earned by G Co. from its joint operation with T Co. can be reached with multiplying the ENPR for game softare distribution, that is, 16% (the index specifically for distributing the gaming software as indicated above), by the TPCR of 50% and the regular corporate income tax rate of 20%:

$$1.6\%=16\%*50\%*\ 20\%$$

Therefore, the tax payable by G Co. is 1.3=80.95*1.6%. The after-tax profit that T Co. will remit to G Co. will be 79.65=80.95-1.3. Since T Co. agreed to remit 70 with all else tax and fees included in the Joint Operation Agreement, T Co. can still realize a 9.65 profit (79.65-70) profit margin from every 100 spent by Taiwanese users on the Game App.

	Conditions	TPCR
Tier 1	Taxpayers can provide supporting documents regarding transactions flows for their contribution to profit making	As assessed factually
Tier 2	All transaction flows are in Taiwan,or service provision and using are in Taiwan	100%
Tier 3	Other circumstances	50%

Table 3: Tiers in the TPCR

CONCLUSION

Within the ambit of taxing digital economy, Taiwan's tax regime for cross-border electronic services was initiated almost concurrently with the OECD-led Pillar One reform. The two reform efforts share both commonality and differences. The commonality lies in their disruption of the traditional approach of taxing business profits built on the concept of permanent establishment. This, of course, corresponds to core of the challenges brought by digital economy to the international tax system. In addition, both the Taiwanese CEST regime and the Pillar One Amount A employ pre-determined ratio for the calculation of tax liability. As for differences, Pillar One Amount A is a multilateral instrument that, in substance, creates a new taxing right on the residual profits of large MNEs. The CEST regime of Taiwan, contrastingly, is unilateral and applies restrictively to electronic services. Beyond the commonalities and differences with the OECD's approach, Taiwan's CEST regime, with its cumulative ENPR and TPCR components as clear, quantitative, formula-based standards, offers a practical method for reforming the taxation of the digital economy without introducing overly complex rules that would burden both taxpayers and tax authorities. This is the key takeaway from unraveling the Puzzle and the main contribution of this article, particularly in light of the delayed progress of Pillar One.[6]

Jie Wang

[1] The author can be contacted at wang@law.eur.nl. This article is funded by China Scholarship Council.
[2] Taiwan has adopted a prohibitive policy against Chinese game operators, requiring those governed by Chinese law to operate in Taiwan through local Taiwanese agents. This policy is stipulated under Article 40, Paragraph 1, Subparagraph 1 of the Act Governing Relations Between the People of the Taiwan Area and the Mainland Area, and further detailed in Point 2 of the Operational Procedures for the Registration and Agency of Mainland China Games issued by the Digital Development Agency of Taiwan's Ministry of Digital.
[3] Available at https://law-out.mof.gov.tw/LawContent.aspx?id=FL050237, as accessed on 25 August 2024.
[4] Available at https://www.dot.gov.tw/singlehtml/ch_478?cntId=dot_201801290001_478, as accessed on 25 August 2024.
[5] 2023 Standard Industrial Classification of the Republic of China & Industry Profit Standard), available at https://www.ntbt.gov.tw/singlehtml/ba1c058d32ea40828a9d8889200efcd3?cntId=6f5461989c1f48f4821ca6acefa23ef8, as accessed on 25 August 2024.

NEXT EDITION

Expected Online Appearance Date:
27 February 2025

International Fiscal Association
Curaçao-Aruba-Sint Maarten