THE ROLE OF TAX TREATIES IN FACILITATING DEVELOPMENT AND PROTECTING THE TAX BASE

Abstract

The amount of taxes paid by multinational enterprises (MNEs) in host and home countries continues to make headline news. Corporate tax regimes, particularly those in many OECD countries, have never been more complex and the competition to attract and retain foreign direct investment (FDI) has perhaps never been so great. All of these political, legal, economic and competitive realities face countries at a time when they need additional budget revenues.

At the June 2012 G-20 Summit in Los Cabos, leaders identified base erosion and profit shifting as key fiscal issue to be addressed. Many are expecting this to translate into a new approach to applying existing international tax standards, an increased pressure to eliminate "corporate tax breaks," enact tougher anti-abuse provisions, and less tolerance of aggressive tax planning.

There has been an increased critical focus on transfer pricing, corporate restructuring and double tax treaties. Some have suggested that double tax treaties are eroding the domestic tax bases of developing countries, while others conclude that double tax treaties promote development and FDI and thereby expand the tax base. Dividing up a "revenue pie" has never been easy and the implementation of international tax rules to transparently and predictably allocate revenue to avoid double taxation and double non taxation has never been more adversarial between taxpayers and tax authorities and between tax jurisdictions.

It was for these reasons that the Global Tax Policy Center of the Institute for Austrian and International Tax Law (Vienna University of Economics and Business) and the International Tax and Investment Center (ITIC) decided to undertake this study. The objective of our study was to look at the development impact of double taxation treaties and, more broadly, how tax policy can help generate economic growth and prosperity. Legally domestic tax laws are normally subordinate to international double taxation treaties, but in reality a double tax treaty only serves a country as well as its domestic tax regime.

We've concluded that the problems affecting developing countries lie not with double tax treaties but rather in weak domestic tax legislation. Our study reviews empirical data from 20 developing countries, including LDCs, middle-to-high income developing countries, resource-rich countries, and BRIICS[1] countries.

We hope that the empirical analysis and the conclusions that can be drawn from it can help guide policymakers to refocus their policy objectives to boost capital formation, expanding exports, and protect their domestic tax bases. We believe that a country with strong domestic tax legislation can advance their pursuit of the Millennium Development Goals by affectively utilizing double tax treaties and the related international tax rules to more transparently share and grow their tax base.

[1] Brazil, Russia, India, Indonesia, China, and South Africa

We would like to thank the Qatar Financial Center Authority (QFCA) for their generous support to help make this study possible.

Professor Michael Lang
Head, Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business), Vienna

Professor Jeffrey Owens*
Director WU, Global Tax Policy Center at Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business), Vienna

* The authors Prof. Owens and Prof. Lang would like to give a special thanks to Veronika Daurer, Peter Hann and Hafiz Choudhury for their work.

Executive Summary

The Role of Tax Treaties in Facilitating Development and Protecting the Tax Base

The paper prepared by the Global Tax Policy Center of the Institute for Austrian and International Tax Law looks at the role of tax treaties in facilitating FDI in developing countries, allocating taxable income between developed and developing countries and protecting the tax base in developing countries. The report is based on a survey of 20 developing countries and economies in transition which can be grouped into four categories: less developed countries (LDCs), middle to high income developing countries, resource rich countries and the BRICS countries.

Among the targets set by the Millennium Development Goals was the mobilization of domestic resources, mainly taxes, non-tax revenues and foreign direct investment (FDI). FDI can add value to an economy by boosting capital formation, generating exports, extending value chains and expanding the tax base. New and higher skilled work may be created, and multinational enterprises (MNEs) generally have a better gender balance in their workforce, pay higher wages and increase the range of products available to consumers. Knowledge transfer by MNEs can introduce new ways of doing business and new production techniques.

Although flows of FDI have recovered after the economic crisis, the outlook remains uncertain owing to the euro crisis, declining growth rates in the BRICS countries, volatility of capital flows and political instability in the Middle East, North Africa and some countries of sub-Saharan Africa. In the years 2009 to 2011 FDI flows were unevenly distributed between the different economic regions and types of activity. FDI flowing into the BRICS increased by 25%, FDI into Asia increased by 10% and FDI flows into Latin America increased by 16%, but FDI flows into Africa fell slightly during the period. Developing and Emerging Economies (DEEs) account for 51% of the total FDI flows.

Tax policy can help to generate economic growth and prosperity. Capital is mobile across national boundaries and an increasing role is played by MNEs in international trade and investment. The type of tax regime and the level of tax rates may have a significant influence on decisions about the location of production and investment. A fair legal and administrative framework can have a strong bearing on competitiveness and growth in a country. Tax policy may contribute to this by raising tax revenues in a fair way; promoting good tax administration to deter evasion; implementing tax law consistently and without corruption; reducing the waste of resources by inefficient administration; keeping compliance costs low for business and making tax policy in an evidence-based and transparent way.

The international competition to attract FDI also requires a tax regime that creates a climate in which investment and innovation are encouraged. For an MNE, a competitive tax regime is one where the tax rate is no less favorable than the rate facing domestic companies in the host country and the subsidiaries of MNEs from other countries. The effective tax rate depends on a range of factors including the statutory corporate tax rate, the tax base (including depreciation of assets for tax purposes), the rules for double tax relief and the opportunities for aggressive tax planning.

A review of the tax treaty network in some developing and emerging economies

When they negotiate tax treaties most countries base their negotiating position on the OECD or the UN Model. The OECD Model was primarily developed with the interests of industrialized countries in mind, while the UN Model aimed to create an alternative that could be used by developing countries. The drafters of the UN Model therefore adapted the OECD Model by changing the rules for allocation of taxing powers to give more rights to the contracting state where income is sourced. Countries choosing between the OECD and UN Model as the basis of tax treaty negotiations are therefore choosing between more or less taxing rights for the source state. The UN Model gives the source state more taxing rights through the articles on business income, definition of a permanent establishment, passive income, capital gains and other income.

Under Article 7 of the OECD and UN Models business profits are taxable in the residence state of the enterprise unless that enterprise has a permanent establishment (PE) in the other state and carries on business through it. The concept of PE is broader in the UN Model and it is easier for an enterprise to have a connection with the source state so that the source state is allowed to tax the profits. The UN does this by lowering the thresholds for building sites and construction projects to constitute a PE and by introducing a provision for a service PE. Also, more profits may be attributed to the PE under Article 7 of the UN Model due to the rule allowing for limited force of attraction.

In the OECD Model the PE threshold for building sites and construction projects is twelve months, but in the UN Model only six months. The sample analyzed shows that the middle to high income developing economies and the less developed countries (LDCs) adhere more closely to the UN Model. Russia, China and India tend to have higher building site PE thresholds, while the large majority of Brazilian and India treaties contain lower PE thresholds. The PE threshold for building sites is usually the same as the threshold for construction, assembly and installation projects. In the UN Model supervisory activities in connection with a building site or a construction project are deemed to be a PE if such activities last for at least six months. All the groups of developing countries analyzed apart from the BRICS follow the approach of the UN Model in this respect, with a few exceptions.

Under the UN Model the term PE also includes the furnishing of services within a country for periods aggregating more than six months within any twelve month period (a "service PE"). The countries analyzed in the sample differ from each other in terms of including this rule in their treaties, even within the different groups of developing countries.

Article 7 of the UN Model permits the state in which the PE is located to tax profits that result from substantially similar activities to those carried on by the PE, such as the sale of goods of a similar nature (known as the "limited force of attraction" rule). This provision counteracts attempts by foreign companies to avoid profits being taxed in the PE by selling directly from the foreign entity rather than through the PE. This provision was not commonly used by the countries analyzed. The countries examined in the sample that use the provision more often are Nigeria, Indonesia, Vietnam, Tanzania and Kenya. Also India, Thailand and Kazakhstan make use of the force of attraction in several of their treaties. These countries in some treaties apply the rule only in abusive situations.

Passive income and capital gains

Tax treaties play a role in ensuring that capital importing countries may take significant tax at source from dividends, interest and royalties flowing back to the developed countries. The ability to tax passive income at source must however be balanced against the role of tax treaties in encouraging FDI. The benefit to any foreign investor of lower WHT rates would depend on the home tax system of the investor and the existence of a credit or exemption system, and on the inclusion in the treaty of any provisions in respect of tax sparing.

A foreign company setting up a subsidiary in a developing country would repatriate profits in the form of dividends. Within the BRICS group China, Russia and South Africa offer relatively low rates of 5% or 10% withholding tax to non-portfolio investors in the majority of their treaties. The middle and high income LDCs include non-portfolio dividend withholding tax rates of 10% or higher in their treaties. In the LDC group Uganda, Tanzania, Rwanda and Kenya have relatively low withholding tax rates of 5% or 10% for dividends to non portfolio investors while of the resource rich countries Kazakhstan and Zambia also offer low withholding tax rates to non-portfolio investors in many of their treaties. Vietnam has a policy to differentiate between more substantial participations (mostly around 70%) and less substantial participations (mostly 25%) offering an even lower rate for more substantial participations.

The OECD Model restricts withholding tax on interest to 10% while the UN Model does not specify any maximum percentage for source country taxation of interest. Among the BRICS India and Brazil have high withholding tax rates of 10% to 20% or more on interest while the middle to high income LDCs (apart from Qatar) and most of the LDCs also include high treaty withholding tax rates. Most treaties include certain exemptions from interest withholding tax, the most common exemption being for interest derived and beneficially owned by a State, a political subdivision or a local authority of the other contracting state. An exemption is also quite commonly given to interest derived by the Central Bank of the other State.

The UN definition extends the royalties article to cover the use of, or the right to use, industrial, commercial or scientific equipment, whereas these are no longer included in the OECD Model definition of royalties. The UN Model provides for source country taxation of royalties with the percentage to be determined by negotiation between the treaty partners. The countries analyzed have negotiated greatly varying rates of royalty withholding tax in their treaties. The LDCs plus Thailand and India generally negotiate high withholding rates of 10% to 20% for royalties. Certain countries analyzed, for example India, Malaysia and Vietnam, have also negotiated provisions for source taxation of technical fees in their treaties.

Land rich companies

The OECD and UN Models both contain a paragraph in the capital gains article permitting source country taxation of gains from the sale of shares in land rich companies, these being companies whose shares derive more than 50% of their value directly or indirectly from immovable property situated in a contracting state. Some developing countries such as China, India, Vietnam and Kazakhstan incorporate a provision similar to this in their treaties whereas others such as Malaysia, Russia or Thailand do not include this provision in many of the treaties they negotiate. In many treaties the provision does not refer to a 50% asset value but refers to the shares of a company the assets of which consist wholly or principally of real property in the other contracting state. This avoidance of a particular threshold may be intended to discourage attempts at tax avoidance that could otherwise be carried out by artificially adjusting land or property values to remain under a 50% threshold. Some treaties broaden the provision to include the sale of a land-rich partnership or trust, while other treaties provide an exception from the rule in the case of the sale of shares that are listed on an approved stock exchange in one of the contracting states.

Other income

Most treaties contain a "catch-all clause" dealing with income that does not fall under the other allocation rules. Article 21 of the OECD Model provides that this other income is taxable only in the residence state. The UN Model on the other hand allocates taxing rights in respect of other income to the source state where the income arises. Generally the BRICS and the resource-rich developing countries follow the approach in the OECD Model, with the exception of Brazil and Nigeria which have almost exclusively concluded treaties with "other income" articles that allocate the taxing rights to the source state. The middle to high income developing countries analyzed (except for Qatar) and the LDCs lean more towards the UN Model.

Tax sparing credits

Tax treaties normally provide for the elimination of double taxation by either the tax exemption method or the tax credit method. If exemption is used, the source state has the right to tax income arising in that state and the residence state exempts the income. If the tax credit system is used the residence state gives a credit for the tax paid in the source state.

Tax sparing credits are included in tax treaties to deem a certain amount of tax to have been paid in the source country where this tax has in fact been exempted or subject to a reduced rate. The incentive value of the tax exemption in the source country is therefore retained from the point of view of companies resident in the other contracting state when double tax relief is given by a tax credit rather than an exemption. Many OECD countries have shown a trend away from granting tax sparing credits, often allowing them to lapse where there is a sunset clause in the treaty. Tax sparing can give opportunities for tax planning and avoidance and another consideration is that companies in the developed country may now be competing directly with companies in the source country that are benefiting from tax sparing provisions. Other concessions may need to be made by developing countries if they are to be granted tax sparing in return, for example they may need to give up some source state taxing powers by making a concession such as lower withholding tax rates on passive income.

Tax sparing provisions are often restricted by only applying them to certain categories of taxpayer, certain categories of income or certain specified incentive laws. The amount of deemed tax paid may also be limited. Anti-abuse provisions may be inserted in the treaty. Also, tax sparing is often restricted to the first ten years for a particular source of income, or the tax sparing clause itself may expire after ten years.

Relevance of tax treaties for developing and emerging economies

More than three thousand bilateral tax treaties have been signed to date, the vast majority of which are based on the OECD and UN Models. The objectives of tax treaties are to eliminate double taxation; to provide certainty and predictability for foreign investors; to create a framework within which the tax authorities can minimize disputes and resolve them when they arise; and to create a legal framework for cooperation between the tax authorities to counter offshore non-compliance.

The existing system of allocating taxing rights is supported by the concept of neutrality. Economic efficiency or tax neutrality may be defined as the optimal allocation of production resources and the minimization of any distortion caused by the tax system. Capital export neutrality (CEN) and capital import neutrality (CIN) are based on the idea that the economic decision making of business should not be influenced by tax considerations. In a situation where there is CIN funds originating from another country should compete on equal terms with local funds on the domestic market. Where there is CEN the investor should pay the same total tax (including both domestic and foreign tax) whether the investment income comes from domestic sources or from foreign countries. Bilateral or multilateral tax agreements generally use either the tax exemption method (CIN) or the tax credit method (CEN) to avoid double taxation. Under an exemption system the source state has the right to tax the income and the residence state exempts the income from tax. Under the tax credit system the residence state gives a tax credit in respect of tax paid in the source state.

There have been a number of studies attempting to determine the impact of tax treaties on FDI flows into developing and emerging economies, but there is currently no consensus. All the studies acknowledge the difficulty in isolating the influence of treaties from other variables such as the economic and political environment. Surveys of business suggest the MNEs look at whether there is a treaty and what are its provisions when deciding where to locate. Other things being equal, MNEs will tend to favor a country with a good treaty network. How important this is will depend on the economic structure in each country, the relationship between treaty and domestic law and the attitudes of the administration and the courts in the application of the treaty.

There has also been some examination of the possibility of treaties being used as a new means of development assistance. Allocation rules could be drafted so as to transfer more taxing rights to the source state, thereby transferring revenue from the developed to the developing country. This could be an important step towards public resource mobilization which is a major goal in modern development strategies in order to end dependency on aid. The current international tax system, however, falls short of any distributive justice arguments. The allocation rules of tax treaties may be a suitable instrument to distribute wealth across borders but many modifications are required before they meet this goal.

Tax treaties provide the legal basis for administrative assistance among tax authorities and for the exchange of information. They therefore provide a legal framework for cooperation between tax authorities to counter offshore non-compliance, profit shifting and base erosion. This function of tax treaties has been highlighted by the recent actions of the OECD to eliminate bank secrecy as a veil behind which tax evaders can hide and to ensure developing countries benefit from a more transparent environment. The problem of capital flight is particularly severe in developing and emerging economies because many of their high net worth individuals find it easy to get their capital out of the country into low or zero tax jurisdictions. Concluding treaties for the exchange of tax information with countries that facilitate non-compliance may help to track down capital flight.

Effective exchange of information may also help countries to enforce their transfer pricing rules.. However if a comprehensive double tax treaty is concluded with a tax haven jurisdiction this may offer opportunities for aggressive tax planning that outweigh any benefits to be gained from the provisions for exchange of information. It is preferable in these circumstances to negotiate an agreement providing just for the exchange of tax information.

The cost for developing countries in terms of time, skills and money of negotiating tax treaties should not be allowed to distract from the task of building up the capacity of their own tax administrations. Resource restraints should be taken into account before entering into treaty negotiations. Developing countries also need to have the resources to implement treaty provisions. A clear policy rationale and economic analysis should therefore be set out as to why a country needs to extend the treaty network and with what countries. The developing country should decide on the countries with which it needs to negotiate tax treaties. This may be done in consultation with businesses operating or intending to operate in the country. On the basis of the consultations the tax administration should decide on the type of provisions that it aims to include in a treaty and could consider a model treaty to form the basis of negotiations.

I. Introduction

This paper has been prepared as part of the global research programme on taxation matters of the International Tax and Investment Center (ITIC). Recognizing their expertise on international taxation and unique data set, ITIC commissioned the newly created Global Tax Policy Center of the Institute for Austrian and International Tax Law, WU Vienna to undertake the research, analysis, and writing of a report. The paper is intended as a contribution to the on-going debate on the role that tax treaties can play in facilitating Foreign Direct Investment (FDI) into Developing and Emerging Economies (DEEs), the division of the tax base between these countries and developed countries, and the protection of the tax base of DEEs. . The paper is based upon a survey of 20 countries in Africa, Asia, Latin America and the CIS. The sample countries were selected as being representative of developing countries at various stages of development and have been categorized for the purpose of this study into four groups: the BRICS countries, middle and high income developing countries, resource rich developing countries and less developed countries. The level of economic development of these countries varies considerably, but all are highly dependent on FDI to drive their economies. This study does not examine all the determinants of FDI: it focuses on the role of tax treaties.

Section II provides an overview of the growth of FDI and the increasing importance of MNEs in the global economy. Section III provides a brief survey of what constitutes a business friendly tax environment. Section IV first sets out what are the main characteristics of tax treaties and provides a survey of the relevant provisions in the treaty networks of the countries surveyed. Section V looks in more detail at the way that treaties divide up the tax base and the way that treaties can encourage FDI and counter offshore non-compliance. The final section also speculates on how the treaty network of these DEE's will evolve over the next decade.

The study has been directed by Prof. Michael Lang and Prof. Jeffrey Owens of the Institute for Austrian and International Tax Law. The research has been carried out by Veronika Daurer, Researcher at the Institute for Austrian and International Tax Law, and Peter Hann at the ITIC. Mr. Hafiz Choudhury, a senior advisor at ITIC and a consultant to the UN Tax Committee, provided helpful guidance. *

The study has also benefited from discussions at an Executive seminar hosted by the European University Institute in Florence in spring 2012 organised by Prof. Pasquale Pistone, WU and Ana Dourado of Lisbon University and a seminar co-sponsored by the ITIC, the Commonwealth and the International Finance Corporation (IFC) in London on the 9th March 2013.

The study is also part of the on-going research at the Institute on the role of taxation in development and was supported by a grant from the Qatar Financial Centre Authority.

II. FDI as a source of domestic resource mobilization[1]:

The Millennium Development Goals (MDG) set ambitious targets for the reduction of poverty and the elimination of disease affecting billions of people in developing countries, with a target date for implementation of 2015. One of the ten targets set by the MDG was domestic resource mobilization (DRM), primarily taxes, non-tax revenues and FDI. This declaration led to a new political interest in building up the tax capacity in DEEs and encouraging FDI. This section briefly examines what has been achieved so far in terms of attracting FDI.

[1] This section draws upon the World Investment Report of UNCTAD Geneva 2012.

* Useful comments were received from Richard Vann, Martin Zagler, Tricia Brown, Pasquale Pistone, Michael Keen

Before looking at the data it's worth recalling why FDI and MNE's are a key factor in the development process:

- FDI adds economic value to an economy. It boosts capital formation, generates exports, helps formalize an economy by extending value chains and helps to expand the tax base.

- In this process FDI generates new jobs both directly and indirectly and these jobs are generally higher paid and require higher skill levels than those generated by domestic investment.

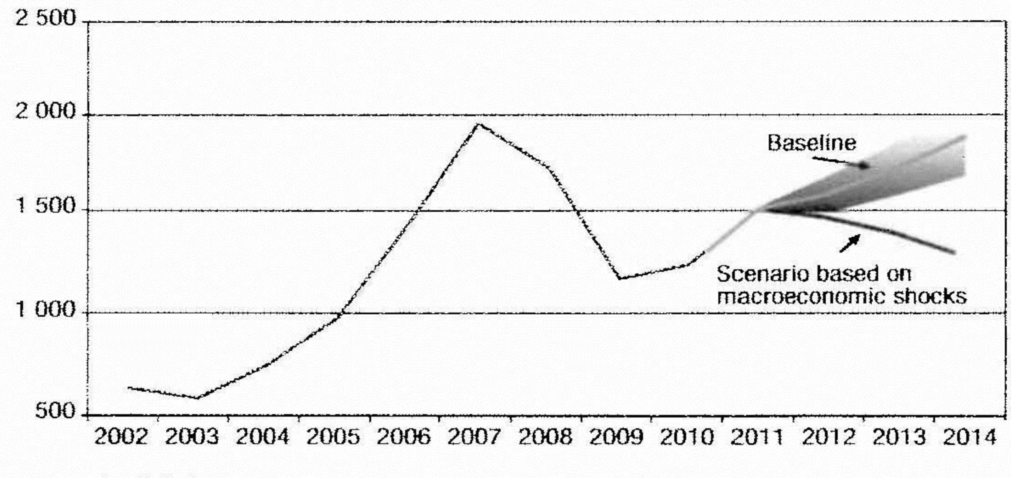
- MNE's also tend to achieve a better gender balance in their staff, contribute to alleviating poverty by paying wages well above subsistence levels and expand the range of products offered to consumers at reasonable prices.

- MNE's are also a rich source of knowledge transfer, exposing DEEs to new ways of doing business and new production techniques.

FDI provides capital that may otherwise not be available in a developing economy and therefore plays an essential part in capital intensive sectors of the economy, enabling developing countries to build up their infrastructure which is an important basis for the development effort. For all of these reasons there is a broad consensus that FDI must be an integrated part of any country’s development strategy. The effectiveness of FDI inflows may depend on the general business environment in the developing country and the measures taken to maximise the effect of the investment inflows. There are also potential problems for some countries as FDI may crowd out domestic investment.

Figure 1 shows that global FDI flows peaked in 2007 and then fell sharply between 2007 and 2009 and since that date have grown strongly. Despite the continuing effects of the financial and economic crisis global foreign direct investment (FDI) inflows rose 16 per cent in 2011. Forecasts by UNCTAD suggest that by 2014 FDI levels will almost be back to pre-crisis levels. This increase has been accompanied by higher profits of MNE and relatively higher economic growth in developing countries.

Figure 1. Global FDI flows, 2002–2011, and projection, 2012–2014
(Billions of dollars)



Source: UNCTAD, *World Investment Report 2012*.

Nevertheless, the overall outlook remains uncertain because of:

- The impact of the euro-crisis and declining growth in the BRICS;
- The volatility of capital flows with some DEEs attracting large speculative capital inflows and others experiencing capital outflows; and
- Political instability in the Middle East and North Africa (MENA) region and some sub-Saharan Africa countries.

Table 1 shows that FDI flows were unevenly distributed between the different economic regions and types of activities.

Table 1. FDI flows, by region, 2009–2011
(Billions of dollars and per cent)

Region	FDI inflows			FDI outflows		
	2009	2010	2011	2009	2010	2011
World	**1 197.8**	**1 309.0**	**1 524.4**	**1 175.1**	**1 451.4**	**1 694.4**
Developed economies	606.2	618.6	747.9	857.8	989.6	1 237.5
Developing economies	519.2	616.7	684.4	268.5	400.1	383.8
Africa	52.6	43.1	42.7	3.2	7.0	3.5
East and South-East Asia	206.6	294.1	335.5	176.6	243.0	239.9
South Asia	42.4	31.7	38.9	16.4	13.6	15.2
West Asia	66.3	58.2	48.7	17.9	16.4	25.4
Latin America and the Caribbean	149.4	187.4	217.0	54.3	119.9	99.7
Transition economies	72.4	73.8	92.2	48.8	61.6	73.1
Structurally weak, vulnerable and small economies[a]	**45.2**	**42.2**	**46.7**	**5.0**	**11.5**	**9.2**
LDCs	18.3	16.9	15.0	1.1	3.1	3.3
LLDCs	28.0	28.2	34.8	4.0	9.3	6.5
SIDS	4.4	4.2	4.1	0.3	0.3	0.6
Memorandum: percentage share in world FDI flows						
Developed economies	50.6	47.3	49.1	73.0	68.2	73.0
Developing economies	43.3	47.1	44.9	22.8	27.6	22.6
Africa	4.4	3.3	2.8	0.3	0.5	0.2
East and South-East Asia	17.2	22.5	22.0	15.0	16.7	14.2
South Asia	3.5	2.4	2.6	1.4	0.9	0.9
West Asia	5.5	4.4	3.2	1.5	1.1	1.5
Latin America and the Caribbean	12.5	14.3	14.2	4.6	8.3	5.9
Transition economies	6.0	5.6	6.0	4.2	4.2	4.3
Structurally weak, vulnerable and small economies[a]	**3.8**	**3.2**	**3.1**	**0.4**	**0.8**	**0.5**
LDCs	1.5	1.3	1.0	0.1	0.2	0.2
LLDCs	2.3	2.2	2.3	0.3	0.6	0.4
SIDS	0.4	0.3	0.3	0.0	0.0	0.0

Source: UNCTAD, *World Investment Report 2012*.
[a] Without double counting.

Over this period the flow of FDI into the transition and other developing economies, primarily the BRICS, increased by 25 per cent with a 10 per cent increase in Asia and a 16 per cent increase in the FDI flow into Latin America and the Caribbean. Inflows into Africa marginally fell. DEE's account for more than half of global FDI (51 per cent). The poorest developing countries, especially politically vulnerable countries, experienced a significant fall. UNCTAD expects that developing and transition economies will continue to keep up with the pace of growth in global FDI in the medium term (see Table 2).

Table 2. Summary of econometric results of medium-term baseline scenarios of FDI flows, by region
(Billions of dollars)

Host region	Averages					Projections		
	2005–2007	2009–2011	2009	2010	2011	2012	2013	2014
Global FDI flows	**1 473**	**1 344**	**1 198**	**1 309**	**1 524**	**1 495–1695**	**1 630–1 925**	**1 700–2 110**
Developed countries	**972**	**658**	**606**	**619**	**748**	**735–825**	**810–940**	**840–1 020**
European Union	646	365	357	318	421	410–450	430–510	440–550
North America	253	218	165	221	268	255–285	280–310	290–340
Developing countries	**443**	**607**	**519**	**617**	**684**	**670–760**	**720–855**	**755–930**
Africa	40	46	53	43	43	55–65	70–85	75–100
Latin America and the Caribbean	116	185	149	187	217	195–225	215–265	200–250
Asia	286	374	315	384	423	420–470	440–520	460–570
Transition economies	**59**	**79**	**72**	**74**	**92**	**90–110**	**100–130**	**110–150**

Source: UNCTAD, *World Investment Report 2012*.

The following paragraphs provide more details of recent developments in different regions:

- Inflows to sub-Saharan Africa recovered from $29 billion in 2010 to $37 billion in 2011, a level comparable with the peak in 2008. A rebound of inward FDI to South Africa accentuated the recovery, although recently this influence has declined. The continuing rise in commodity prices and a relatively positive economic outlook for sub-Saharan Africa are among the factors contributing to the turnaround. In addition to traditional patterns of FDI to the extractive industries, the emergence of a middle class is fostering the growth of FDI in services such as banking, retail and telecommunications, and increasingly these inflows are coming from non-OECD countries.

  In DEE's in East and South-East Asia, FDI inflows reached new records, with total inflows amounting to $336 billion.

- Significant flows went into Indonesia, Malaysia, Thailand and China (In China for the first time the flows to the services sector surpassed those to manufacturing).

- Latin America and the Caribbean experienced an increase of 16 per cent driven mainly by higher flows to South America. Inflows to Central America and the Caribbean, excluding offshore financial centres, increased by 4 per cent, while offshore financial centres registered a 4 per cent decrease. High FDI growth in South America was mainly due to its expanding consumer markets, high growth rates and natural-resource endowments.

- The Commonwealth of Independent States (CIS) and South-East Europe recovered FDI flows after two years of stagnant flows, driven in large part by cross-border M&A deals. Resource-based economies particularly benefited, with the Russian Federation continuing to account for the main share of inward FDI to the region. The services sector continues to account for a small part in inward FDI in the region.

In more recent years the flow of investments between the DEEs has increased.

The distribution of FDI between sectors also varies:

- Global FDI flows continue to be primarily in the manufacturing sector, followed by services and primary products. All three of these sectors saw sharp increases in investment flows in 2011. The biggest relative increase was seen in extractive industries, chemicals, utilities, transportation and communications. Globally greenfield investments were predominant, with the DEEs hosting more than two thirds of the total in 2011.

- Over this period FDI into less developed countries have continued to be concentrated in a few resource rich countries, with investment in mining, quarrying, oil and gas predominating, although recently there has been a renewed interest in utilities, communications and transportation.

Although the focus has tended to be on FDI, outward investment from the DEEs is significant, with their share in the global outflows at 23 per cent. Nevertheless, outward investment from the DEEs declined by 4 per cent in 2011, with outflows from Latin America and the Caribbean falling by 17 per cent, largely owing to the repatriation of capital to the region. Outflows from the East and Far East were stagnant and from Africa the flows were negligible.

Some resource rich and other middle and high income developing countries are increasingly investing not only in other developing economies but in industrialised countries. One example of this type of investor is the sovereign wealth fund, such as those from China, Kuwait, Qatar and Abu Dhabi that play an increasing role on the world stage. The OECD is considering the application of double tax treaties to these entities and the appropriate wording of treaties to encompass the activities of state owned entities in general including the sovereign wealth funds.

A further growing development is that some enterprises in DEEs, e.g. from Brazil, China, India, Malaysia, are making significant investments outside their home countries. DEEs thus have an interest in the efficient operation of tax treaties as capital exporters, in addition to their more traditional interest as capital importers.

What this brief survey shows is that overall FDI flows are recovering from the crisis and that the expectation is that this recovery will continue. From the perspective of this study three conclusions are practically relevant:

- FDI flows into the DEEs are no longer just from OECD countries, as increasingly we see these flows coming from the BRICS and other emerging economies.
- Sectors outside of extractive industries are beginning to attract more FDI and south-south flows are increasing.
- Outward investment from the BRICS is important with MNEs based in the BRICS playing an increasing role in the global economy.
- Both inward and outward flows remain volatile and are vulnerable to developments in OECD countries.

III. <u>How and if so what taxes are important to attract FDI?</u>[2]

It is important to address the more general question of what is meant by a competitive tax environment before looking at the impact of tax treaties on investment flows. The term "competitive" is a relative concept in everyday usage. When applied to a business, it means that a firm is able to produce its output at the same or lower cost than other

[2] This section draws upon an article published by Prof. Owens in the David H. Tillinghast Lecture: Tax Competition: to welcome or not? New York State University 2012. See also, the papers presented at an October 2011 American Tax Policy Institute Conference (http://www.americantaxpolicyinstitute.org/conf_10-17.php).

firms in the same line of business, or that is has some other advantage over them such as the quality of its product. In most industries a competitive firm (as a result of its cost or other advantages over its rivals) would be able to earn returns in excess of its cost of capital.

It is more difficult conceptually to apply the term competitive to an economy as a whole rather that to a particular firm. An economy is made up of many different firms (plus extensive public sector provision of services). Moreover the structure of its production and the pattern of its trade will depend on its comparative advantage relative to other economies.[3]

Most of the drivers of the competitiveness of firms lie within the domestic economy. The World Economic Forum in its Global Competitive Report defines competitiveness as "the set of institutions, policies, and factors that determine the level of productivity of a country."[4] The level of productivity in turn sets the sustainable level of living standards. The Global Competitiveness Report weighs together data pertinent to twelve "pillars of competitiveness". [5] Taxes are not always considered among the drivers of competitiveness; but tax policy would clearly have an influence on the development of many of these factors and on competitiveness in the economy.

An alternative set of indicators may be found in the World Bank/IFC study, *Doing Business*, which provides 11 indicators for 185 countries; the study is widely used by both industry and governments in assessing the ease of doing business in a country. The *Doing Business* project includes a "Paying Taxes indicator". As one measure of the ease of *Doing Business*, although given the methodology used; this indicator offers little practical guidance to how competitive an economy is and has been subject to criticism both from governments and NGOs.[6]

There are likely to be significant overlaps and interactions between the various drivers of competitiveness and views may differ on precisely how they translate into increased production efficiency and growth potential[7]. Tax policy and administration will impact differently on the various pillars and hence productivity In practice, most taxes (not just the corporate income tax) can have an impact on competitiveness.[8]

A country's tax system cannot be examined in isolation in considering how tax policy can help to generate economic growth and prosperity. Tax regimes and tax rates potentially can have a significant influence on decisions about the location of production and investment in open economies where capital is mobile across boundaries and multinational enterprises play an increasing role in international trade and investment.

A sound and fair legal and administrative framework, within which individuals, firms, and governments interact to generate income and wealth in the economy, has a strong

[3] Even if its firms operate with higher levels of productivity than their foreign rivals, an economy cannot have a competitive advantage in everything, but will specialize where that competitive advantage is greatest. The higher overall levels of productivity translate (via a higher real exchange rate) into improved terms of trade and higher living standards. See generally, David Ricardo, Principles of Political Economy and Taxation (George Bell and Sons eds., 1891).

[4] World Econ. Forum, The Global Competitiveness Report 2011-2012, at 4 (Klaus Schwab ed., 2011).

[5] Institutions, infrastructure, macroeconomic environment, health and primary education, higher education and training, goods market efficiency, labour market efficiency, financial market development, technological readiness, market size, business sophistication, and innovation. at 4-8.

[6] World Bank Group/PWC, *Paying Taxes 2013*, Washington DC, November 2012

[7] See World Econ. Forum op. cit. at 8.

[8] In practice, the underlying themes arising from taking a „competitiveness" perspective are very similar to those explored in OECD, Tax Policy Studies No. 20: Tax Policy Reform and Economic Growth (2010), and OECD, Tax Policy Brief: Tax Policy Reform and Fiscal Consolidation (Dec. 2010), available at http://www.oecd.org/dataoecd/28/12/46600079.pdf.

bearing on competitiveness and growth of a country. Tax policy and administration can contribute to this framework by:

- Raising tax revenues in a way that is broadly accepted as "fair" and neutral is more likely to achieve high levels of (largely) voluntary compliance.
- Good administration that is effective in deterring evasion reinforces social cohesion and ensures no unfair advantage accrues to businesses that evade tax.
- A tax administration that is not open to corruption and that implements tax law consistently and impartially makes the tax regime predictable and reduces the extent to which it might discourage investment.
- Efficiency in tax administration reduces the amount of an economy's resources that have to be devoted to revenue collection.
- Low compliance costs and burdens on business reduce the time that taxpayers have to spend on tax compliance – time and effort that could otherwise be spent on creating income and wealth.
- Tax policymaking that is evidence-based and transparent, including the publication of the revenue forgone from tax expenditures and periodic reviews of their cost-effectiveness, encourages a broader public debate on the tax policy.

Tax policy can also contribute to achieving a macroeconomic environment which is conducive to growth by raising sufficient tax revenues to finance public expenditure while maintaining sustainable budget deficits and public debt ratios. Correspondingly, any tax cuts have to be "paid for".

Growth-oriented tax regimes distort market signals as little as possible and avoid discouraging the supply of entrepreneurship, investment, and skills. Tax policies need to go with the grain of competition in ensuring that it is the most efficient firms, producing the goods and services demanded by the market, which thrive, and at the same time support the redeployment of resources into firms and industries where the reward they can earn is higher.

Tax systems in general will be less distortive if they use a broad base, for example by applying the standard VAT/GST rate to all consumption expenditure, as this reduces the extent to which tax distorts choices and enables tax rates to be lower than otherwise, so disincentive effects are reduced. Similarly, broadening personal and corporate income tax bases by reducing tax expenditures would allow lower marginal tax rates, and the distortionary effects of these taxes depend primarily on marginal rates.

Governments have to make important judgments about the trade-offs between efficiency and fairness. Both can be important for competitiveness. Social cohesion associated with widely-held views that the tax regime is fair for instance can improve the functioning of institutions, and goods and labour markets. Empirical evidence suggests that some labour supply decisions are more responsive to tax (dis)incentives than others, for example, those of second earners.[9] Tax reforms that promote the labour market participation of these groups thus could increase labour supply and promote inclusiveness – another rider to focusing just on productivity/competitiveness.

Technological readiness refers to the ability of economies to adapt existing technologies and innovation to the development and application of new technologies and products. Successful R&D is clearly crucial. There is some evidence that a favourable tax regime for R&D increases the amount of such expenditure, but less clear evidence on the best design of any tax relief or the appropriate degree of tax privilege.

[9] See, e.g., Nada Eissa, Taxation and Labor Supply of Married Women: The Tax Reform Act of 1986 as a Natural Experiment 16-18 (NBER, Working Paper No. 5023, 1995), available at http://www.nber.org/papers/w5023 (finding that the labor supply of high-income married women increased due to the marginal tax rate reduction of the Tax Reform Act of 1986 and increased more than the labor supply of women in lower tax brackets).

This brief survey shows that DEEs need to focus first on getting the fundamentals of their economies right and designing domestic tax provisions which help achieve this.

The increased openness of national economies, combined with new technologies means that tax bases are increasingly geographically mobile. These trends have had significant implications for tax policy, as cross-border investors generally will be looking to maximize their post-tax not their pre-tax returns. Countries may feel that they are increasingly in a position of competing as a location for FDI and, as a result, under pressure to reduce taxes on the return on investment, particularly their corporate income tax rate. Even an investment with an expected return comfortably in excess of a firm's cost of capital may not go ahead if an even larger return could be achieved in another country through lower tax rates. In practice, the range of empirical estimates of the responsiveness of FDI to corporate tax rates is quite wide and this makes clear-cut policy recommendation difficult.[10]

Nevertheless, this elasticity appears to have increased over the last decade and international competition for FDI thus reinforces the wider competitiveness arguments discussed above for a tax regime that fosters a conductive climate for investment and innovation.

Cross-border trade and investment generally have a positive effect on growth, especially for countries with small domestic markets. Tax policies can support the promotion of cross-border activities by removing tax obstacles to trade. This is the main objective of the OECD and UN Model Tax Conventions.

In lobbying governments about taxes, businesses tend to focus on the corporate tax regime, as this is generally a tax burden on all their shareholders whether domestic or foreign, exempt or taxpaying. And for MNEs a competitive corporate tax regime appears to be seen as one under which the tax rate that they face in a country is no less favourable than that facing both domestic companies in the host country and the subsidiaries of MNEs from other home countries. This tax rate depends in practice on a range of factors including the statutory corporate tax rate, the tax base (notably, depreciation of assets for tax purposes), the type of double taxation relief operated by the home country, the opportunities for (aggressive) tax planning, and the extent to which a business exploits them.

MNEs are generally concerned both with the size of their tax burden and with compliance costs in meeting their tax obligations. Studies such as *Paying Taxes 2013* of the World Bank/IFC show that the most difficult places to pay taxes are mostly small developing countries lacking the resources for adequate tax administration. For this reason, efficient tax administration and a provision for dispute resolution will be among the concerns of MNEs.

A double tax treaty will help MNEs by giving them more certainty as to the tax treatment of their transactions and by setting out clear administrative procedures such as the availability of the mutual agreement procedure. The allocation of taxing rights between the country in which investment is made and the capital exporting country, set out in a treaty, gives a clear guideline to both the taxpayer and the tax administration, and provides assurance to a potential investor with regard to the rules to be applied to it.

All of these factors and certain others such as valued added tax and labor taxes will influence MNEs' location decisions. It is also important to recognise that it is long-run profitability that should drive location decisions. If an economy does not get the fundamentals right – political stability, access to markets, a well-trained labour force,

[10] See Ruud A. de Mooij & Sjef Ederveen, Explaining the Variation in Empirical Estimates of Tax Elasticities of Foreign Direct Investment 2-3 (Tinbergen Inst., Discussion Paper TI 2005-108/3, 2005), available at http://repub.eur.nl/res/pub/7428/20051083.pdf.

good infrastructure, competitive costs and the like – tax incentives or good tax administration are not going to attract the right type of investment, as investment decisions are not made primarily on tax grounds.

IV. A review of the tax treaty network and practice in selected DEEs

(A) Introduction

There are today more than 3000 bilateral tax treaties around the globe. The vast majority of these treaties are based upon the OECD and UN Model (the UN Model follows the OECD Model very closely). Both Models are regularly updated to reflect changes in business models, in technologies and in national tax systems. Because these bilateral treaties are based upon similar models the network functions in a way which is not dissimilar to a multilateral treaty. (See Figure I for an overview of the network of treaties in the 20 countries covered by this study.)

Both the OECD and UN have for many years emphasised the desirability of all countries entering into tax treaties and each organisation has expended considerable resources in helping DEEs to negotiate and to apply tax treaties.

The goals set for tax treaties are:

- The elimination of double taxation;
- The provision of certainty and predictability to foreign investors;
- The provision of a framework within which the tax authorities can minimize disputes and resolve them when they arise; and
- A legal framework for cooperation between tax authorities to counter offshore non-compliance.

Traditionally OECD countries have been the most active in negotiating tax treaties and most of the 34 Member countries have a network of between 50 to 80 treaties. Over the last decade we have seen many non OECD countries becoming more active in the treaty area both in terms of negotiating treaties with OECD countries and between themselves. Today there are many non-OECD countries which have a treaty network which exceeds 50 and some, like China, which are now approaching 100.

The OECD model tends to emphasise residence taxation rights, favouring developed countries; the UN model emphasises source taxation, favouring developing countries. This classification may today represent an oversimplification. Many non-OECD countries are now capital exporters as well as importers and some OECD countries are also capital importers. There are an increasing number of DEEs which have significant outflows of capital and large service sectors (e.g. India where in 2012, capital outflows exceeded capital inflows). There are also an increasing number of BRICS-based MNEs which are playing a more active role in the global economy; in fact these are now amongst the fastest growing MNEs. Poor developing countries, however, remain in the traditional pattern of capital importers, as they are large agriculture and primary producers with low levels of technology.
When entering into tax treaties countries base their negotiation positions on the OECD and the UN Model. Whereas the OECD Model has been primarily developed in light of the interests of industrialized countries, the drafters of the UN Model were aiming to create an alternative to the OECD Model which can be used by developing countries. For this purpose the OECD Model was adapted primarily by changing the allocation rules in such a way that the source state receives more taxing rights. Choosing between the OECD and the UN Model therefore means choosing between less or more taxing rights for the

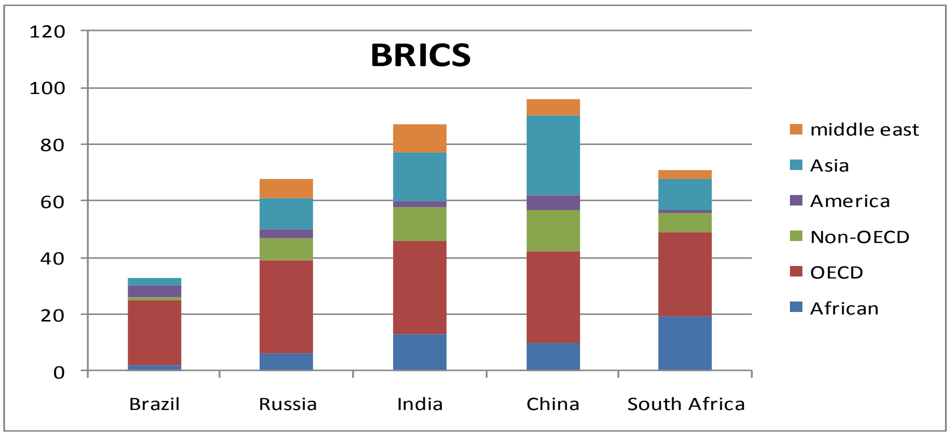
source state.[11] Chapter V examines the allocation of taxing rights between the contracting states.

While basically following the structure and the wording of the OECD Model, the UN Model differs from the OECD Model in several ways. The most important deviations can be found in the articles concerning business income and the definition of permanent establishment (PE), the passive income articles and the capital gains article as well as the other income article. All these deviations lead to more source taxing rights. This chapter will look at whether the countries analysed prefer to follow the approach in the OECD or the UN Model.[12] It will also show if there have been changes over time, which would reflect on these changes in FDI flows that many of the countries are experiencing. The chapter focuses on these articles and does not work for the majority of the other articles in tax treaties where the DEEs tend to follow the OECD model quite closely.

This chapter aims to depict the approach of several groups of countries towards choosing between the OECD and the UN Model. The country groups are as follows: BRICS countries (Brazil, Russia, India, China, and South Africa), lower and upper-middle income economies (Malaysia, Indonesia, Qatar, Thailand, Vietnam, and Colombia), least-developed countries and low income economies (Bangladesh, Kenya, Mozambique, Rwanda, Tanzania, and Uganda), and resource-rich developing countries (Kazakhstan, Nigeria, and Zambia). These country groups were chosen in order to show the diversity of the large group of developing countries. In fact, developing countries are very heterogeneous and include emerging economies as well as least-developed countries – which have a wholly different level of development. It will be seen if these differences are also reflected in the tax treaty network of the different country groups.

(B) Treaty network of the country groups

Generally the first double tax treaties were entered into by OECD countries with each other and then with developing countries. For this reason, all developing countries in the four categories have concluded a number of tax treaties with OECD countries. The BRICS group of countries and the middle income developing countries have expanded their networks to all regions and have concluded treaties with both OECD and non-OECD countries. The resource rich group and the LDCs have a less numerous and less wide ranging network of treaties and have concluded tax treaties mainly with OECD countries or other countries in their own region. The African countries in the sample of LDCs have for example, concluded relatively few treaties with non-OECD countries in Asia, the Middle East or Latin America.



[11] See in detail in the next chapter.

[12] Annex 1 includes all data analysed for the purpose of this study and gives a detailed overview of the provisions used in the tax treaties of the target countries.

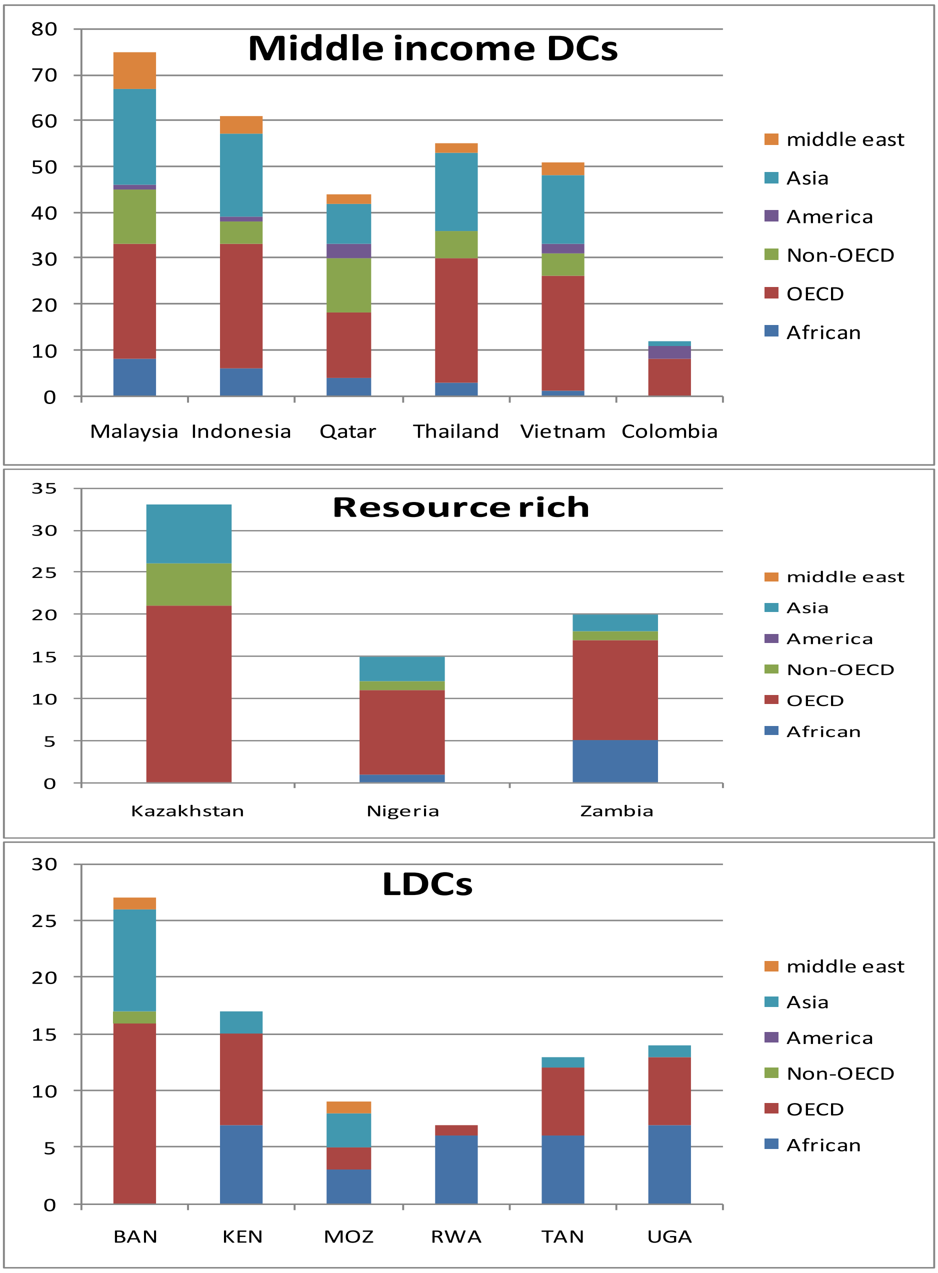


Fig. 1 – Treaty networks

(C) Business income

Following Article 7 of the OECD and the UN Model, business profits are taxable only in the residence state of the enterprise unless that enterprise has a permanent establishment (PE) in the other state and carries on business through it. Here the main difference between the OECD and the UN Model is on the one hand that the concept of PE is broader in the UN Model so that it is easier for an enterprise to have a connection with the source state that allows it to tax the profits. This is achieved by lower thresholds for building sites and construction projects, by deeming supervisory activities in connection with such sites or projects as a PE, and by the service PE provision.[13] On the other hand, following Article 7 of the UN Model more profits can be attributed to the PE than under the OECD Model due to the limited force of attraction rule.

[13] What is not analysed in this chapter is the insurance PE provision which is also a feature of the UN Model.

(i) Building sites and construction projects

The graphs below show the thresholds which can be found in the different tax treaties in which a building site and a construction project constitute a PE. In the OECD Model this threshold is twelve months, but in the UN Model only six months. One can see that especially middle income economies and LDCs adhere more closely to the UN Model. Only Malaysia has more treaties in which a higher threshold can be found. The BRICS are more diverse among themselves: whereas Russia, China and South Africa tend to have higher building site thresholds, the large majority of Brazilian and Indian treaties contain lower thresholds. Also the resource-rich DCs have different approaches towards the building site provision: Kazakhstan has a large majority of treaties with OECD style thresholds, Nigeria generally has even lower thresholds than those provided for in the UN Model and Zambia is somewhere in between with lower as well as higher thresholds. The threshold for building sites is usually the same as the threshold for construction, assembly and installation projects. India, Malaysia, Indonesia and Thailand, however, have concluded a number of treaties in which different thresholds can be found for projects.[14] No change in treaty policy can be observed over time for any of these countries.

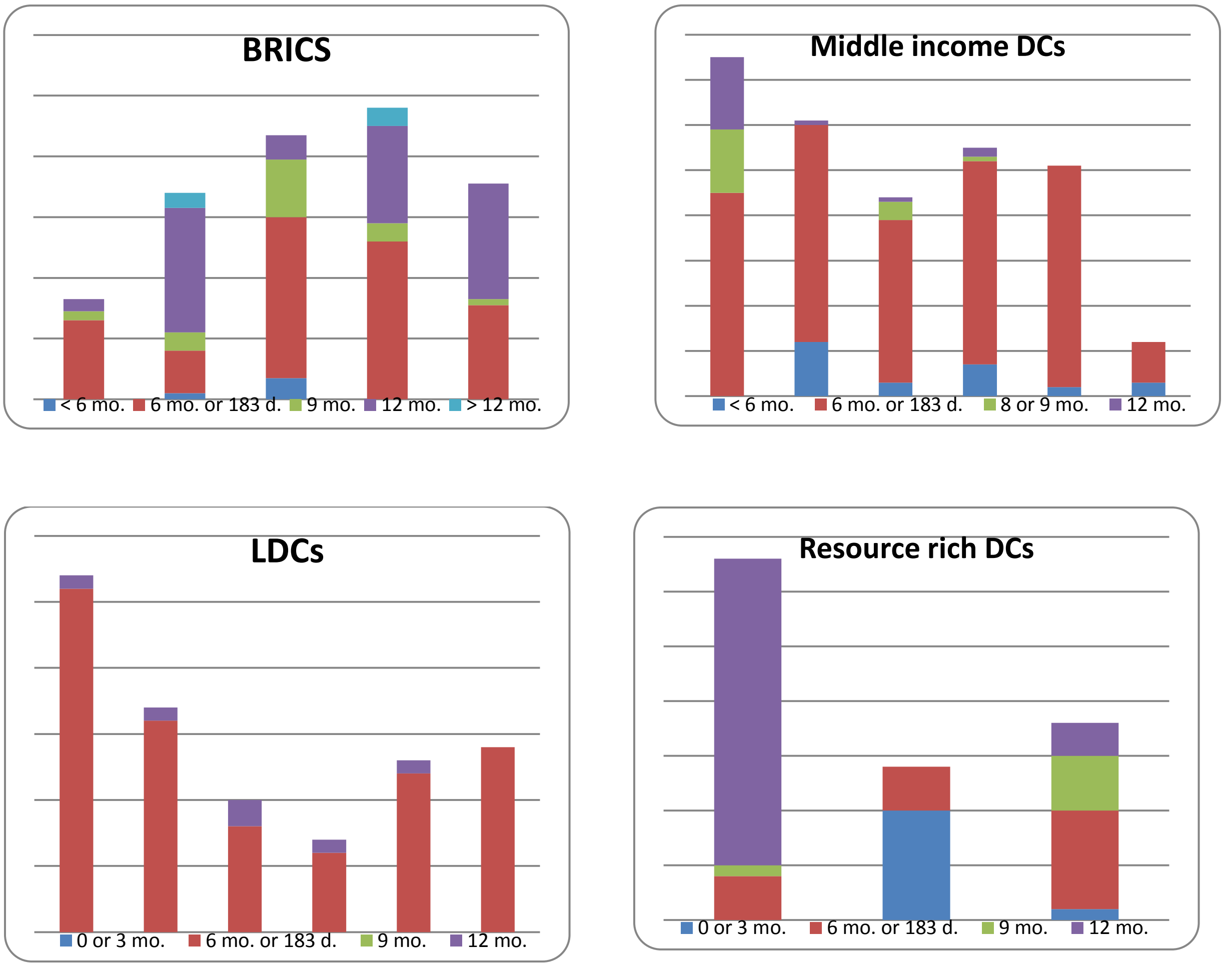


Fig. 2 – Building site thresholds

(ii) Supervisory activities

In the UN Model supervisory activities in connection with a building site or a construction project are deemed to constitute a PE if such activities last for at least six months. All the

[14] See in detail, annex 1.

country groups analysed, except for the BRICS, follow the approach of the UN Model in this respect. Within the BRICS only Brazil is the exception, and within the LDCs Bangladesh follows the opposite policy to the other countries. Malaysia and Indonesia have concluded some treaties in which different thresholds are used for supervisory activities than for building sites and construction projects. This is not in line with the UN Model which only provides for one threshold.[15]

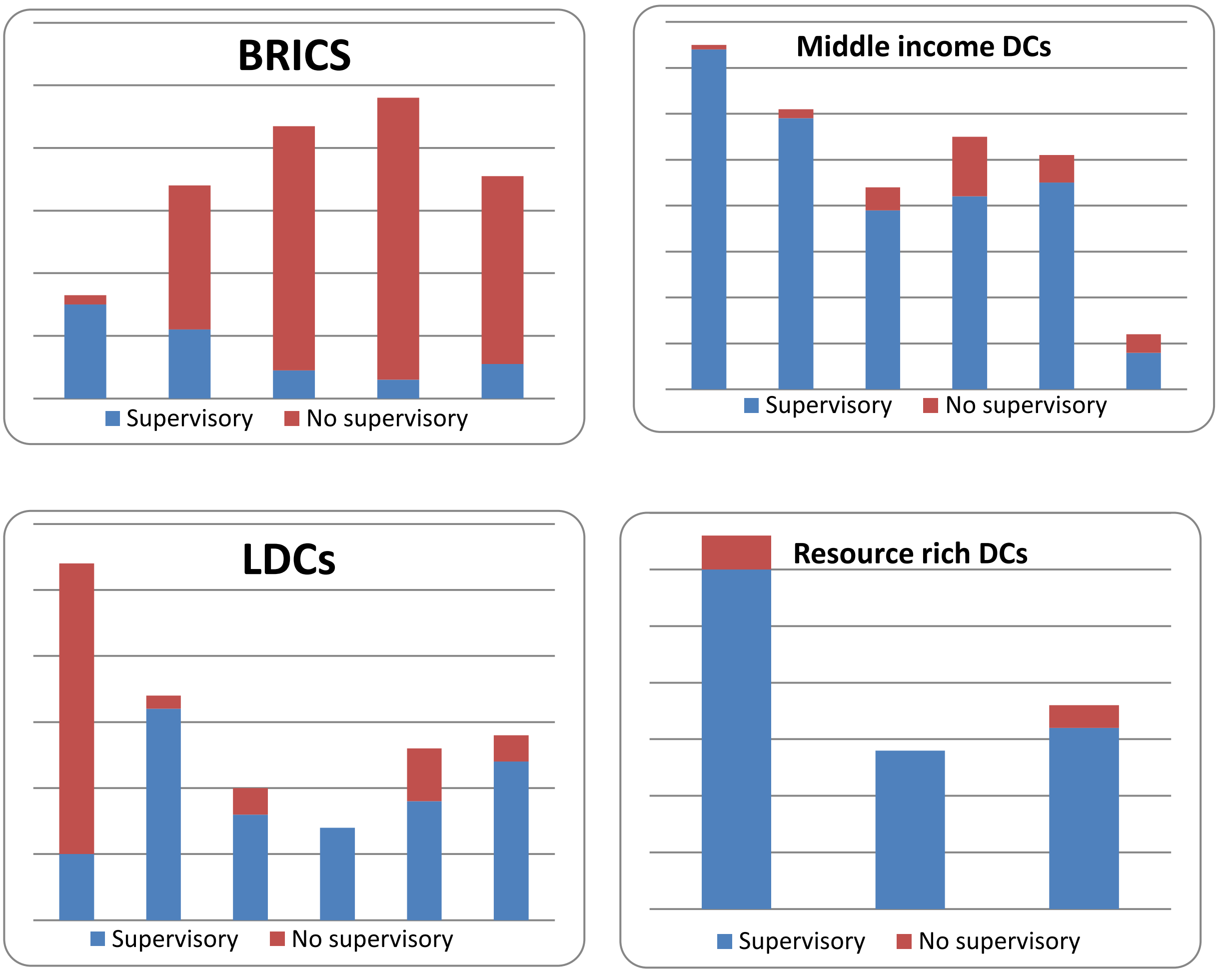


Fig. 3 – Supervisory activities

(iii) Service PE

Following the UN Model the term PE also encompasses the furnishing of services within a country for periods aggregating more than 6 months within any 12-month period ("service PE"). The countries analysed differ from each other in terms of including such a rule in their treaties; and even within the country groups no consistency can be observed. Among the BRICS China and South Africa include service PE rules more frequently than India and Russia; Brazil does not use them at all. Even though India has not included so many UN style service PE rules, it has concluded some treaties in which the provision of specific types of services by an enterprise (e.g. services of entertainers and services in connection with the exploitation of mineral oils)[16] are deemed to be a PE.

[15] See in detail, annex 1.
[16] "An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if it provides services or facilities in connection with, or

It should be noted that India also frequently includes in its tax treaties provisions for withholding tax in respect of technical service fees and therefore provides in this way for the source taxation of such service fees.

From the middle income DCs Colombia, Malaysia and Qatar do not make use of the service PE rules in a majority of their treaties; while the other countries use it in nearly all their treaties. Within the group of LDCs only Mozambique and Rwanda frequently have service PE rules in their treaties, whereas the other countries do not make use of service PE rules in a majority of their treaties and Bangladesh has them in only a few of its treaties. Kazakhstan is the only resource-rich DC analysed that tends to include service PEs in its treaties more often, not with the UN style threshold of six months but with higher thresholds.

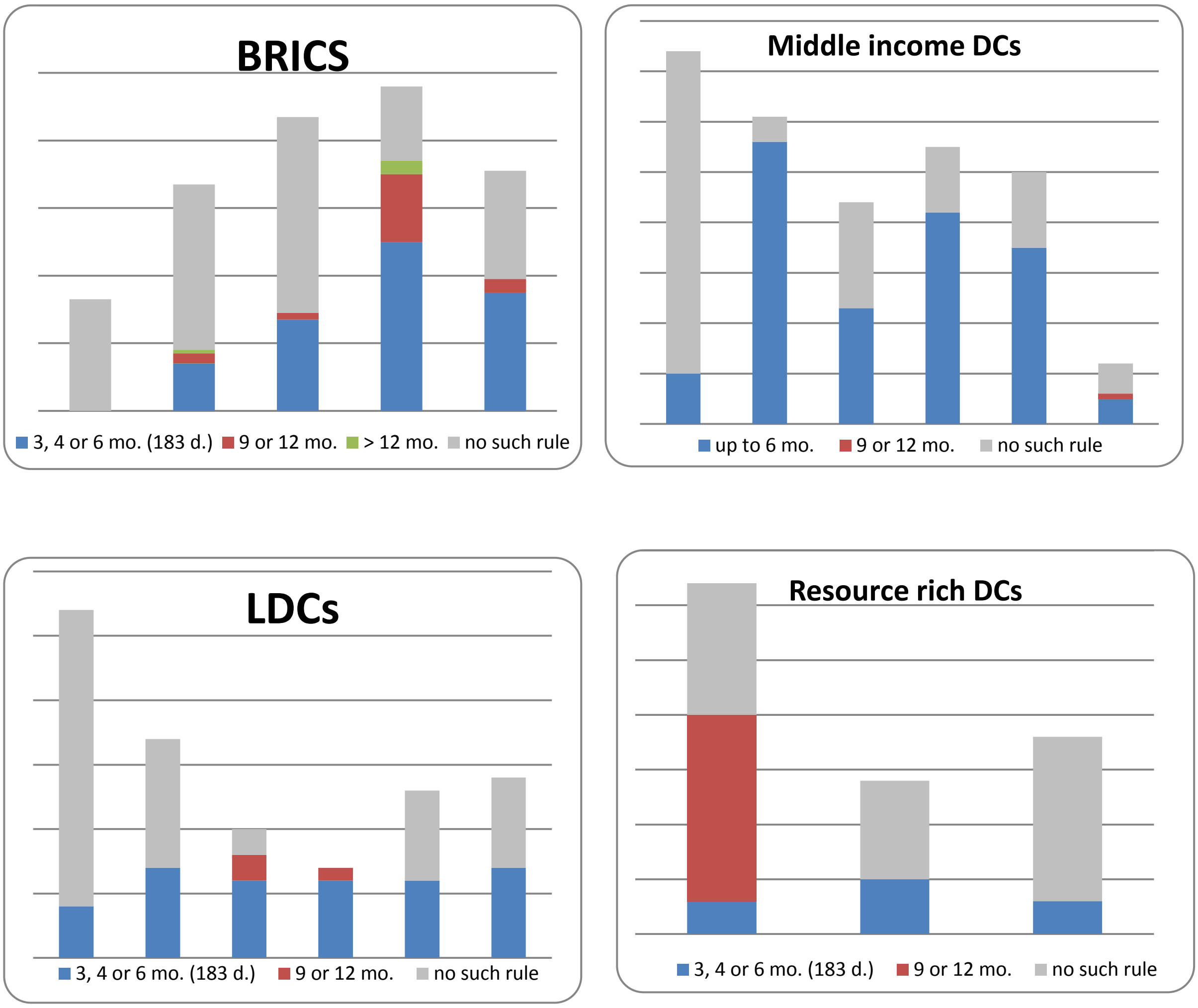


Fig. 4 – service PE

(iv) Force of attraction

In contrast to the equivalent provision in the OECD Model, Article 7 of the UN Model allows the state in which the PE is located to tax profits not directly attributable to the PE but resulting from substantially similar activities, such as the sale of goods or the provision of services ("limited force of attraction rule"). The idea behind this provision is

supplies plant and machinery on hire used for or to be used in the prospecting for, or extraction or exploitation of mineral oils in that State." (Art. 5 (3) India-Austria DTC) that it counteracts efforts of enterprises to avoid taxation through a PE by direct sales.[17] This particularity of the UN Model is not commonly used by the countries analysed. The only countries that use the provision more often are Nigeria, Indonesia, Vietnam, Tanzania, and Kenya (half or even more than half of their treaties include it). India, Thailand and Kazakhstan make use of the limited force of attraction rule in several of their treaties. In general, when including such a rule, a tendency towards using it only in abusive situations can be observed.

(D) Passive income and capital gains

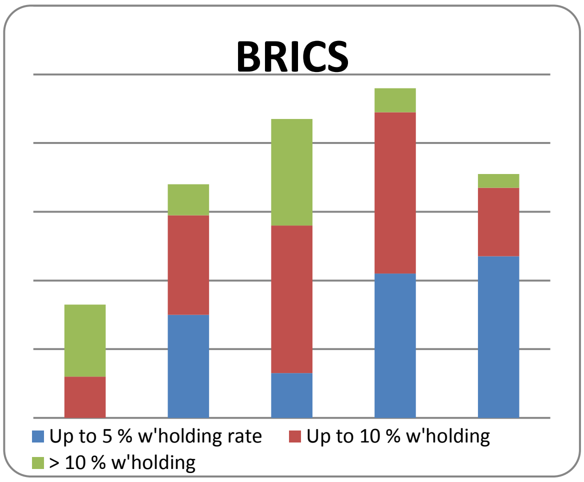
The role of tax treaties in protecting the taxing rights of the source country is clear in respect of provisions on source country taxation of passive income. Capital importing countries may be expected to require significant taxation at source of dividends, interest and royalties given that this passive income will tend to flow from developing to developed countries. It might be expected that as a country becomes more developed and capital flows are more even between the contracting states there would then be a preference for lower withholding tax rates.

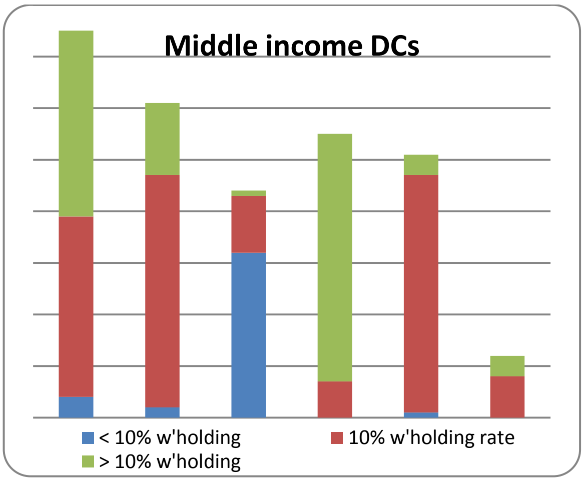
This consideration needs to be balanced against the role of tax treaties in encouraging FDI. Lower WHT rates, especially in respect of non-portfolio dividends, might be expected to encourage FDI. The benefit to any foreign investor of lower WHT rates would depend on the home tax system of the investor and the existence of a credit or exemption system, and on the inclusion in the treaty of any provisions in respect of tax sparing relating to certain dividends.

(i) Dividend income

Another form of investment – besides having a PE – is to acquire a company or greenfield investment (setting up a new company).

Within the BRICS group China, Russia and South Africa offer relatively low rates of 5% or 10% to non-portfolio investors in the majority of their treaties. Russia also has a policy of offering non-portfolio rates to investors where their investment exceeds a certain monetary level. This provision is found in around one-third of the treaties concluded by Russia. Non-portfolio rates offered by the middle income LDCs are typically 10% or higher. Among the LDCs Uganda, Tanzania, Rwanda and Kenya have included relatively low rates of 5% or 10% for non-portfolio investors in many treaties, while of the resource rich countries Kazakhstan and Zambia also offer low rates to non-portfolio investors in many of their treaties.





[17] See Debatin, Handbuch der Vereinten Nationen für Verhandlungen über Doppelbesteuerungsabkommen zwischen Industriestaaten und Entwicklungsländern, *Der Betrieb* 1980, Annex 15/80, 11.

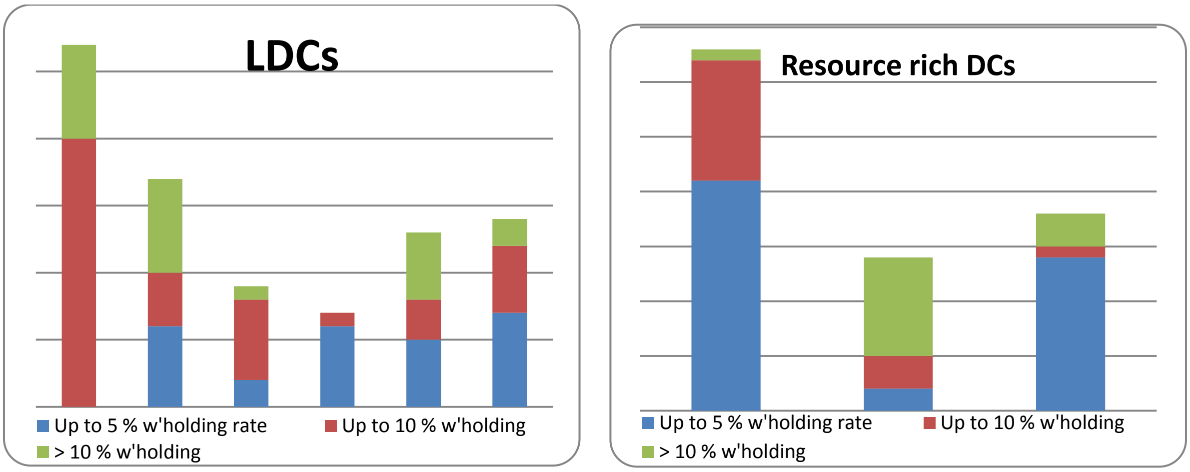


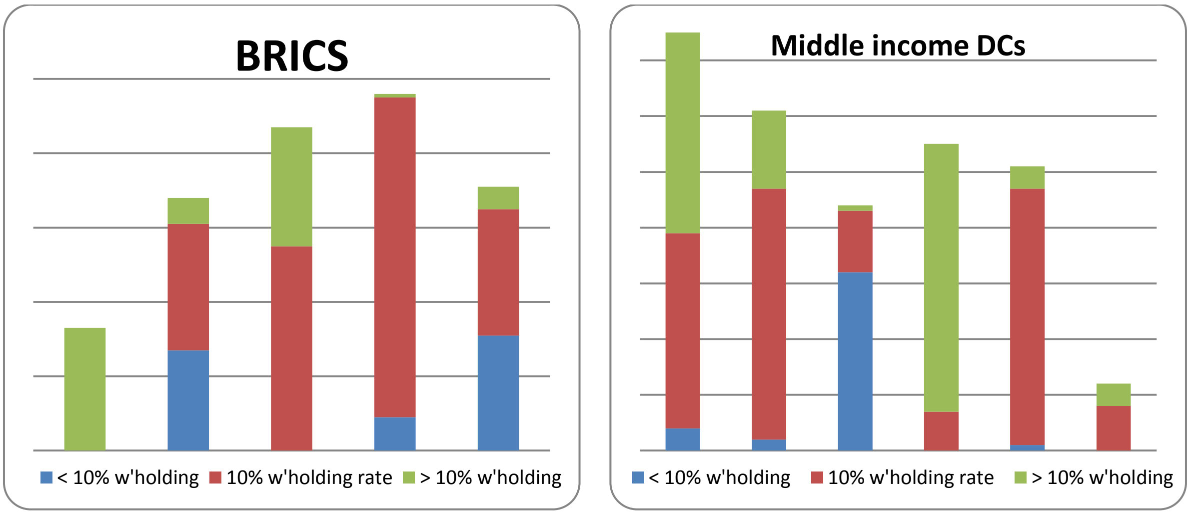
Fig. 5 – Non-portfolio dividends

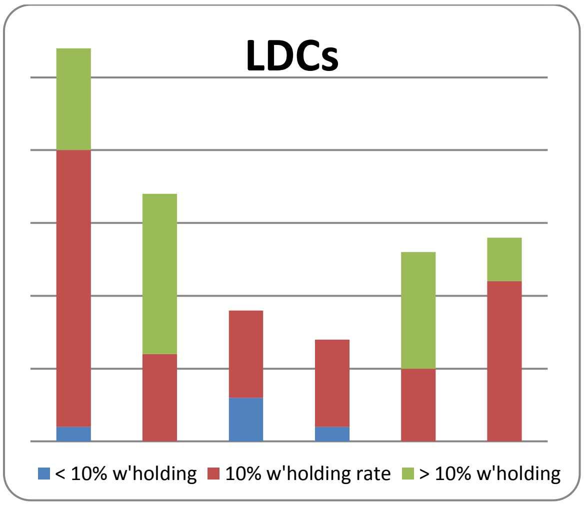
Vietnam has a policy to further differentiate between more substantial participations (mostly around 70 %) and less substantial participations (mostly 25 %) offering an even lower rate for more substantial participations.

(ii) Interest income

The OECD Model restricts WHT on interest to 10%, while the UN Model permits a percentage to be established through bilateral negotiations without specifying any particular maximum percentage for source country taxation of interest. Among the BRICs group India and Brazil have high WHT treaty rates of 10% to 20% or more on interest and the middle income LDCs (apart from Qatar) and most of the LDCs also include high treaty WHT rates.

Most treaties include certain exemptions from interest WHT, the most common exemption being for interest derived and beneficially owned by a State, a political subdivision or a local authority of the other contracting state. An exemption is quite commonly given to interest derived by the Central Bank of the other State. In many of the treaties of Thailand a lower WHT rate is also included for interest paid by banks or financial institutions.





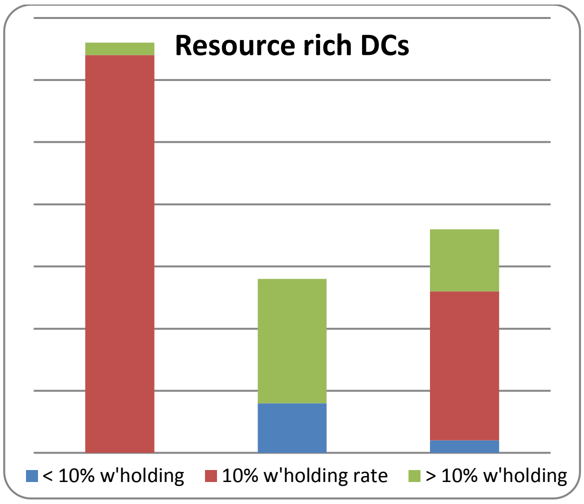
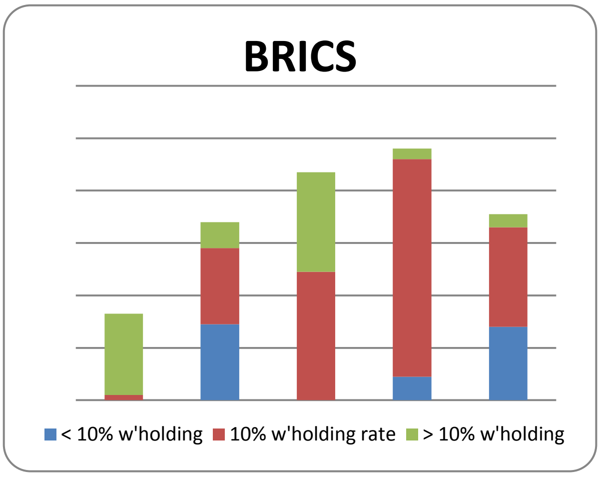


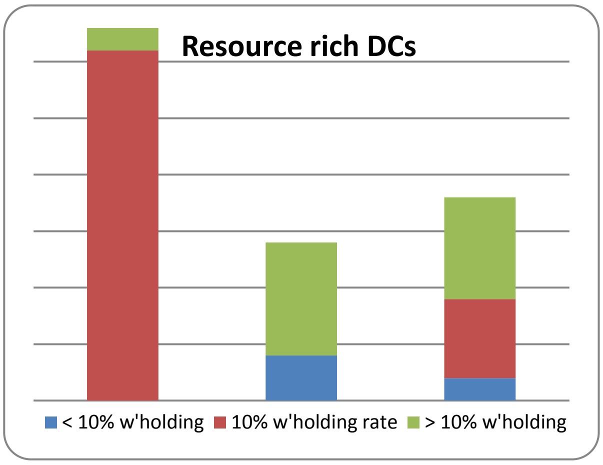
Fig. 6 – Interest withholding rates

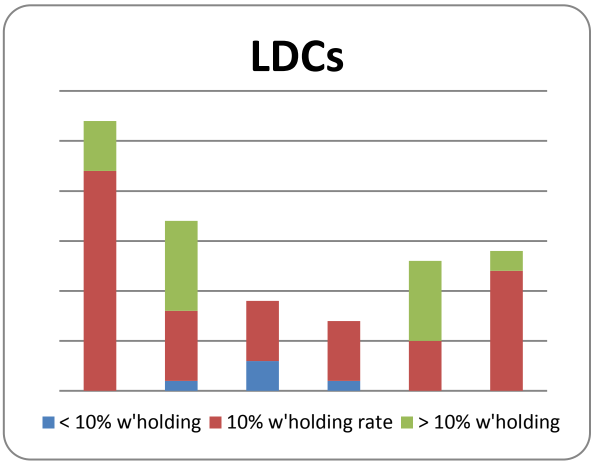
(iii) Royalties

The UN definition extends the Article on royalties to cover the use of, or the right to use, industrial, commercial or scientific equipment, whereas the OECD Model no longer extends the definition to these payments. The UN Model provides for source country taxation of royalties, with the maximum percentage to be determined by negotiation between the treaty partners.

The royalty WHT rates negotiated by developing countries vary enormously, but the LDCs plus Thailand and India generally negotiate high rates of 10% to 20%. Thailand generally negotiates a WHT rate of 15% for royalties but in some treaties provides for a lower rate for some types of royalty e.g. 5% or 10% for copyright royalties or for the use of, or right to use, industrial, commercial or scientific equipment. Certain countries also extend the scope of the withholding tax to technical fees. Malaysia, Vietnam and particularly India have some provisions for source taxation of technical fees in many of their treaties.







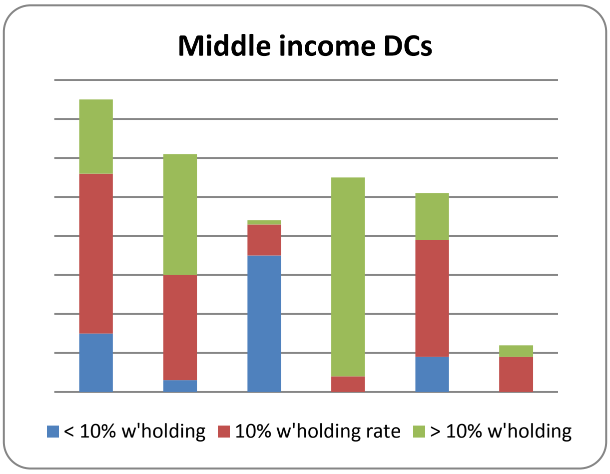


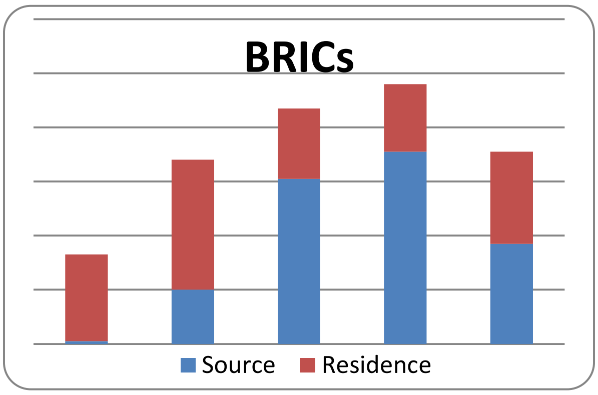
Fig. 7 – Royalty withholding rates

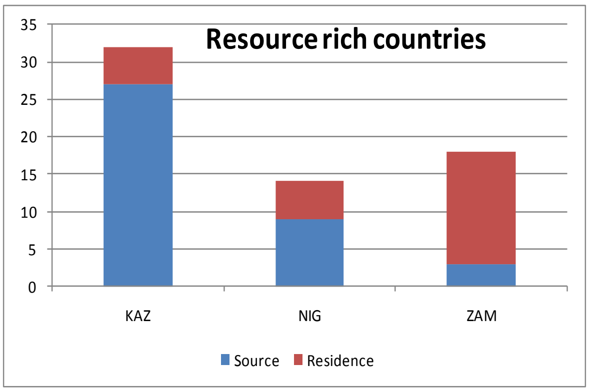
(iv) Land-rich companies

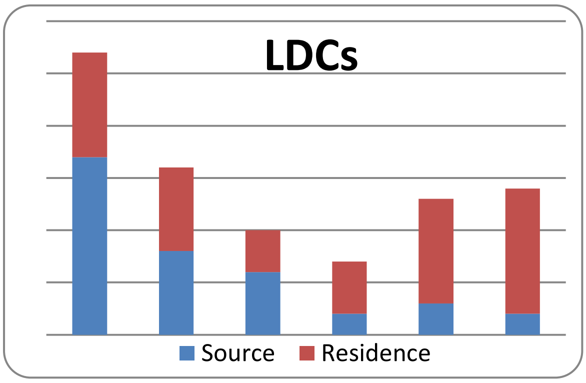
Both the OECD and UN Models contain a paragraph in the capital gains article permitting source country taxation of gains on the sale of shares in land rich companies, these being companies whose shares derive more than 50% of their value directly or indirectly from immovable property situated in a contracting state. Some developing countries such as China, India, Vietnam and Kazakhstan incorporate a provision similar to this in their treaties whereas some others such as Malaysia, Russia or Thailand do not incorporate this provision in many of their treaties.

In many treaties the wording of this provision does not refer to a 50% holding but refers to the shares of a company the assets of which consist principally of real property in the other contracting state. This avoidance of a particular threshold may be intended to discourage attempts at tax avoidance that could take place by artificially adjusting land or property values to remain under a 50% threshold. Some treaties on the other hand provide for a different threshold, for example 75% (e.g. the tax treaty between Russia and Singapore).

In some treaties concluded by developing countries the provision is widened to the sale of interests in other entities such as partnerships or trusts. Some contracting states agree that the provision will not apply in the case of the sale of shares that are listed on an approved stock exchange in one of the contracting states.







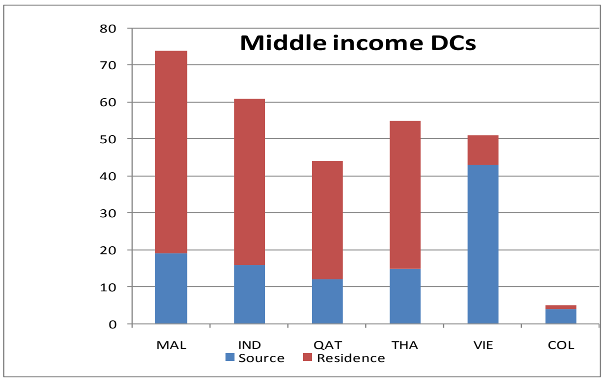
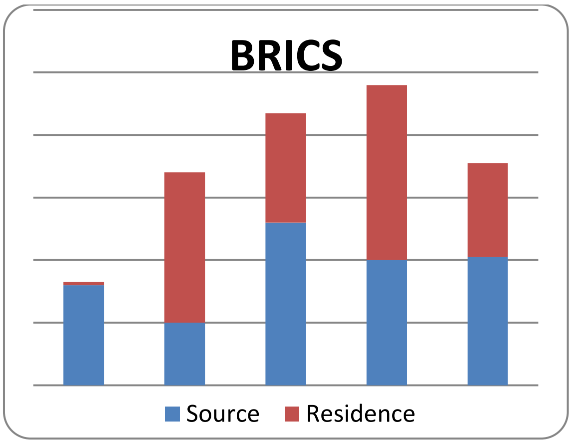


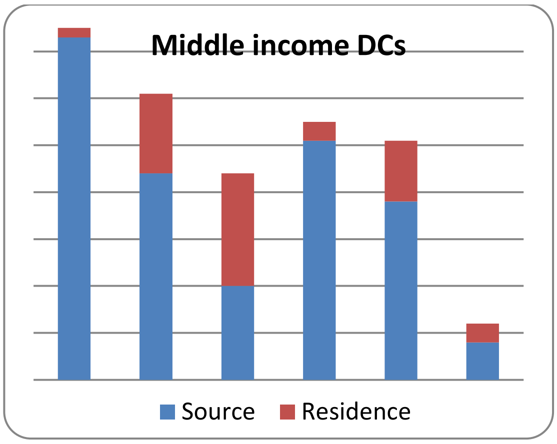
Fig. 8 Land rich companies

(v) Other income

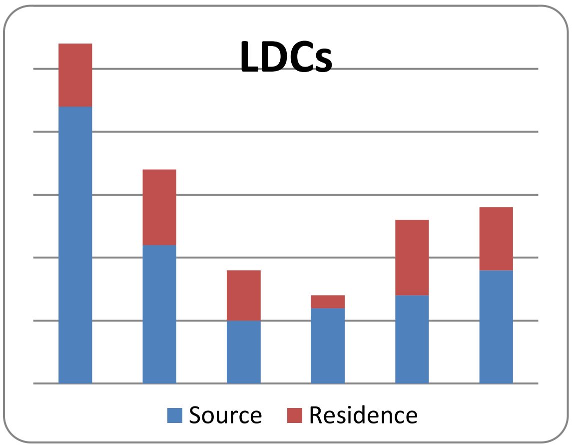
Tax treaties are usually structured in a way that covers all possible types of income. Therefore, most treaties contain a "catch-all clause" (based on Article 21 "Other income"). It encompasses all income which does not fall under the other allocation rules. Article 21 of the OECD Model provides that such income shall be taxable only in the residence state. The UN Model, in contrast, allocates taxing rights in respect of other income also to the source state where the income arises.

The graphs below show that the BRICS and the resource-rich DCs rather follow the approach taken in the OECD Model. Exceptions are Brazil and Nigeria which have almost exclusively concluded treaties with other income articles that allocate the taxing rights to the source state. Observing China's treaties one can see that especially the more recent treaties mostly follow the OECD Model. Middle income DCs (except for Qatar) and LDCs lean more towards the UN Model. Indonesia, Russia and India have signed a number of treaties where the source state may not tax other income except for gambling income (e.g. lotteries, horse racing and similar prizes).[18]





[18] See in detail, annex 1.



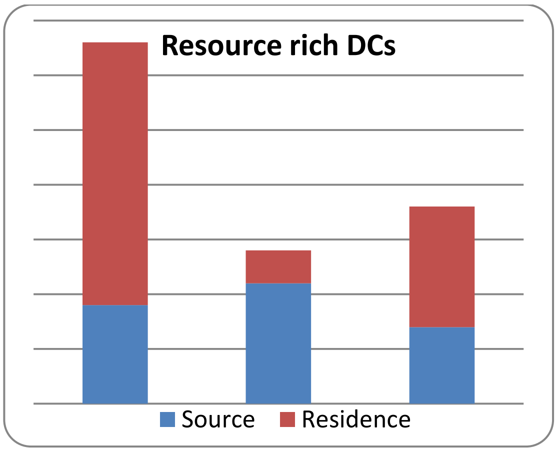


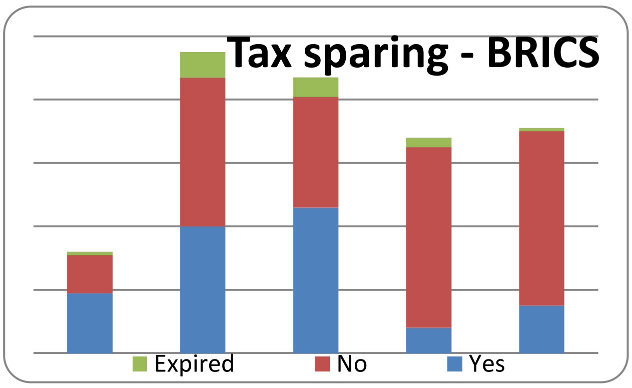
Fig. 9 – Other income (source or residence taxation)

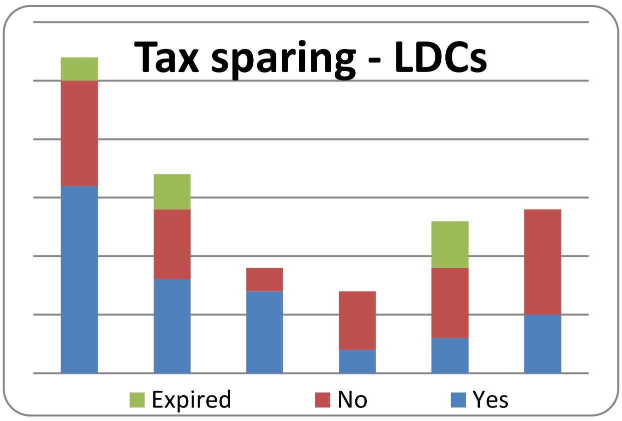
(E) Tax sparing credits

Tax sparing credits operate to deem a certain amount of tax to have been paid in the source country where this tax has in fact been exempted or subject to a reduced rate. The incentive value of the tax exemption in the source country is therefore retained from the point of view of companies resident in the other contracting state. This would operate in tax systems where the residence country normally gives double tax relief by a foreign tax credit. In a system where the source country gives double tax relief by exemption of foreign income the incentive value of tax relief in the source country would generally be retained to some extent, depending on other features of the home country tax system.

The adoption of tax sparing provisions in a tax treaty may depend on the economic relationship between the developed and developing country, including trade relations and FDI flows. The extent to which the tax system of a developing country should be designed to provide an incentive for inflows of FDI is a controversial issue for developing countries.

The developing countries included in the study have generally included tax sparing provisions in a large number of their treaties. Among the BRICS, China and India have negotiated such provisions in around half their treaties, though in some cases the provisions have expired. The middle and high income developing countries reviewed (apart from Colombia) have also been active in including tax sparing in their treaties. Among the resource rich countries Nigeria and Zambia have included such provisions in most of their treaties. Among the sample of LDCs Bangladesh, Kenya and Mozambique have negotiated tax sparing provisions in many of their treaties.





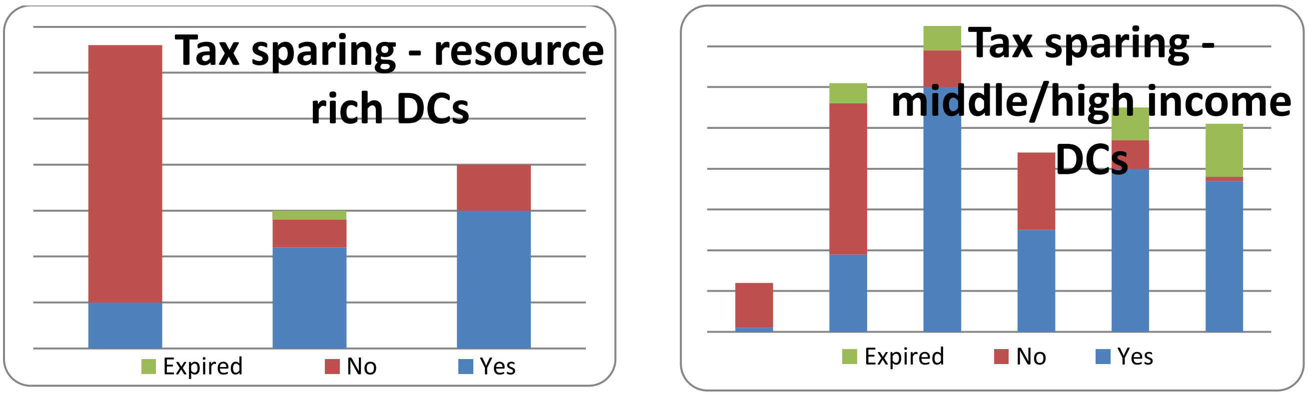


Fig. 10 – Tax sparing credits

Where tax sparing provisions have been allowed to expire without renewal, this is mainly in the treaties concluded with OECD countries and particularly treaties with European countries. Many OECD countries have shown a trend away from granting tax sparing credits, often allowing these to lapse where there is a sunset clause. The reasons for this were outlined in the OECD paper "Tax Sparing: A Reconsideration" in 1998. One important disadvantage of tax sparing is that it gives opportunities for tax planning and avoidance. It is also considered not to be an effective way to promote FDI or national economic goals. Investment decisions are not necessarily influenced by the existence of tax sparing provisions. Other concessions may need to be made by developing countries in tax treaty negotiations if they are to be granted tax sparing in return. The tax sparing credit may for example be used by the other party as a bargaining chip to obtain a concession such as lower withholding tax rates on dividends, interest or royalties.

OECD countries operating the tax credit method would consider that an investment decision should be neutral as between investing at home or abroad, whereas granting a tax sparing credit would make it more favourable for companies to invest in the other contracting state than on the domestic market from a tax point of view. Some countries may however give a tax sparing credit because they see this as part of their foreign aid policy or because they fear putting their investors at a disadvantage in the foreign country (as against competitors from that country or investors from countries that grant their residents the tax sparing credit).

Where countries give double tax relief in their national legislation by means of an exemption for foreign income, this may often only apply to active business income. The same country may give relief from foreign tax on dividends, interest and royalties by means of a tax credit. Tax sparing may therefore still be relevant to these countries. Also, some tax systems switch to a credit method in certain situations such as anti-avoidance.

OECD countries have tended to become more sceptical with regard to the inclusion of tax sparing provisions in their double tax treaties. There is a greater awareness of the ineffectiveness of tax incentives in promoting economic development. The treaty partners who were once much weaker economically and were purely capital importing countries are now becoming stronger and to some extent becoming capital exporting countries, the BRICS group being the main example. Industries in the residence country may now be competing directly with industries in the source country that may be benefitting from tax sparing provisions. Some tax sparing provisions originally included in treaties between OECD countries and developing countries have expired without being renewed.

OECD countries have considered that the tax revenue foregone by granting tax sparing provisions in tax treaties often outweighs the increase in investment for the treaty partner country. It is difficult to target tax incentives and taxpayers always arrange their tax affairs to take maximum advantage of any relief available. There would therefore be a tendency for groups to ensure that they divert investments into those areas where they are obtaining the tax relief and the tax sparing credit, without necessarily making additional investments. Incentives may attract "footloose" enterprises such as retail and services companies that can quickly move in to take advantage of incentives but move out again and go elsewhere when the incentive is no longer available. Groups may also be tempted to adjust their transfer prices to ensure that maximum profits arise where the tax relief is available, or adjust the group structure to ensure that they have an entity qualifying to receive the relief. Tax relief and exemptions tend to increase the complexity within the system.

Developing countries which may not have adequate administrative resources may be required to devote extra resources to determining which foreign companies fall within incentive provisions and are eligible for reliefs. Given the difficulties and the doubt as to the benefits of tax sparing, some developing countries are now less enthusiastic about the inclusion of tax sparing provisions in treaties. On the other hand, some developing countries have introduced complications such as special rates that may benefit companies qualifying for exemptions and tax sparing credits. This maximises the incentive effect by enabling taxpayers to claim a greater credit in their home country, reducing the tax collected in that country.

Limitations on tax sparing may be imposed by limiting the provision to certain categories of taxpayer, certain categories of income or certain incentive laws or by limitation of deemed paid tax. Some treaties set out specifically the incentive laws to which the tax sparing credit relates. Specific anti-abuse provisions may be inserted into a treaty. Some restrictions are often put on tax sparing provisions by developed countries. These include a provision that the application of tax sparing is limited to ten years in respect of a particular source (e.g. UK-Indonesia treaty). Some treaties also provide for the tax sparing provision to expire after ten years (known as a sunset clause) and many such provisions have now expired as shown by the developing country treaties studied.

V. <u>The relevance of tax treaties for developing and emerging economies</u>

(A) Introduction

Tax treaties may help to create a stable investment climate within which FDI may take place. A tax treaty may contain a number of provisions that contribute to this climate and increase the confidence of a foreign investor, creating more certainty in relation to the tax treatment. For example, in addition to the elimination of double taxation a treaty may contain provisions in respect of non-discrimination, exchange of information and a mutual agreement procedure in the event of tax disputes.

There are a number of factors that a DEE will need to examine before deciding on a tax treaty policy. To understand these factors it is helpful to first have a discussion on the different concepts of tax neutrality since this is a concept which guides treaty negotiation.

(B) Capital Import Neutrality/ Capital Export Neutrality

Countries may tax on a worldwide or a territorial basis. Tax neutrality is desirable because the actions and decisions made by business entrepreneurs should not be influenced by taxation. Capital export neutrality (CEN) and capital import neutrality (CIN) are based on the idea that the economic decision-making of a business should not be influenced by tax considerations. In a situation where there is capital import neutrality the funds originating from any other country should compete on equal terms with local funds on the domestic market of a particular country. Where there is capital export neutrality the investor should pay the same total tax (including both domestic and foreign tax) whether investment income comes from domestic sources or from foreign countries.

Bilateral tax agreements and multilateral tax agreements generally use either the tax exemption method (CIN) or the tax credit method (CEN) to avoid double taxation. Under the exemption system, the source state has the right to tax the income and the residence state exempts the income from tax. Under the tax credit system the residence state gives a tax credit in respect of tax paid in the source state.

The tax credit system ensures that double exemption will never arise, unless other provisions are introduced. As a result, any relief or exemptions given by the source state are taken away, because the residence state can always tax the income. The developing country may however be granted a tax sparing credit by the treaty partner to preserve the incentive effect of tax reliefs and exemptions. Using a tax credit system CEN may not be entirely achieved. For example, where the rate of tax in the source country is above that in the residence country it is likely that the residence country will restrict the tax credit to an amount equal to its own tax rate applied to the foreign income. The investor is then effectively paying tax at the rate imposed by the foreign country rather than at its national tax rate.

Under the exemption system the residence state would normally include foreign income in computing the rate of tax applicable to the income of the taxpayer, but would exempt that income from tax. The taxpayer pays tax only on domestic income but the exempted foreign income may be taken into account in computing the rate at which tax is paid. The tax rate is normally calculated as an average of the rate that would be applicable to the overall income but the actual tax payable is computed by applying that average rate only to the domestic income.

Often double tax treaties use a mixture of the exemption and credit methods. In the case of passive income a tax credit is often given in the residence country. Active income from employment, business profits and personal services would however often be exempted in the residence country. In other words, often CEN applies to passive income and CIN applies to active income.

CEN and CIN omit the production factor of labour. These concepts could be extended to include labour neutrality. Capital and labour export neutrality (CLEN) could be defined as a situation where a recipient of income pays the same total tax (foreign and domestic) whether labour or investment income are received from foreign or from domestic sources. Capital and labour import neutrality (CLIN) would then be defined as a situation where capital and labour from different countries are able to compete on equal terms in the labour and capital markets of a state, regardless of where the investor or workers are resident.

Another neutrality concept which has been recently developed is capital ownership neutrality (CON) which assumes that the return on any capital asset depends on the ability of the firm using it to extract a particular return by combining the asset with the other resources used by that firm. The most efficient allocation of the asset is therefore to the owner who can extract the best return. This requires that the transfer of any asset to a new investor is not distorted by the tax system. The asset should be allocated to the investor who has the resources (e.g. intangibles, production synergies, economies of scale, access to markets etc) to obtain the best return from that asset.

CON will be achieved in practice by either residence-only taxation or source-only taxation, the latter being a more realistic possibility. CON is only relevant to investments by multinationals, where they are combining assets in various jurisdictions for their business operational goals. Portfolio investment or investment in areas such as real estate would not be affected by CON as returns on such investments are less likely to be firm-specific.

Further concepts looking at the efficiency of ownership rather than location include national ownership neutrality (NON) that aims to encourage patterns of ownership that add to the national welfare. Taking as its basis the concept that some owners may use their resources to extract a greater return from the same assets, this concept would ensure that the tax system is neutral between owners so that assets do not change hands in order to achieve benefits derived from the system of taxation. This ensures that the tax system does not discourage the ownership of assets by those firms who can put them to the most efficient use. This concept might be achieved for example by a territorial tax system that would give the same treatment to the income and gains relating to assets in the same territory.

It has been suggested that a form of national neutrality, rather than overall neutrality, could be achieved for an individual country by a system treating foreign tax only as an expense. Under this system foreign tax would only be deductible from the tax base in computing taxable profits rather than being taken into account by giving any tax credit or exemption from foreign profits. National firms would then gain an advantage from investing at home rather than abroad. The best outcome they could achieve when investing abroad would be to take advantage of tax exemptions in the foreign country, ensuring that they are only taxed in the home country. This is clearly not a realistic method of international tax coordination, as it would lead in many cases to profits of international firms being taxed twice. National firms would have difficulty expanding internationally and foreign firms would be discouraged from investing in the domestic market.

These efficiency norms (CEN, CIN, CON, NON) play a very prominent role in the academic discussions on international taxation. According to some proponents it seems that these norms alone should define the design of the international tax system. However, as Shaviro points out, these norms merely define "a single margin of choice at which (all else equal) the tax system ought to be neutral, so taxpayers will make choices at that margin based on pre-tax profitability. However, none of these rival acronyms even purports to address the full efficiency picture, much less to incorporate equity concerns".[1] It is thus stated that these efficiency norms – even though important as concepts for understanding the efficiency margins at stake – should not serve as the only basis for designing tax policies[19].

(C) How do tax treaties facilitate inward investment into DEEs and what risks do they pose for these countries?

(i) Treaties as a tool to promote inward investment.

As noted above both the OECD and UN encourage both developed and developing countries to conclude tax treaties since both organisations believe that these facilitate FDI and cross border trade. This view is shared by the vast majority of countries around the world, which is why over the last three decades we have seen a tripling of the number of treaties. It is also a view supported by the business community.

[19] Shaviro, D. (forthcoming): Fixing U.S. International Taxation, Chapter 3, p.2

Nevertheless, some empirical research has pointed out that the signing of a tax treaty has either no effect or a negative effect on FDI, especially in those cases where the countries involved are a developed country on the one hand and a capital importing country on the other hand[20].

Traditionally the following arguments have been put forward in favour of treaties as facilitating inward investment:

1. The elimination of double taxation: Tax treaties send a strong signal to the business community that a country is prepared to respect the international norms and is committed to the elimination of double taxation, although this may also be achieved by means of unilateral domestic measures[21].

2. Certainty and predictability: tax treaties provide foreign investors with a stable and predictable tax environment since tax treaties tend on average to remain in force for 10-15 years and generally override domestic tax laws, which change much more frequently. Moreover, tax treaties increase certainty about the tax liability generated in a foreign country through the clarification of given tax rules and the limitation of withholding taxes. Some studies have, however, suggested that this goal may be achieved through the enactment of domestic rules to eliminate double taxation without the need to make the concessions to the residence country that may be required by a treaty[22].

3. Non-discrimination: treaties aim to avoid the possibility that the nationals of one contracting state are subject to discriminatory treatment which places a heavier tax burden on them than that applied to the nationals of the other contracting state (or stateless persons); the possibility that taxation might be less favourably levied on a permanent establishment in a state than on enterprises of that state; or the possibility of discrimination against domestic enterprises owned or controlled by non-residents.

4. Mechanisms to minimize and resolve tax disputes: treaties provide for extensive mechanisms to avoid disputes and where they do arise, as is inevitable, to resolve them.

5. Dividing up the tax base: the division of the tax base between the source and resident countries depends upon the way that treaties are drafted. The analysis in annex 1 suggests that DEEs are increasing giving up some of their source taxation rights, (e.g. lower withholding taxes). This may reflect pressure from developed countries or it may reflect a belief on the part of DEEs that lower source taxation,

[20] See Paul L. Baker "An Analysis of Double Taxation Treaties and their Effect on Foreign Direct Investment. Paper Submitted to the Journal of Economics"; Pendant of Publication; Available at www.sbs.ox.ac.uk. Also see Blonigen, BA., Davies, R.B., (2002). "Do Bilateral Tax Treaties Promote Foreign Direct Investment" National Bureau of Economic Research (NBER) Working Paper, No. 8834. Cambridge, MA: NBER. Blonigen, B.A., Davies, R.B., (2004). "The Effects of Bilateral Tax Treaties on U.S. FDI Activity". International Tax and Public Finance, 11(5): 601 – 622. And Egger, P., Larch, M., Pfaffermayr, M., Winner, H., (2006). "The Impact of Endogenous Tax Treaties on Foreign Tax Investment: Theory and Evidence". The Canadian Journal of Economics, 39(3): 901-931.

[21] If certainty is the main goal of the signing of tax treaties, some commentators have mentioned this goal may also be achieved unilaterally by any country and that in fact, developed countries have enacted domestic rules for the avoidance of double taxation in cross border transactions achieving the same results obtained by signing tax treaties. See Dagan, T., (2000). "The Tax Treaties Myth". New York University Journal of International Law and Politics, 32: 939 – 996. p. 17. Baker (2012) Op. Cit. p. 6. And Ligthart, J. et al. (2011): The Determinants of Double Tax Treaty Formation. Available at http://www.tilburguniversity.edu/webwijs/files/center/ligthart/SavingsTaxation.pdf

[22] See Dagan, T., (2000). Op. Cit. p. 44.

while implying an immediate revenue loss, will in the long term lead to more FDI and higher growth rates which in turn will increase the revenue base[23].

There remains a lively debate in the academic literature on whether treaties between developed and developing countries are in the broad interest of developing countries. Research has suggested that the only way developing countries may avoid signing tax treaties is if they act as a group, but the lack of such consensus brings them into a situation where they have to create their own treaty network in order to become attractive for foreign investment[24]. A large majority of bilateral tax treaties follow the OECD Model which is more beneficial for the residence state. If the treaty partners are roughly balanced in terms of their economic relations, this bias is not a problem since eventually one country will be the residence state as often as the other. In developing countries, however, capital and income flows are not balanced. The developed country stays in the role of the residence state, whereas the developing country stays in the role of the source state. Some have criticised this system since developing countries are deprived from levying taxes at source and tax revenues are shifted from the source to the residence state[25].

The existing system of allocating taxing rights is linked to the concept of neutrality (efficiency). Economic efficiency, also referred to as tax neutrality, can be defined as the "optimal allocation of production resources and, from the taxation point of view, the minimisation of any distortion caused to the private sector by the tax system" [26]: This definition is based on the assumption that the highest productivity can be achieved "when income producing factors are distributed by market mechanisms without public interference" .[27]

Even though tax laws can never be absolutely neutral, they should at least be drafted in a way which keeps distortions as minimal as possible. [28] Many years ago, Richard and Peggy Musgrave, convincingly argued that economic efficiency can best be reached when the international tax rules support capital export neutrality (as opposed to capital import neutrality) [29]. This, in turn, can only be reached by implementing residence taxation combined with a foreign tax credit mechanism. It should be noted that the foreign credit regime cannot fully realise the concept of CEN, as the taxpayer may defer home country tax by not remitting foreign income to the home country.

---

[23] Some studies analyze the DEE's tax policy as a reaction to the tax policy addressed by the developed country they are signing the treaty with and also to the tax policies of direct competitor DEEs. See Barthel, F., Neumayer E., "Competing for Scarce Foreign Capital: Spatial Dependence in the Diffusion of Double Taxation Treaties". Available at www2.lse.ac.uk.

[24] Baistrocchi considers DEEs are in a prisoner's dilemma situation. See Eduardo Baistrocchi (2008), The Use and Interpretation of Tax Treaties in the Emerging World: Theory and Implications, British Tax Review, 4, 352-391. Also see Barthel, F., Neumayer E. Op Cit.

[25] See Avi-Yonah/Clausing, Business Profits (Article 7 OECD Model Convention), in Lang/Pistone/Schuch/Staringer (eds.) *Source versus Residence* (2008) 11 (13); Dagan, The Tax Treaties Myth, *N.Y.U.J. Int'l L. & Pol.* 2000, 982; Graetz, *TLR* 2001, 277; Vogel, *Bull. for Int'l Tax.* 2002, 8; Brooks, *eJournal of Tax Research* 2007, 171; Pistone, 'Tax Treaties with Developing Countries', p. 424.

[26] See Schindel/Atchabahian, General Report, in IFA (eds.) *Source and residence: new configuration of their principles* (2005) p. 21 (p. 34).

[27] See Vogel, Worldwide vs. source taxation of income – A review and re-evaluation of arguments (Part II), *Intertax* 1988, 310 (310).

[28] See ibid.

[29] Capital export neutrality means that an investor should be subject to the same amount of tax irrespective of where the investment income is sourced; following capital import neutrality, an investment should be treated on equal terms on the market of a country irrespective of where it comes from (see Musgrave, R., Criteria for Foreign Tax Credit, in Taxation and Operations Abroad, Symposium, 1960, p. 83, as cited in Vogel, *Intertax* 1988, 311; also Brewer Richman, P. (later Musgrave), 1963: 8; Graetz, *TLR* 2001, 270; Schindel/Atchabahian, 'General Report', p. 35).

Others have argued that there are other criteria which are relevant to this decision: equity, simplicity, ease of compliance, all of which may be particularly important in the context of developing countries[30].

There have been a number of empirical studies which attempt to determine the impact of tax treaties on FDI flows into DEEs. Nevertheless, at present, there appears to be no consensus, with Baker (2012), Blonigen and Davies (2004) showing a very weak correlation between the existence of a treaty and FDI and others showing a stronger correlation with either a positive effect on FDI like Neumayer (2007) and Barthel (2010) or a negative effect like Blonigen and Davies (2002) and Egger et al. (2006). All studies acknowledge the difficulty in isolating the influence of treaties from other variables such as the economic and political environment. Surveys of business, however, do suggest that MNEs look both at the existence of a treaty and its provisions when making a decision on where to locate and that other things being equal they will favour a country that has a good treaty network.

How important this is will very much depend upon the economic structure in each of the two countries, the relationship between treaty and domestic law and the attitude of the administration and the courts in the application of the treaty. Dagan (2000) and Baker (2012) have argued that tax treaties restrict developing countries from levying taxes on the income derived by foreign investors and are therefore not beneficial for developing countries. From this perspective, developing countries should refrain from signing treaties in which they give up taxing rights and thereby revenue unless they expect a long term benefit in terms of additional inward investment[31]. However, as mentioned above, the only way DEE's may achieve this position is by acting together, otherwise they are obliged to develop treaty networks with developed countries in order to remain as competitive as their direct competitors among developing countries and be attractive to developed country investments[32]. This situation may be affected as more countries move towards exemption (territoriality) systems. The current debate on base erosion and profit shifting may also lead to a reconsideration of the role of withholding taxes on interest, dividends and royalties. Also, some benefits of tax treaties may be available in alternative ways, for example measures on exchange of information could be implemented as part of a bilateral agreement on the exchange of tax information without the need for a comprehensive double tax treaty. The Multilateral Convention on Mutual Administrative Assistance in Tax Matters is another possibility for accessing exchange of information.

In practice, whether the potential benefits of a treaty are realised will depend on the specific provisions found in the treaty and as the analysis in chapter IV shows DEEs vary considerably in the design of their treaties and in the way they divide up the tax base between source and resident countries.

Some authors outside the treaty world have begun to examine how a tax treaty could be used as a new means of development assistance[33]. The thought behind this is that the allocation rules could be drafted in a way that more taxing rights are transferred to the source state so that revenue can be shifted from the developed to the developing country. This could be an important step towards public resource mobilization which is a major goal in today's development strategies in order to end aid dependency[34].

(ii) The distributive function of tax treaties

[30] See McInerney, "The Emerging Developmental Approach to Multilateral Treaty Compliance".

[31] See more detailed below.

[32] See Barthel, F., Neumayer E., "Competing for Scarce Foreign Capital: Spatial Dependence in the Diffusion of Double Taxation Treaties. Op. Cit and Baistrocchi (2008).

[33] See e.g. Brooks, *eJournal of Tax Research* 2007, 171; Pistone, 'Tax Treaties with Developing Countries', p. 424.

[34] See in more detail Daurer, *Tax treaties and developing countries* (forthcoming).

From a theoretical perspective the distributive function of tax treaties can be justified on the basis of what Benshalom (2010) calls "relational-distributive duties" [35]. According to his reasoning, globalization and international trade have put people into a joint economic system, in which persons from developed countries benefit from "disadvantages and low bargaining power of people from developing countries"[36] .

Developing countries may, on the basis of this view, not benefit from international trade as much as developed countries and in addition many low income countries do not have enough power and influence to have a say in global trade policies and rule-setting[37]. Following Benshalom, this interrelation combined with unfair market transactions give rise to moral (including redistributive) duties especially when developed countries, which are mainly benefiting from this unfairness, are in a position to remedy it[38]. The *status quo* of the international tax system falls short of considering any distributive justice arguments[39]. The allocation rules of tax treaties may be a suitable instrument to distribute wealth across borders but as Pistone (2010) has suggested, many modifications are required before they meet this goal[40].

The analysis in Chapter IV suggests that many developing countries are well aware of these risks and have been relatively successful in negotiating treaties which favour source taxation. One might add that developed countries often take into account the level of development of their potential treaty partners and make appropriate adjustments to treaty provisions when negotiating tax treaties.

(iii) Tax treaties as a tool to counter offshore non-compliance

Apart from facilitating an on-going relationship between the two tax authorities and the arguments referred to above, another reason put forward in favour of treaties is that they provide a legal framework for cooperation between tax authorities to counter offshore non-compliance, profit shifting and base erosion. Tax treaties provide the legal basis for administrative assistance among tax authorities and for the exchange of information. This particular function of tax treaties has been highlighted by the recent actions of the OECD to eliminate bank secrecy as a veil behind which tax evaders can hide and to ensure developing countries benefit from the resulting more transparent environment. (Almost 110 countries are now in the global forum on tax transparency.)

The OECD standards for the exchange of information are now globally accepted, even by non-OECD countries. Two arguments support the view that DEEs should benefit from this new era of global tax transparency. Firstly, the problem of capital flight is particularly severe in these countries because many of their "high net-worth individuals" [41] find it easy to get their capital out of the country into low or zero tax jurisdictions. Tax, however, is not only reason for capital flight[42]: it may also be due to political and

[35] See Benshalom, The New Poor at our Gates: Global Justice Implications for International Trade and Tax Law, 85 *NYU Law Rev.* 2010, 1.

[36] See Benshalom, *NYU Law Rev.* 2010, 37.

[37] Even though trade transactions are voluntary and usually benefit all parties involved, they can be unfair if one of the parties gets much more out of them than the other. This is the case when a developing country supplies cheap labour or sells scarce natural resources for a rather low compensation which can only achieve the mere survival of the recipient of the compensation. See Benshalom, *NYU Law Rev.* 2010, 45 et seq.

[38] See Benshalom, *NYU Law Rev.* 2010, 38 and 43 et seq.

[39] See ibid. 67 et seq.

[40] Pasquale Pistone. "Tax Treaties with Developing Countries: A Plea for New Allocation Rules and a Combined Legal and Economic Approach" in Lang *et al. Tax Treaties: Building Bridges between Law and Economics*: IBFD. 2010

[41] See OECD, *Engaging with high net worth individuals on tax compliance*, www.oecd.org/ctp/ta/hnwi (last accessed 04/10/2012).

[42] Recent studies by non-governmental organizations show that capital flight had a particularly severe impact on the public budget of developing countries. For an overview, see Tax Justice Network, *Illicit Capital Flows and*

economic instability or terrorist threats. Entering into tax treaties with countries which facilitate non-compliance can help to track down such capital flight. Secondly, entering into agreements which allow for the exchange of information may discourage small LDC from becoming tax havens themselves, as a way of trying to attract foreign investments[43].

Another way in which tax treaties can curb tax avoidance is to provide a legal basis for implementing transfer pricing principles. Transfer pricing *per se* is neutral and the arm's length principle was originally developed as a commercial concept enabling MNEs to assess the profitability of different subsidiaries. Also an agreed implementation approach on transfer pricing rules is an important instrument to eliminate economic double taxation by determining which parts of the profits of associated enterprises may be taxed in which country[44]. Transfer pricing rules may however be misused by multinational enterprises to engage in aggressive tax planning and mispricing which might lead to shifting profits from least developed countries to lower tax jurisdictions[45]. An effective exchange of information under Article 26 of the OECD and UN model can help counter such practices, as can the new emphasis on improving tax transparency.

Finally, DEEs may also suffer from offshore non-compliance due to levels of corruption in their own country and relaxed laws in tax havens where companies may create affiliates. However, as Hebous and Lipatov (2011) mention, signing a tax treaty with tax havens which enforces strong exchange of information rules may reduce the chances for MNEs to take advantage of the corruption existing in those countries[46].

(iv) The cost of negotiating and implementing treaties

The biggest challenge facing DEEs and especially LDCs is how to build up the capacity of their tax administrations. Extending their network of tax treaties should not distract from this fundamental task. Treaty negotiations are expensive in terms of time, skills and money; also, a country might have other priorities than negotiating tax treaties or may simply not have the capacity for extensive negotiations. [47] Moreover, the application of a tax treaty is intensive in terms of cost and personnel used. Especially for developing countries, these restraints need to be considered carefully before entering into treaty negotiations and a clear policy rationale should be explicitly set out on why a country wants to extend its treaty network and with which countries[48]. Ideally this should be based upon an economic analysis, although this research may be difficult due to the need for it to be conducted on a case by case basis and to assess all the costs and benefits associated with a tax treaty.

---

the Offshore Economy, http://www.taxjustice.net/cms/front_content.php?idcat=101 (last accessed 04/10/2012).

[43] See Mutén, Double Taxation Conventions between Industrialised and Developing Countries, in IFA (ed.) *Double Taxation Treaties between Industrialised and Developing Countries; OECD and UN Models, a Comparison*, IFA congress seminar series vol. 15 (1990) p. 3 (p. 5).

[44] See Vogel, in Vogel/Lehner (eds.), *Doppelbesteuerungsabkommen*[5] (2008) Einl. m.no. 32; Daurer, *Tax treaties and developing countries* (forthcoming). And Owens in "Myths and Misconceptions about Transfer Pricing", IBFD, 2013.

[45] For an overview see Tax Justice Network, *Transfer Pricing*, http://www.taxjustice.net/cms/front_content.php?idcat=139 (last accessed 04/10/2012) and Owens in "Myths and Misconceptions about Transfer Pricing", IBFD, 2013.

[46] Hebous and Lipatov (2011): A journey from a corruption port to a tax haven. CESIFO Working Paper No. 3620. October 2011.

[47] See Thuronyi, 'Tax Treaties and Developing Countries', p. 442.

[48] Thuronyi ('Tax Treaties and Developing Countries', p. 444) offers a three-step analysis in order to determine whether a tax treaty should be negotiated: (1) are there problems of double taxation in relation to the potential treaty partner, (2) is there a substantial concern for trade, investment and other transactions, and (3) are the costs for negotiating a treaty justified. Moreover, he suggests having a look at whether countries even have enough capacity to negotiate and to administer tax treaties. After this analysis Thuronyi comes to the conclusion that most developing countries will very likely decide against the negotiation of tax treaties.

In conclusion, what this section shows is that countries will need to carefully weight up the cost and benefits of treaties. They also need to accept that concluding treaties is only the first step in a process: they need to have the resources to apply the treaties.

(v) Conclusions

Certainty in regulatory treatment is a key factor for foreign investors in considering an investment location. The negotiation of double tax treaties can create a more stable and certain climate in which FDI can take place. The creation of a network of bilateral tax treaties is therefore one aspect of tax policy for developing countries looking to attract FDI. A treaty ensures a clear allocation of taxing rights between the two contracting states and provides for elimination of double taxation and a procedure for dispute resolution.

Treaties may help developing countries to protect their tax base by ensuring sufficient taxing rights for the source country; and for a DEE with enterprises that are becoming investors in other countries treaties provide certainty as mentioned above. A treaty can also be a basis for administrative assistance and exchange of information between tax authorities, helping the developing country to combat all forms of offshore non-compliance.

A central consideration of tax policy for developing countries is to balance the need of foreign investors for certainty with the right of the source country to collect the right amount of tax. DEEs must therefore consider the costs and benefits of double tax treaties. The process of negotiating and implementing the provisions of treaties requires considerable resources and the country must be sure that the benefit in terms of tax collection and increased FDI is worth the expenditure of time and money on the negotiation of treaties. DEE need to be pro-active in determining which countries they wish to negotiate with rather than just reacting to requests from developed countries. DEEs also need to build up the skills and experience of their tax administrations and need to take decisions on allocation of scarce resources.

The evidence shows that there is a wide variety of treaty policies among the developing countries in the sample, not only between higher and lower income countries but among the members of each category. This reflects different tax systems, economic conditions and the general tax policy of each country. Natural resources, geographical position, trading partners and the level of development clearly have an influence on tax policy and these are reasons behind some of the differences in negotiating stances. The relative economic strength of the contracting states and level of economic development of the DEE partner and the experience of the negotiators are all factors in determining the final provisions of the treaty.

Many developing countries originally favored tax sparing and often sought to negotiate a tax sparing clause in treaties with developed countries; but the benefits of tax sparing may now be seen as less valuable when weighed against the other concessions that may have to be made in treaties in return for tax sparing. While DEEs remain net capital importers, there is an observed trend in some countries of changing their negotiating stance over the years. One particular example is the strength of the sovereign wealth funds, which generally prefer the residence principle for allocation of taxing rights to passive income. As some DEEs become significant R&D centers they may be expected to modify their approach to the treatment of royalties and technical service fees; MNEs resident in developing countries will probably have different preferences to their governments. More general as MNEs based in DEEs become more active globally the treaty positions of their home country will change. These factors will influence DEE officials when negotiating tax treaties.

There seems to be no consensus in the academic studies attempting to determine the impact of tax treaties on FDI flows into developing and emerging economies. All the studies acknowledge the difficulty in isolating the influence of treaties from other variables such as the economic and political environment. Surveys of business suggest that MNEs look at whether there is a treaty and examine its provisions when deciding where to locate. Other things being equal, MNEs will favor a country with a good treaty network. How important this is will depend on the economic structure in each country, the relationship between treaty and domestic law and the attitudes of the administration and the courts in the application of the treaty.