THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2025

MODULE 1 – PRINCIPLES OF INTERNATIONAL TAXATION

SUGGESTED SOLUTIONS

PART A

Question 1

There is no one way to answer the question. The following provides one possible schematic. The question provides candidates with an opportunity to consider the extent to which contracting states(CS) assist in the collection (AIC) of each other's tax debts without time constraints.

The revenue rule provides the general principle that states will not enforce the tax claims of other states. It is widely recognised in international jurisprudence (e.g. in the UK by Government of India v. Taylor) but is also subject to exceptions (e.g. in US v. Pasquantino 336 F3d 321 (4th Cir 2003), (2005) 7 ITLR 774 (Sup. Crt.) (Baker et al., 2011)). As part of the move towards increased levels of mutual administrative assistance, states have moved to assist each other by exchanging information and also AIC of each others' tax claims. The primary effect of AIC is to widen the area in which the domestic power of the tax authorities can be effective (Baker et al, 2016). There are a number of different routes open to states wishing to AIC (Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MCMAATM), Council Directive 2010/24/EU of 16 March 2010 (Directive) and Article 27 OECD / UNMDTC).

Article 27 OECD / UNMDTC MTC

Allows one country to ask another for help in collecting revenue claims that are owed under its own laws in the context of a bilateral DTA relationship. This includes not only collecting the amount due (and related amounts such as interest and penalties) but also taking steps to make sure it can be collected later, by way of conservancy measures, such as freezing assets. The country receiving the request (requested state) treats the revenue claim as if it were its own (equivalence principle) and uses its usual legal procedures to recover it. However, there are limits e.g., the requested state does not have to assist if doing so would go against its fundamental legal principles or public policy. Article 27 was added to the OECD MTC in 2003 (and in the UNDMTC in 2011) and while initially rarely included in DTAs, has been adopted in more DTAs since 2013 (Dourado, 2022) with some countries typically including the provision (e.g. Mauritius, (Oberson, 2013)). While Article 27 offers a framework for cross-border cooperation in the collection of revenue claims, many states have chosen not to adopt it, reflecting sensitivities around sovereignty, enforcement priorities, and the political implications of assisting in the collection of another state's revenue (e.g. Jamieson v Commissioner for Internal Revenue [2007] NSWSC 324 [34] and Taylor et al, 2021) where the absence of a mutual assistance in collection (AIC) article in the USA-Australia DTA meant that tax debts could not be collected as there was no mechanism to so do under domestic law at the time).

Although Article 27 OECD MTC 2017 is optional in terms of whether CS choose to include it in their DTAs, once adopted in the form set out in the MTCs, it creates a binding obligation to provide AIC, as evidenced by the use of the word "shall" in Article 27(1) (Dourado, 2022). Furthermore, Article 27 contemplates AIC on request and not on a spontaneous basis (Dourado, 2022). This means that a CS must actively seek AIC before the other CS is obliged to act but that there is no obligation to provide AIC unilaterally or without a formal request under this provision. Article 27 is not limited by Articles 1 and 2, which respectively define the persons and taxes covered. This means that AIC of revenue claims can extend beyond the taxes and persons otherwise within the scope of the relevant DTA, provided the requesting and requested states agree to apply the provision in this broader manner. In practice DTAs may restrict the application of Article 27 (e.g. in relation to those taxes covered by Article 2).

Temporal aspects:

- Article 27 does not expressly impose a limitation period on when a request for AIC may be made nor refer to whether the relevant AIC may be carried in relation to revenue claims that existed prior to the entering into force of the relevant DTA. The Commentary on Article 27 notes that it is for CS to determine such practical matters as whether time limits to revenue claims should apply (Commentary on Article 27(1), [9] OECD MTC and UNMDTC). Prima facie, this opens up the possibility of a potentially "unlimited temporal reach" in the operation of Article 27 as worded.

- However, a number of points can be made, including that:

    - There is a question as to whether such AIC provisions operate with retrospective effect. According to the Commentary, such assistance may be provided where the AIC is provided after the DTA has entered into force and the relevant DTA provisions have become effective (Commentary on Article 27(2), [14] OECD MTC and UNMDTC). This approach reflects the principle that the timing of the AIC, not the origination of the claim, governs the application of Article 27 - provided, that relevant conditions are satisfied (broadly, the claim is otherwise enforceable under the law of the requesting state). However, some domestic jurisprudence may reveal limits on such an approach (e.g. the Federal Court held that - in the circumstances - retroactively enforcing the Canada-U.S. AIC article against liabilities that arose before the Third Protocol violated equality rights under section 15 of the Charter (Judy Chua v The Minister of National Revenue, [2000] 12 FCR 608 (FCTD). This may illustrate that while Article 27 may

permit wide temporal scope in principle, its domestic implementation may remain subject to fundamental legal safeguards. In practice, CS may modify Article 27 to address this point, especially where the relevant DTA may apply to different taxes from different dates (Commentary on Article 27(2), [14] OECD MTC and UNMDTC). This flexibility could be said to enable the tailoring of temporal scope in DTA negotiations to ensure legal certainty in both CS.

- A more general point is that Article 27 operates on the basis that the relevant claim made by the requesting state must be enforceable in that state (Articles 27(3) and (4)). Accordingly, where the relevant domestic tax legislation of the requesting state that imposes the revenue claim was lawfully adopted and is enforceable, there appears to be no time limit to requests for AIC (Dourado, 2022). It could be said that while Article 27 does not directly provide for either limited or unlimited temporal reach, it may indirectly enable time limitations of the requesting state.

- This outcome appears to be supported by Article 27(5), which provides that time limits in the requested state do not apply to AIC, even where those limits would ordinarily bar domestic enforcement (e.g. a statute of limitations in the requested state cannot be invoked). This is the case because Article 27(5) must be read alongside Article 27(3) and (4), which only apply if the claim is enforceable or subject to conservancy measures under the law of the requesting state. Consequently, whether a claim is enforceable or whether conservancy measures are still available - including whether any time limits have expired - is determined by the law of the requesting state (Commentary on Article 27(5), [22] and [23]). It could be said that Article 27 may provide for the indirect operation of temporal limits on AIC as AIC under Article 27 cannot be triggered where the statutory limit is from the requesting state. Put another way, time limits cannot be extended beyond the requesting state's law (e.g., in France v. United States, Tax Court of Appeal of Paris, 10 November 2022, No 21PA01182, the court held that there was a need to look at the French position (requesting state) and while France had a longer limitation period that applied under its domestic law this only applied to DTAs equivalent to EU Directive 2010/24/EU. As the France-U.S. DTA was not equivalent that extension did not apply).

- Article 27(8)(a) provides that the requested State is not obliged to carry out administrative measures that would be at variance with its own or the requesting State's laws or administrative practice (Commentary on Article 27(8), [30]). While this could be interpreted as potentially reintroducing, inter alia, time limits of the requested state through the back door, the Commentary makes clear that Article 27(8)(a) is not intended to override Article 27(5) and that expired time limits in the requested State cannot form the basis for refusal (Commentary on Article 27(8)(a), [33]). This interpretation has been confirmed in case law (e.g. Ryckman v. Commissioner, 163 T.C. No. 3 (2024), where the U.S. Tax Court held that once a Canadian revenue claim was enforceable under Canadian law, the U.S. was required to treat it as finally determined and deny the taxpayer access to U.S. procedural protections).

- Conservancy measures are necessarily temporary, as they are intended to preserve the possibility of collection rather than serve as enforcement in themselves. Since Article 27 does not define "conservancy measure," there is a view that the requested State is to refer to the legal meaning or practice of the requesting state when determining whether AIC can be provided (Dourado, 2022). However, while the requesting State may only request conservancy measures that it itself recognises under its own laws, the requested State must also confirm that it can carry out the same measures under its own legal framework (Commentary on Article 27(4), [20]-[21]). In practice, therefore, although Article 27 contains no express limitation period, the inherently provisional character of conservancy measures - and the fact that their duration and termination are governed by each state's domestic expiry rules - means that Article 27's temporal reach appears to remain anchored in national limitation regimes.

- Another practical consideration relating to Article 27's temporal scope may arise due its silence on suspension or interruption of limitation periods. Under Article 14(2) of the MCMAATM, any recovery measure in the requested state that would suspend or interrupt its limitation period automatically does so for the requesting state and obliges the requested state to notify the requesting state. By contrast, Article 27 contains no equivalent rule, so whether a conservancy measure or recovery action in the requested state suspends or interrupts the relevant limitation period appears to be governed by the requesting state's domestic limitation regime, unless the DTA expressly provides otherwise (Engelschalk, 2008 and Dourado, 2022).

- Candidates may note that Article 27 covers some of the same subject matter as the MCMAATM and Directive and that it was introduced at a time when the MCMAATM did not have many signatories and before the Directive. Given that the MCMAATM and Directive both provide that reference minimum / maximum time limits, there may be a need to consider the interaction in the case of overlap. There is a view that multilateral conventions prevail over Article 27 and that both the Directive and Article 27 will apply where they overlap (Krabbe, 2003 and Dourado, 2022).

Conclusion

While Article 27 does not impose express time limits and permits AIC based on the enforceability of the revenue claim in the requesting state and may be seen to provide potentially broad temporal reach (including to revenue claims that arose before the entry into force of the DTA provided that AIC is requested after the DTA becomes effective), in practice this flexibility is shaped by DTA wording, domestic implementing laws, constitutional safeguards, and public policy exceptions.

Case law demonstrates that procedural rights in the requested state may be overridden (as in Ryckman), while domestic courts may still block collection efforts on constitutional or interpretive grounds (as in Chua and France v. United States). While Article 27 provides a bilateral framework, its objectives may be likely to be addressed in the short term through multilateral instruments (such as the MCMAATM and the Directive) on mutual assistance in tax matters. These instruments may offer a more standardised and comprehensive approach, and relevantly they also include references to temporal periods. Given the cost and administrative effort involved in cross-border tax collection, reciprocity is still expected to play a major role in shaping how and when AIC is granted (Dourado, 2022 and Taylor et. al, 2021). However, it is acknowledged that a certain degree of flexibility must be incorporated into the classical scheme relating to reciprocity in relation to AIC, both in law and in practice when considering the position of developing countries (Baker et. Al, 2016). In sum, although Article 27 may permit extensive AIC, its temporal reach remains subject to practical and legal limitations.

Question 2

There is no single way to answer this question and the following provides one possible schematic.

This question provides candidates with an opportunity to demonstrate their understanding of the concepts of tax sovereignty and tax competition in the context of the OECD's Pillar Two.

Pillar Two

Forms part of the OECD/G20 Inclusive Framework's Two-Pillar Solution to the tax challenges arising from the digitalisation of the economy. Broadly, it establishes a global minimum tax to ensure that large multinational enterprises (MNEs) pay a minimum level of tax (effective tax rate (ETR) of 15%) on income in each country they operate. The framework generally applies to MNE groups with annual consolidated revenues of €750 million or more, with certain types of entities excluded and some safe harbours.

Key components of Pillar Two

Income Inclusion Rule (IIR) - enables parent entities to pay top-up tax on the low-taxed income of subsidiaries; Undertaxed Profits Rule (UTPR) - a backstop mechanism where other entities in the MNE group pay top-up tax where the IIR does not apply; Qualified Domestic Minimum Top-up Tax (QDMTT) - enables jurisdictions to collect top-up tax domestically, preserving primary taxing rights; and a Subject to Tax Rule (STTR) - a DTA-based rule allowing limited source taxation for certain intra-group payments taxed below a minimum rate.

Tax competition

Tax competition involves jurisdictions lowering tax rates or offering preferential regimes to attract capital, profits, or investment. Pillar Two aims to disrupt the "race to the bottom" by, broadly, ensuring that MNEs face an effective tax rate of at least 15% regardless of where profits are booked.

Tax sovereignty

This can be said to refer to a state's authority to design and implement its own tax system. De jure sovereignty reflects legal authority whereas de facto sovereignty refers to the practical ability to exercise that authority. While states using their tax systems competitively may be viewed as exercising sovereignty, there is also a view that tax competition itself undermines sovereignty by pressuring countries to lower tax rates, preventing them from raising adequate revenue (Saint-Adams, 2022).

Considerations

May include issues pertaining to:

- Limited scope - Pillar Two addresses tax rates but is not specifically targeted at the allocation of taxing rights. Source jurisdictions with real economic activity may still lack authority to tax associated profits, which may raise equity concerns (Oxfam, 2022). This may limit substantive sovereignty as countries may be unable to raise sufficient revenue to support collective self-determination. One view holds that for international tax co-operation to yield legitimate outcomes, it must commit to levelling the international tax playing field by progressively allocating the benefits of co-operation (Dagan, 2024).

- One-size-fits-all model - there is a view that Pillar Two imposes a uniform standard that was both designed may disproportionately benefit higher-income, capital exporting countries (Schoueri and dos Santos, 2023). International tax co-operation, it is argued, must be structured to share benefits progressively or risk entrenching inequalities (Dagan, 2023). Pillar Two may therefore constrain the sovereignty of states with differing economic profiles, while narrowing the scope for differentiated competitive approaches.

- QDMTT - while the QDMTT may preserve de jure taxing rights by letting source states collect top-up tax, several issues may limit its sovereignty-protecting effect e.g. the need to align domestic rules with GloBE standards, uncertainty over whether a regime qualifies as a QDMTT and the continued exclusion of withholding tax (WHT) on outgoing payments from the ETR calculation (Schoueri and dos Santos, 2023). As such, the QDMTT may be more effective for countries that are both residence and source jurisdictions (e.g. intermediate holding countries) but may do little to safeguard source state sovereignty over WHT (Schoueri and dos Santos, 2023).

- Two-tier tax environment - as most MNEs fall below the €750 million threshold, a two tier environment of in and out of scope MNEs exists. While in-scope groups represent around 90% of global profits, they make up less than 1% of companies (OECD, 2021). This leaves scope for states to compete for smaller firms using tax

incentives. Furthermore, sectors like shipping and non-covered taxes (e.g. VAT) remain outside GloBE (Chen and Chow, 2023). While this can be viewed as an example of broad sovereignty outside Pillar Two, it could also be seem as a constraint on broader tax design freedom.

- Inclusive Framework (IF): while the IF is presented as evidence of broad consensus, its role may serve more to legitimise outcomes driven by G7 countries than to reflect meaningful agreement among sovereign states (Schoueri and dos Santos, 2023).

- Administrative burdens - compliance with GloBE rules imposes costs for revenue authorities, especially in developing countries, and may negatively impact affected enterprises (not least because as a "live tax", Pillar Two impacts would be expected to be modelled in parallel to other tax consequences such that these businesses will need to build in group governance processes and train staff (BDO UK, 2025). Such a burden may divert resources away from government departments and relevant enterprises, which may then may limit both de facto sovereignty of sovereign states and levels of competition.

- Administrative burdens: - compliance with the GloBE rules imposes significant costs on revenue authorities - especially in developing countries - and on affected enterprises. Revenue authorities must invest in new IT systems, train staff and develop audit frameworks to process GloBE Information Returns and enforce compliance and for enterprises, as a "live tax," Pillar Two requires, inter alia, group governance processes and staff training to model impacts alongside other tax liabilities (BDO UK, 2025). These burdens may divert resources from core governmental and business functions, limiting de facto sovereignty and reducing the ability of states and enterprises to compete in global markets.

- Substance-based tax planning - under Pillar Two, countries may apply lower tax rates to income tied to real economic activity (e.g. payroll or tangible assets), consistent with the substance based income exclusion rule (SBIE), which reduces the amount of top-up tax payable. The SBIE may allow competition for real investment but may also steer tax design toward compliance with global standards rather than domestic preferences. This could be said to preserve sovereignty by enabling targeted policy-making within an internationally accepted framework but also restrict the ability of states to compete in ways they consider best serve their interests.

- Redesign of tax credits - Qualified Refundable Tax Credits (QRTC) are treated more favourably under the rules than other credits, which may incentivise countries to reframe their incentives as QRTCs in order to avoid increasing top-up tax. Such responses may be viewed as preserving sovereignty by allowing countries to pursue domestic policy goals within the global minimum tax framework while maintaining a form of tax competition through "compliant" incentives. However, such responses may also distort decision-making, which may have indirect impacts on sovereignty and competition.

- Tax sparing credits - are typically used to preserve the effect of tax incentives offered by source countries. If a tax holiday or incentive reduces the ETR below the minimum threshold, a top-up tax may still apply. This may limit a country's sovereign right to use DTA provisions (combined with domestic incentives) to attract investment, while also narrowing their competitive space in the global tax landscape.

- Competitiveness concerns in the EU – while candidates are not required to consider the Council Directive (EU) 2022/2523 of 14 December 2022 (Directive), they may note that some EU businesses have expressed concern that the swift adoption of the Directive may undermine their competitiveness, particularly in light of recent U.S. trade measures and the absence of parallel implementation in key economies. The Federation of German Industries (BDI) has warned that the Directive could discourage investment, increase compliance burdens and expose EU firms to trade policy countermeasures (BDI, 2025). BDI has made a number of suggestions, including calling for a deferral of implementation until there is broader international alignment, and introducing clear safe harbour and transitional rules to prevent EU firms from being competitively disadvantaged (BDI, 2025).

Conclusion

Pillar Two is hailed by some as a genuine brake on the "race to the bottom", yet its global minimum tax may come at a cost. The QDMTT may permit source countries to grab the top-up first but it can also be said to intrude on domestic rate setting and creates significant administrative complexity. With Pillar One now stalled, the global minimum tax may carry reform hope that it was never intended to bear. Pillar Two's credibility may also be dented by, for example, concerns that (i) unequal rule-making has been masqueraded as inclusive sovereignty and (ii) the initiative is not truly a global tax reform capable of both curbing tax competition and respecting the tax sovereignty of all states not least because a number of large economies have yet to (and may never) sign on.

Question 3

There is no single way to answer this question and the following provides one possible schematic.

The question provides candidates with an opportunity to consider both the function of the saving clause - introduced as Article 1(3) in the OECD Model Tax Convention 2017 (OECD MTC) - and the consequences of its inclusion for the structure and operation of bilateral DTAs based on the OECD MTC 2017 / UNMDCT 2021.

While the following focusses on the OECD MTC 2017, the question provides an option for candidates to consider the savings clause in the UN MDTC 2021 instead of the OECD MTC 2017. Although there is no requirement for a comparative analysis of the relevant provisions in the two model tax conventions, it is anticipated that candidates opting to consider the UNMDTC will reference the different wording in Article 1(3) UNMDTC 2021 (e.g. in reference to the excepted provisions, the UNMDTC does not reference to Article 7(3) and makes reference to alternatives A and B in both Article 18 (pensions and social security payments) and Article 25 (MAP) and the related Commentary while broadly similar to the Commentary in the OECD MTC 2017 also has adapted Commentary on Article 1(3), [19] and [20] to account for these differences).

The saving clause confirms that a contracting state (CS) may tax its own residents notwithstanding other provisions of the DTA (with some exceptions). Candidates are to reflect not only on its intended role in preserving residence state taxing rights but also on the consequences that may flow from its interaction with provisions of the OECD MTC (e.g. those relating to residence determination, the allocation of taxing rights, and relief from double taxation) and with domestic

Article 1(3)

Article 1(3) provides that the relevant DTA shall not affect the taxation, by a CS, of its residents except with respect to the benefits granted under Article 7(3), Article 9(2) and Articles 19, 20, 23A, 23B, 24, 25 and 28. The effect of the inclusion of the saving clause is to preserve the right of a residence state from abrogating its rights under the DTA except in relation to certain instances e.g. in relation to double taxation relief and some other provisions that have residence taxation in mind (Brabazon, 2019).

The saving clause operates to ensure that the ability to of a DTA to be interpreted consistently with the principle that CS should be restricted from taxing the residents of other CS is not frustrated (de Mattos Marques, 2020) as there is a risk that some provisions could be interpreted as restricting the ability of a CS to tax its own residents where this was not intended e.g. CFC regimes (Commentary on Article 1(3), [17] and 81). Article 1(3) also makes clear where this is not to apply (Commentary on Article 1(3), [18]). As such, the saving clauses takes precedence over other provisions unless those provisions are explicitly excepted (Kofler, 2016 and Van West, 2017).

Excepted provisions - these are intended to cover all cases where it is envisaged that DTA may have to provide DTA benefits to its own residents (Commentary on Article 1(3), [19]). In other words, the savings clause is supposed to operate such that the residence state keeps the right to tax its residents irrespective of the fact that the source state may be allowed to tax the income (de Matto Marques, 2020).

The relevant concept of resident is considered to be that under Article 4 even where it deviates from the definition under domestic law (Schuch and Neubauer, 2016). In the case of dual residents, where a person is resident under one CS under Article 4 but not the other CS then, the saving clause does not apply (Commentary on Article 1(3), [21]).

The savings clause is not a core provision and either CS may reserve against it (de Mattos Marques, 2020, 2019), e.g. Reservation on Article 1(3), [116] Ireland.

Consequences of inclusion

The below outlines a few considerations related to the potential consequences of including a saving clause in a DTA.

- Definition of resident – as noted above the definition of resident in Article 4 is that to be used when applying Article 1(3), which reinforces the view that the saving clause preserves only those rights that have not already been allocated to state A (Rust, 2022). This has been described as an exception to Article 1(3) that is not explicitly listed as an exception (Rust, 2022).

- Unresolved dual residence – following on from the above point, where under Article 4(3), an entity is treated as a dual resident, the competent authorities are only required to "[…] endeavour to determine […] " a single residence. If they fail to reach agreement, the person may lose DTA benefits (Commentary on Article 4(3), [24.4]). Other provisions that depend on a residence determination may also be (indirectly) impacted where there is no resolution - for example, Article 15(2)(b), which exempts employment income where, inter alia, the

employer is a resident of the other CS (Commentary on Article 4(3), [24.4]). While the issue may be seen as being fundamentally about Article 4, Article 1(3) may reinforce the consequences of unresolved residence under the DTA by explicitly permitting CS to continue to treat persons as residents under their domestic law for the purposes of certain provisions. In practice, DTAs may also adopt this "endeavour" language in relation to Article 4(2) such that instances of unresolved dual residence may also exist in relation to individuals.

- Where CS tax different persons – issues may also arise where both CS tax the same income but attribute the income to different persons. This is not confined to anti-avoidance scenarios; such mismatches can also result from ordinary differences in domestic classification rules (e.g. transparent entities). Where both CS assert taxing rights over different persons in relation to the same income uncertainty may still arise. The OECD MTC states that it does not provide a clear answer as to which CS should provide relief in such circumstances: [w]here both States tax the same income on the basis of conflicting allocations of that income to different persons... it is unclear which of the two States should provide relief from double taxation" (Commentary on Articles 23A and 23B, [11.1]).

- The savings clause is considered to play a role in preserving a residence state's ability to apply domestic attribution regimes (e.g. CFC regimes), which may result in income earned by a foreign entity being attributed to a domestic taxpayer. While there is a general view that such regimes are not inconsistent with DTAs (Commentary, on Article 1(3), [81]), relief under Articles 23A and 23B may not be available due to attribution mismatches (Kofler, 2016). The saving clause could be described as facilitating such an outcome and as such has been suggested that courts will need to extra vigilant that saving clauses are correctly interpreted (de Mattos Marques, 2020). Furthermore, where the saving clause is seen as a justification for the operation of attribution regimes then this reasoning can be extended such that (i) those regimes may be viewed as being inconsistent with the provisions excepted from Article 1(3) (Mattos de Marques) and (ii) DTAs that do not include Article 1(3) may not permit such regimes (De Broe and Luts, 2015).

- While the saving clause does not remove the need to provide relief for situations fallings within the relevant DTA (Kofler, 2016), situations envisioned by DTA design dare not generally considered to include residence-residence situations nor do they typically involve situations involving economic double taxation (Mattos Marques, 2020). Although there appears to be an obligation for CS to consider such scenarios when providing relief by considering the tax paid in both CS (Commentary on Article 1(3), [16]), the point remains that DTAs are designed with different scenarios in mind (i.e. broadly, juridical as opposed to economic double taxation).

- In practice, some CS may add in provisions to address these issues. In relation to transparent entities some DTAs provide that the competent authorities must address such double taxation by way of the mutual agreement procedure (MAP) (e.g. Australia-Germany DTA 2015). It is noted that relieving instances of economic double taxation must be effected by way of bilateral negotiation (Commentary on Articles 23A and 23B, [2]). Other examples include CS agreeing to provide relief even where both CS tax their own residents (e.g. Belgium-Netherlands 2001) and in relation to hybrid entities, some provisions deem the relevant entity's residence state as the source state of the relevant income derived and treat that income as being derived through the entity by the relevant interest holder, which effectively reflects the single tax principle (de Mattos Marques 2020 citing the Australia-UK DTA 2003).

- Asymmetry with subject to tax provisions – by "saving" the residence CS's right to tax its residents "as if the DTA had not come into effect," Article 1(3) can be described as a one way back-stop for the residence state that operates independently of whether the source state makes use of its taxing right and so as being different from a "subject to tax" clause, which requires relief to be granted only where the source CS actually levies tax on the income (Rust 2022). There is a view that when these clauses are considered together this may create asymmetry as for the residence state relief may be constrained on the one hand but taxing authority may be preserved on the other. A DTA with these features may then be considered to be tilted in favour of the residence CS.

- Exceptions – while Article 9(2) is an excepted provision, Article 9(1) is not. Consequently, Article 9(1) does not fall within scope of Article 1(3). Because Article 9(2) only requires adjustments made in accordance with the ALP, any non-ALP primary adjustment may fall outside DTA relief requirements and may only be resolved through MAP, which may offer no guarantee of eliminating double taxation (Beskow, 2022). It has been noted that by not including Article 9(1) in Article 1(3), undesirable outcomes may result (adjustments that are not in-line with the ALP) as the saving clause may be viewed as turning what was formerly a restrictive ALP into a non-restrictive permission (Rust, 2022).

Conclusion

The saving clause in Article 1(3) of the OECD MTC 2017 serves an important structural function in confirming that a CS may tax its own residents notwithstanding the limitations imposed by certain DTA provisions. Its inclusion may be seen as a considered response to concerns over DTA abuse and the compatibility of DTA with domestic anti-

avoidance regimes. However, its interaction with other provisions of - may give rise to a range of interpretative and coordination challenges. While DTA practice demonstrates that some C have taken matters into their own hands, numerous suggestions have been made to ameliorate the situation at a more general level (including the introduction of “reverse saving clauses” to shifting the “liability to tax” criterion so that it attaches to the income as opposed to the person”). However, it is likely that ad-hoc solutions may remain for some time as it may be too soon to expect any structural changes to the OECD MTC anytime soon (Wheeler, 2018).

PART B

Question 4

There is no single way to answer the question and the following provides one possible schematic.

The question provides candidates with an opportunity to demonstrate their understanding of the operation of Article 20 OECD MTC 2017 and to apply this knowledge to a basic fact pattern. There is no need to spend time on assessing whether Amelie is a student in this scenario.

Article 20: payments made to a student (or business apprentice) who is or was immediately before visiting State B, a resident of State A and is visiting State B solely for the purposes of education / training and receives a payment for their maintenance education or training. In such a situation State B is precluded from taxing the relevant payment provided the payment does not arise in State B. The purpose of the provision appears to ensure that the generosity of governments or public bodies towards students of their own State from being diverted into the treasuries of the foreign states where they students pursue their studies because often the sponsoring state is unable to provide the required level of education (Herm, 1996).

Year 1 maintenance grant from State A

This payment is likely to fall within Article 20 of the DTA. The OECD Commentary notes Article 20 applies where the person was resident in one state immediately before visiting the other for study and the payments are for maintenance or education (Commentary on Article 20, [3]) and the payment does not arise in State B. In such a situation state B's right to tax is prohibited under Article 20. Amelie was a resident of State A before arriving in State B, and the grant arises in State A. Her purpose for being in State B is to study. On this basis, State B cannot tax this amount under Article 20. State A may then tax the grant but it appears that State A exempts it under domestic law.

It is not anticipated that the fact she receives a research related payment in year 1 could affect the classification of the maintenance grant if that research related payment were considered to be related to employment. It appears that students may derive additional payments from employment / independent activities and that this in and of itself does not lead to an automatic denial of the operation of Article 20. As such, even if the research related payment were considered to be related to employment, then Article 20 treatment would still appear to apply to the maintenance grant where the relevant Article 20 conditions are satisfied in relation to the maintenance grant. In such a situation, the research related payment would be considered separately (Commentary on Article 20, [2.1]) - see below. Candidates may note that where it was determined that the sole or predominant purpose of Amelie's presence in State B were the performance of independent economic activities then Article 20 may no longer apply (De Broe 2022). However, on the facts it is more likely that her stay will be considered to have a sole / main purpose of study and as such Article 20 will apply to the maintenance grant.

While it is open to candidates to consider Amelie's residence under the DTA (and consider whether she is dual resident etc.) this is not considered to be necessary in relation to amounts that fall within Article 20 as all that is needed is that Amelie was a resident of State A before visiting State B where she is in State B for the purposes of study and her stay is temporary. Where these criteria are met State B cannot tax the payment irrespective of whether she is resident in State B or not (De Broe, 2022). In any event, Amelie is not resident in State B in year 1 under its domestic law as she has not been present in State for 6 months in year 1. Candidates may refer to her personal circumstances (e.g. accommodation, personal relationships, visa status etc.) when considering whether she is likely to continue to be considered to be "visiting" state B for the purpose of study in Year 2.

Year 1 research-related payment

There are a number of issues that could be explored including that the payment may payment is likely to be classified as a payment that is for maintenance, education or training (Commentary on Article 20, [3]) rather than for a provision of services so may prima facie fall within Article 20. However, as the payment arises in State B, Article 20 cannot apply to preclude State B's right to tax the payment. Where the payment is considered to be made for maintenance, education or training (and not employment income due to, broadly, the lack of contractual obligations), it may then fall under Article 21 (Other Income). Under Article 21, the resident state has the right to tax the payment.

The resident state here is State A (Amelie is not resident in State B under its domestic tax laws as she has not spent 6 months or more in State B in year 1). While it is not anticipated that the amount would be classified as employment income, candidates may note that State B may have the right to tax this amount under Article 15(1) as Article 15(2) may not be satisfied (Amelie is present for more than 183 days in a 12 month period beginning or ending in the fiscal year concerned in state B (i.e. 1 July of year 1 to 30 June of year 2 and the relevant amount is paid by a resident of state B). However, it is also the case that where her research activities are considered to be ancillary to her studies then notwithstanding the fact these are "employment or independent" activities they may still fall within article 20 (however, as noted above, Article 20 does not apply as the payment arises in State B).

Year 2 maintenance grant from State A

While the payment may also fall within Article 20 as it did in year 1, candidates may explore whether Amelie's changed circumstances in year 2 mean that there is an argument that Article 20 may not apply (Amelie's presence in State B may no longer be considered to satisfy the ordinary meaning of "visiting" and may not be considered to be solely or even mainly for educational purposes). Candidates may reference any relevant cases (e.g. Qing Gang K. Li v The Queen, 94 DTC 6059 [1994] 1 CTC 28 (Qing Gang K. Li)), where Article 20 has been decided not be operational as the taxpayer was shown to no longer be a temporary visitor. Where such an approach is adopted then Article 20 may not apply and the amount may then fall within Article 21 such that the resident state (State B) may have taxing rights. Should such an approach be adopted the question then arises whether the non-application of Article 20 in year 2 in these circumstances could retrospectively impact the application of Article 20 to the maintenance grant in year 1.

Candidates may note that Article 20 does not refer to a specific time period during which the individual may access the benefit of Article 20 (cf. US Technical Explanation. 2006 US Model Tax Convention, on Article 20, [293]) and so it may be unclear whether the year 1 payment could be impacted. However, there is support for the view that where the benefit of Article 20 is lost in year 2 due to changed circumstances then it should not affect the application of Article 20 in year 1 (Vogel, 1997 and De Broe, 2022 and Qing Gang K. Li).

However, there is also an argument that assessing the purpose of her stay in Year 2 on the basis of personal circumstances may conflate the purpose of Article 20 with criteria that are more generally related to residence requirements (e.g. applying for a permanent residence visa, moving into her fiancé's house etc may point towards residence under some countries' domestic tests). Furthermore, there is a question mark around whether the object of Article 20 is the elimination of double taxation as there is support for the view that its purpose is to ensure that State B cannot tax unless the requirements of the Article are not met (De Broe, 2022). If the fact that her stay in Year 2 is still primarily viewed as being to complete her two year course and the payment continues to be seen as being paid to maintain her during her studies and there is no evidence to suggest that she isin State B for other economic purposes (i.e. there is no other independent economic activity in State B in year 2), then Article 20 continue to apply and as such State B may not be able to tax the maintenance payment in year 2.

Conclusion

In year 1 the maintenance grant from State A is exempt from taxation in State B under Article 20, and may be taxed by State A (although it exempts such payments) and the research payment from State B may fall under Article 21, with taxing rights allocated to State A.

In year 2, it is open to candidates to explore whether the fact that Amelie's connections with State B changing in year 2 should impact the classification of the payment for the purposes of the double tax agreement. Should the payment fall within Article 20 (the changed circumstances are not seen as affecting the application of Article 20 as the course continues to run in year 2 and there is nothing to suggest that Amelie has stopped attending the course) then State B cannot tax the payment. Where, however, an argument is made that Amelie's time in State B is inconsistent with a temporary stay then Article 20 may not apply such that State B may not be precluded from taxing the maintenance grant under its domestic law. Where the payment does not fall within Article 20, then it may then fall within Article 21 and State B as the resident state may tax the payment. Candidates may also consider whether the fact that Article 20 may not apply to the maintenance grant in year 2 could retrospectively affect the application of Article 20 in year 1.

It is open to candidates to note that Article 20 operates differently from other provisions within the OECD MTC (Lang, 2010) as its function is to preclude the right of State B to tax in specified circumstances and it does not require Amelie to be resident of either State A or B (Ismer and Black, 2022). It is acknowledged that Article 20 may result in double non taxation (Lang, 2010). Furthermore, and while not required, it is also open to candidates to note that the boundary between Article 20 and Article 15 has been the subject of numerous tax cases where some taxpayers have been considered to have intentionally mixed up their status as students / teachers in order to get the benefit of the operation of Article 20 where they have been in the non-resident state for more than 183 days (e.g. Langroudi , US Tax Court of 5 September 2007, 10 ITLR, 102).

PART C

Question 5

There is no single way to answer the question and the following provides one possible schematic.

The question provides candidates with an opportunity to demonstrate their understanding of the significance of Article 2 OECD MTC 2017 and its interplay with other provisions, in particular, Article 23B. It is acknowledged that there are minimal facts and that responses may be nuanced. The below provides an overview of the some of the points that candidates may be expected to raise in their answers.

Article 2

Candidates may note that in order for a FTC to be granted by Country X, there are some hurdles to overcome such as the fact that the relevant taxpayer is a resident (Sekarte is a resident) and is a person (Sekarte is recognised as a person) and that the relevant Country Y payment is a tax covered by Article 2. The following provides an overview of some of the issues that could be raised in relation to Article 2.

Application

First, the MPA possesses the classic hallmarks of a tax: it is payable by every enterprise that meets the relevant statutory thresholds, it is imposed by statute, it is unrequited in that no direct benefit is given in return, and its proceeds flow into Country Y's general revenue. While it is acknowledged there is no one universally accepted definition of tax, it is likely that these features may mean that it is characterised as a tax However, because the MPA is not listed in Article 2(3) as an existing tax, it is necessary to consider whether it may be considered a tax on income or elements of income under Article 2(2) or a tax that is identical or substantially similar to a tax in Article 2 (as it is due to be introduced (in year 3) after signature of the DTA (in year 1)).

There are a number of different ways to assess whether the MPA is a tax on income / elements of income or is substantial similarity; among them are (i) the micro approach, which asks whether the MPA shares the essential attributes of the specific income tax named in the DTA, i.e. Country Y's income tax and (ii) the macro approach, which asks whether it falls within the wider category of taxes on income or profits (OECD Commentary on Article 2(4), [7]; Ismer & Blank 2022).

Under the micro approach the MPA appears to diverge from Country Y's income tax. The tax bases of the two taxes are distinct and this is considered to weigh against a finding of similarity (Helminen, 2016) i.e. the MPA's tax base is gross revenue and user metrics rather than net income and it does not appear to allow deductions etc. Furthermore, it operates outside the income-tax statute and is described as a market-based contribution. It appears that the tax base differential is critical, the fact it operates outside the income tax system may mean that on the basis of the macro approach it may also be considered not to be sufficiently similar and the nomenclature and description while relevant are in and of themselves not decisive.

Candidates may note that in relation to the different tax base point, some authors contend that gross-basis levies can, in limited circumstances, qualify as income taxes when they act as simplified substitutes for net-income taxation and cite their frequently lower rates being an administratively convenient way to tax non-residents (e.g. without needing them calculate their tax position in detail in the source country) (Hohenwarter et al. 2019 and HM Treasury, 2018). However, the MPA is formulaic, linked to both revenue and user engagement and does not appear to have been presented as a proxy for income tax. Candidates may also note that while the reference to "elements of income" in Article 2(2) is considered by some to open up the possibility that taxes that attach to elements of income, such as gross income, may be included, there is also a view that the "elements of income" reference in Article 2(2) should be interpreted narrowly to mean sources of income (such as dividends or interest) and that disaggregation of individual taxes in this way is inappropriate (Kotha, 2020).

Candidates may also note that the MPA may share some features with recent digital-services taxes (DST) and equalisation levies that jurisdictions appear to regard as falling outside their DTA networks (e.g. the UK's 2019 response to its consultation on its DST included a comment that the DST was not a tax on income for the purposes of Article 2 (HM Treasury, 2018) and was "compatible with the UK's international obligations" (HM Treasury 2019) and India's equalisation levy has been stated to have been designed so that it falls beyond DTA scope because it is imposed on gross revenue and by a statute that is separate from the income tax legislation (Chaturvedi et al. 2023). Candidates may also note that notwithstanding these views, there is a view that DSTs may, depending on their design, fall within DTAs (Chaturvedi et al. 2023).

In relation to the MPA,its distinct structure, base and legal integration, may mean it is more likely that it is not a "substantially similar" to Country B's income tax for Article 2(4) purposes. On this basis, the MPA would not be a

“covered tax,” and Article 23B would not oblige Country X to grant relief from double taxation. There is no information about whether Country X’s domestic law would provide a unilateral FTC.

Policy - candidates may note a number of different policy considerations, e.g. as noted where the MPA is considered to be outside Article 2, the distributive and relief articles would not apply and as such Country X would have no DTA-based duty to grant relief; however, various DTA provisions still operate (e.g. Articles 24, 25 and 27) and MAP will then be required to resolve relevant DTA related issues, such as Article 24 related issues (Ismer & Piotrowski, 2022).

There is also the point that where the MPA is outside Article 2, the costs of business for Country X enterprises (such as Sekarte Ltd) are likely to rise and double taxation may remain unrelieved. If, by contrast, the MPA were ever classified to fall within Article 2, Country Y’s revenues would rise but the burden of relief would shift to Country X, which may choose to respond by renegotiating relevant parts of its DTAs or revising its domestic rules on relief from double taxation. Both scenarios may raise compliance and(or) dispute-resolution costs. More generally, an increased spread of DST-style levies across countries may (further) weaken political support for Pillar One and intensify trade frictions.

Conclusion

The MPA’s gross-receipts base, user-metric formula and stand-alone statute may make it unlikely to be classified as a tax that is identical or “substantially similar” to Country B’s income tax and as such candidates may conclude that it is likely to fall outside Article 2. Country A therefore has no DTA obligation to grant relief. Candidates may also note that there may be some (albeit less generally accepted) counter-arguments that taxes such as the MPA may fall within Article 2 but that states would have to manage discussions in this regard through MAP or by way of renegotiation of relevant provisions. Where the MPA is outside Article 2 other provisions still apply (e.g. Articles 24, 26 and 27). Country X may be advised to monitor competitive effects, decide whether to offer unilateral relief, and keep its DTA strategy under review, especially given the OECD’s call to pause new DSTs and the uncertain Pillar One timetable.