THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

December 2023

MODULE 1

SUGGESTED SOLUTIONS

PART A

Question 1

The question requires candidates to consider the place of reservations, observations and positions within the OECD MTC 2017, their respective roles, and the differences between them. There are numerous ways to answer this question and the below provides one possible schematic.

A good place to start is defining or otherwise considering what these categories of departure from the OECD MTC / Commentary have in common and then how they can be from each other. At a high level, it can be said that they are similar in that they all provide a mechanism for countries to state where their view is not necessarily consistent with that contained within a provision and / or Commentary on the OECD MTC 2017 and that their role is, broadly, to notify other countries of their DTA policy and practice etc. However these are also different from each other in a number of ways including that these stated departures are (i) made by different groups of countries (OECD and non-OECD); (ii) may relate to different content within either the OECD MTC 2017 / Commentary as relevant; (ii) may be located at different places with the OECD MTC 2017 / Commentary and (iv) were introduced into the OECD MTC 2017 / Commentary at different points in time. Despite their differences, some commentators appear to analyse the prevalence and significance of both reservations and positions together as "reservation" as they consider both reservations and positions have the same purpose i.e. "disagreement" - for the purposes of their research (Vega and Rudyk, 2011).

Some historical context may be incorporated into answers to support any points being made but at least some relatively recent examples from either or both the OECD MTC 2017 / Commentary and some examples from DTA practice would be expected to be included. Whilst there has been some empirical research into the prevalence of both reservations and observations, this research acknowledges that numerical analysis relating to the frequency of inclusions of these departures is problematic not least because some categories of departures have disappeared (e.g. "special positions" and "certain special derogations") but also because countries that record reservations and observations do not remain static i.e. they may make new reservations / observations or withdraw reservations / observations (Arginelli and Dirkis, 2014).

Candidates could conclude that whilst there may be some uncertainty as to the precise role that reservations and observations play in the interpretation of DTA provisions, there appears to be support, albeit not universal, for the view that by allowing countries to indicate reservations and observations with respect to narrow issues, agreement can be reached on the basic structure and approach of the provision in question (Ault, 2009). Notwithstanding this view, there is also the view that the OECD MTC (at a general level) cannot be said to describe a consensus due to the various reservations and observations (a prior, where there are alternative provisions within the Commentary) that the OECD MTC and the Commentary contain (Ellingsworth, 2007). Candidates may conclude by considering the extent to which reservations, observations and positions support or undermine the view that these "departures" operate to bolster the view of the OECD MTC as being, inter alia, reflective of a consensus across OECD members and their role in the interpretative process.

Distinguishing Reservations, Observations and Positions: Role and Nature

Reservations

The Introduction to the OECD MTC 2017, [31] notes that member countries whilst in agreement with the aims and main provisions of the OECD MTC, nearly all member countries have entered reservations on some provisions, which are recorded in the Commentaries on the Articles concerned. The term reservation is defined in Article 2(1)(d) of the Vienna Convention of the Law of Treaties (VCLT) as a "[…] unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". Whilst it is clear from the reference to "reservation" signifies that the term can be used in a wide range of public international law settings (and so would be generally be relevant to the effect of a particular DTA provision), in the context of the question to be addressed, the term reservation is used to refer to the reservations made by OECD members with respect to their view of provisions of the OECD MTC 2017 (as opposed to a reservation made on a particular treaty).

The term "reservation" appears to have been first used in the context of the evolution of the OECD MTC in the Fourth OEEC Report, No 13, 7 but no definition of the term was included in that Report (Bossuyt, 2020). Rather the wording of certain reservations on the then draft articles has been stated to support the following meaning of a "reservation": "retain or hold (a right or entitlement) especially by formal or legal stipulation" rather than an expression of a disagreement with regard to certain provisions" (Bossuyt, 2020 citing as an example France's use of the words "retain its freedom of judgment" with respect to its withholding regime, Fourth OEEC Report 49, 56). On such an interpretation, reservations permit a country to communicate the fact that they wish to leave open the possibility of adopting a position that may differ from the stated position (e.g. in the context of the OECD MTC this would refer to a provision within the OECD MTC 2017). Whilst the inclusion of a reservation by these countries may signal their

disagreement with a relevant provision (or an intention not to insert particular provisions of the Model in future tax treaties (Linderfalk and Hilling, 2015)), there may be other related reasons why countries wish to make a reservation e.g. they may wish to communicate that their domestic tax law or their constitution may not permit them to adopt the relevant DTA wording (Bossuyt, 2020). On this basis, the role of reservations may be seen as being wider than just expressing disagreement.

Before further considering the role of reservations, it should be noted that reservations should generally be distinguished from (i) Observations, which refer to a stated view of an OECD member on the OECD MTC's Commentary (as opposed to terms within the OECD MTC 2017 provisions) and (ii) Positions, which refer to the stated views of non-OECD members on both the OECD MTC and its Commentary.

The role of reservations can be considered from a historical context and the below provides a very high level overview of some of the pertinent developments in the life of reservations on the OECD MTC: (i) the then OEEC in its Second Recommendation recommended that Member Countries should take into account reservations that featured in the Commentaries; (ii) the OEEC Council requested that Member countries adopt an effective "comply or explain" approach with regard to the adoption or otherwise of the relevant DTA provisions i.e. countries were to adopt the provisions or explain why a particular provision would not be adopted; (iii) the focus of on the "comply and explain" approach was to be of particular relevance when concluding new DTAs or revising existing DTAs. A few points can be made in connection with these developments, including that there was an acknowledgment that in order to achieve a consensus there was a need to balance uniformity and flexibility and that the ability of countries (concerned about their sovereign right to tax and the interaction of their domestic tax regimes with DTA provisions) to leave open the possibility to adopt a different provision within their DTA networks may also have the benefit of leaving the door open to gradual harmonisation of tax regimes as well as the possibility of a multilateral (as opposed to a bilateral) approach to reducing instances of double taxation (Bossuyt, 2020).

The 1963 Draft OECD MTC continued the same approach as the OEEC i.e. when concluding new DTAs or revising existing DTAs there was a need to take into account derogations and reservations of the membership and there was a need to both refer to the OECD MTC provisions as interpreted by the Commentaries and to explain any derogations from the articles. ((Bossuyt, 2020). The principle of reciprocity was also referenced in the OECD's 1963 Introductory Report as an acknowledgment that where a member country reserved its position (i.e. retained their freedom of action during the negotiating process) then the other Member countries could also retain their freedom of action to the extent that the country with the reservation had recorded their reservation.

This historical perspective shines some light on the role of reservations: they clearly communicate to both OECD members and non-OECD members how those countries are likely to respond during the negotiation process whilst enabling some level of consensus to be obtained in respect of provisions where there is no reservation, they enable countries to buy into a unified approach whilst providing flexibility (as they can remove a reservation in the future) and they provide a mechanism by which countries can explain why they are generally in agreement with the OECD MTC 2017 but may not be in a position to commit fully to all aspects of all provisions of the OECD MTC 2017 (this is also supported by the definition within the VCLT which acknowledges the role of reservations within public international law). An example of the role that a reservation may play in leaving an opportunity for a country to remove its reservation in the future can be found in a historical context: in 1958 several countries entered "reservations" on the then "consensus" in relation to the wording of a particular draft article until such time as the relevant group of experts had finalised their study into the relevant matter, which arguably enabled those countries to retain their freedom over this particular issue until such time as they were in a position to fully commit to the particular provision (all delegates reserved their position on the immovable property article until such time as the expert study was finalised, Minutes of the 7th Session of the Fiscal Committee, 25-27 February 1958, FC/M (58) 2, 4).

In terms of the uptake of reservations, the Draft OECD MTC 1963 is reported to have had 36 reservations and two other categories of departure (special positions and special derogations, which no longer exist). This increased to 286 reservations in the OECD MTC 2000, and 276 reservations in 2008 (Arginelli and Dirkis, 2014). The OECD MTC 2017 has 226 reservations with the highest concentration of reservations (listed per reservation not reservations per country) being on Article 5 (29 reservations) and articles 10 and 13 (respectively 22 and 20 reservations on each article). Interestingly, Articles 26-28 do not have any reservations and Article 23A and B has only three reservations as does Article 29 (although given that its wording is included in the MLI and it forms part of the Minimum Standard (at least in respect of the particular anti-abuse test or combination of tests to adopt) the lower number of reservations may not be surprising).

There is some evidence (albeit relating to earlier versions of the OECD MTC and UNMTC) that: where an OECD member has its own MTC (or rather there is a published MTC that can be analysed) that the relevant reservations it makes in its MTC may be consistent with the relevant reservations it makes on the OECD MTC provisions (e.g. the USMTC). There is also some evidence from 2014 that a significant proportion of reservations (that relate to OECD members other than the US) are consistent with provisions in the 2011 UNMTC (Arginelli and Dirkis, 2014). Whilst there are clearly newer versions of both MTCs in existence, it is possible that the view that where a country has its

own MTC that it publicly available (e.g. USMTC) the ability of countries to peruse said MTC may undermine the role of reservations as it may be more useful for a country to examine the terms of a country's MTC than refer to the reservations where these are identical. e.g. it has been reported that Austria, for many years, had no reservations on the OECD MTC 2017 and now appears to have just one reservation (Reservation on Article 7, [95]). Austria has been reported to have first published its MTC in 1998 and to have updated it regularly since. It is at least possible that the existence of a regularly updated MTC may reduce the need for an OECD member to rely upon reservations in order communicate its DTA policy but given the (i) that the more upfront information about a treaty partner pre-negotiation the better and (ii) the apparent expectation that OECD members will "comply and explain", it is reasonable to expect reservations on the OECD MTC 2017 to continue being made and to have a role in communicating DTA practice to other countries.

Although the above delineation of reservations as involving a communication of the stated position of an OECD member on a provision within the OECD MTC is helpful in distinguishing reservations from observations (which refer to stated view of OECD members on the Commentary), there is also the point that whilst the border between reservations and observations on the one hand and positions on the other may be relatively straightforward to draw (i.e. OECD as opposed to non-OECD member departures) there may be instances where the line is harder to determine. There is a view that certain observations are drafted as if they are reservations and vice versa e.g. Canada and the UK have an observation on Article 10, [68], which provides that they do not adhere to the paragraph because under their domestic laws certain interest payments are treated as distributions and are therefore included in the definition of dividends in Article 10(3) i.e. they effectively reserve the right to amplify Article 10(3) of their DTAs. Whilst Canada also includes a reservation to this effect (Reservation on Article 10, [81] the UK does not (it just includes the aforementioned Observation). The UK does appear to modify the definitions in Article 10(3) and 11(3) in at least some of its DTAs e.g. (Arginelli and Dirkis, 2014), e.g. Article 10(3) US-UK DTA refers to the fact that amounts that constitute distributions under the domestic law of either, as relevant, the UK or the USA will be dividends for the purposes of Article 10. Notwithstanding the possibility that the line between reservations and observations may be blurred at times, the following now considers the nature and role of Observations.

<u>Observations</u>

Since 1977, OECD member countries have had the opportunity to formulate observations on the Commentaries if they are "unable to concur in the interpretation given in the Commentary on the article concerned" (OECD CFA, Report on the Revision of the 1963 Draft Convention, Paris 7 March 1977, (76) Part I (1st revisions), 27). The Introduction to OECD MTC 2017, [30] clarifies that Observations "usefully indicate the way in which those countries will apply the provisions of the Article in question." Whilst the wording "unable to concur" may be interpreted by some as suggesting disagreement, it may also encapsulate something broader than disagreement i.e. incapacity (a member country may simply not be in a position to accept a particular interpretation due to the constraints of its own domestic tax law) (Bossuyt, 2020). There is a view that observations indicate that the relevant country cannot accept a particular interpretation and so indicate the way observing states interpret the relevant OECD text etc. (Linderfalk and Hilling, 2015).

Observations have been categorised in a number of different ways including whether they are focussed upon interpretative or non-interpretative issues. The below is an example of one possible categorisation:

- Interpretative Observations e.g. there are a variety of Observations within this category Observations made in relation to a part of the Commentary where the Commentary may be considered to be consistent with an international autonomous meaning but a member country determines to state it does not agree with a particular aspect of what is being stated e.g. Portugal (OECD MTC 2014) reserved its right not to interpret a server as being a permanent establishment, (OECD Commentary on Article 5, [122]-[131] OECD MCT 217 discusses servers as PEs. The Portuguese example has been described as an example of an Observation being made in respect of wording of the Commentary of the OECD MTC that is consistent with the autonomous meaning of PE under the OECD MTC 2017 (the wording in the Commentary refers to the possibility of a server being a PE where other relevant conditions are satisfied as opposed to merely stating that the place of a server will constitute a PE) (Bossuyt, 2020). Many Observations are relatively briefly worded, a priori in relation to the length of parts of the Commentary to which they refer, such that they appear to operate as a way of putting interested countries on notice that they are not constrained by the relevant part of the Commentary rather than providing those interested countries with a crystal clear indication of what interpretation they will adopt in respect of the provision to which the Commentary subject to the Reservations relates. Some OECD member countries may also make an Observation on the interpretation of a term that is undefined in the MTC. Whilst, in such a case there may be a need to refer back to domestic law under Article 3(2), it has been suggested that member countries may use their observations on the Commentary as a means of prescribe one approach they favour thereby potentially avoiding the need to refer back to other possible alternative interpretations under domestic law (Bossuyt, 2020). On this basis, it could be said that the placing of an Observation may also operate as a mechanism of leaving one's options open in order to get the most favourable result, which whilst understandable could be described as leading to less certainty in the interpretation of the relevant provision.

- Non-interpretive Observations - Observations may operate so as to communicate to other countries' that a particular OECD member's has a certain DTA practice e.g. Hungary has placed an observation on the Commentary on Article 25(1) and (2), [27] where it has stated that it is unable to engage in a mutual agreement procedure (MAP)regarding an issue that has already been adjudicated by a Hungarian court. This Observation could be described as providing context for the wording within the Commentary rather involving a differing view on the interpretation of a term or disagreement (Commentary on Article 25, [95] where the Commentary, [27] refers to the fact that it will be a rare case for a taxpayer not to be able to make use of the MAP where the domestic law of a country does not permit such an outcome but then refers to the fact that where there is a genuine domestic law impediment then this should be communicated publicly such that all taxpayers are put on notice). It is at least possible that the audience for Hungary's Observation may be wider than the governments of the OECD membership and that Hungary may be relying on its Observation as part of a process of publicising the potential conflict between MAP and its domestic law (i.e. this Observation could described as be an expression of its inability to act in a manner consistent with the Commentary rather than a disagreement with the relevant provision or the provision or a differing interpretation of a DTA provision) (Bossuyt, 2020).

As noted above, Observations provide an opportunity for OECD members to communicate their views on the Commentary but may also provide an opportunity to communicate special circumstances that apply to the country with the Observation. There are several functions that Observations appear to have including: notifying to other countries an interpretation of the Commentary that is not identical to that contained within the Commentary, notification of a domestic law position that may not permit a country to adopt a particular interpretation as contained in the Commentary, leaving one's options somewhat open in relation to a specific interpretative issue with the possibility of varying the wording of the observation or removing it altogether at some point in the future. The precise extent to which observations may influence the interpretation of terms within a DTA may be at best uncertain but there is evidence that observations of a contracting state may form part of a general interpretative approach to the intended meaning of DTA terms (e.g. the Explanatory Memorandum to the International Tax Agreements Amendment Bill (No 2) 2002 referred to the Canadian observation on the Commentary on the definition of royalty in Article 12, [paragraphs 13] and [13.4] to provide context for the relevant Protocol to the Australia-Canada DTA, and was cited in Task Technology Pty Ltd v FCT [2014] FCA 38).

Positions

In 1997 the OECD determined that non-OECD members would have the opportunity to be involved with the drafting and negotiations of both the OECD MTC and the Commentary and to state their "position" with regard to both (OECD, Non-OECD Economies' Positions on the OECD MTC, [1]). The OECD MTC 2017 includes a section entitled "Non-OECD Economies' Positions on the OECD MTC" and it is anticipated that this will be updated to reflect the views of participating economies (referred to as Observers or Associated Countries). The OECD refers to the situation where such countries are "unable to agree" ((OECD, Non-OECD Economies' Positions on the OECD MTC, [2]), which whilst similar wording is used in relation to "Observations", Position operate in a different context. Whereas Observations are the stated views of particular member countries in relation to an interpretation in the Commentary, Positions are expressly stated to be reflective of both non-member countries' disagreement with the text of a provision and with their disagreement as regards the interpretation contained within the Commentary ("Non-OECD Economies' Positions on the OECD MTC, [5]). A further difference is the placing of Positions (i.e. within a separate section of the OECD MTC) and the fact that non-OECD members are not the audience for the OECD's various Recommendations (which provide context for both the OECD MTC and its Commentary and refer to the Commentary and derogations etc.) and as such the wording contained in the Recommendations is not strictly relevant when considering the status of Positions.

Positions have been stated not to form part of the Commentary (Bossuyt, 2020) and as such their role is limited in terms of their interpretative value when considering OECD MTC provisions and the Commentary. Notwithstanding this fact, arguably, Positions are likely to also function as a useful mechanism for communicating the likely DTA practice and policy of non-OECD members within which OECD members may already have DTAs or with whom they will go on to enter into DTAs. There is also the point that the introduction of Positions may have had some role to play in have kick-starting the move towards, inter alia, a hope of greater uniformity across DTA provisions as well as playing a role in developing a more inclusive international tax community. Given the more recent work of the OECD/Inclusive Framework and the discussions around increasing the role of the UN in international tax co-operation as well as the call for a UN MTC, there is an increasing awareness building of the respective positions of non-OECD members in the international tax arena, and it is possible that the Positions of non-OECD members can be described as forming a part of this increased awareness.

Conclusion

There has been some interesting new research into reservations, observations and positions on the OECD MTC as part of a wider study relating to the use of extrinsic materials in the interpretation of DTAs (Bossuyt, 2020). Whilst

there appears to be a broad consensus that the Commentaries on the OECD MTC may be relevant to the interpretation of terms contained within the OECD MTC 2017 and in turn DTAs entered into by the OECD's membership that adopt the wording of the relevant MTC, the precise influence of the Commentaries in guiding interpretative issues under a DTA may vary across jurisdictions and over time.. This then begs the question what text within the Commentaries is relevant to DTA interpretation. It would appear there is support for the view that both Reservations and Observations form part of the Commentary and therefore may inform the interpretation of the provisions of the OECD MTC 2017 when negotiating a new DTA or revising an existing DTA but the same does not appear to hold for Positions (Bossuyt, 2020). For the reasons outlined above (e.g. the fact that Positions are stated to express disagreement in relation to both the provisions and the Commentary and are "added on" to the end of the OECD MTC rather than sitting within the Commentary section (cf: Reservations and Observations),the very fact of their non-OECD membership means that the OECD's various Recommendations etc are not addressed to those non-OECD member countries and as such the OECD's Recommendation's wording in relation to reservations and interpreting provisions in line with the Commentary is not of direct relevance to the Positions of non-OECD members when considering how OECD MTC 2017 provisions or the relevant Commentary on those provisions, are to be interpreted (Bossuyt, 2020). In sum, the role of these departures may vary in different circumstances but, broadly, they may both act as a mechanism for communicating the desired right of the relevant country to leave its position open with respect to a particular aspect of the OECD MTC 2017 / Commentary whilst at the same time adding to the pool of knowledge about the DTA practice and policy of both non-OECD members and OECD members, a priori pre-negotiation.

It has been noted that in the context of the OECD MTC Commentary "[to] the extent that a member country has entered reservations or observations on the OECD Model or a non-member has registered a position contrary to the OECD position, the guidance in the OECD Commentary is not applicable to that country's tax treaties" (Arnold, 2021) e.g. It was noted in Alta Canada v. Alta Energy Luxembourg S.A.R.L 2021 SCC 49 (Alta), that the relevant DTA could not be interpreted in line with OECD Commentaries that are published after the entering of the relevant DTA as these Commentaries did not reflect the intentions of the drafters and furthermore interpreting Article 1 in such a way as to deny benefits would have involved overlooking Luxembourg's registered Observation on Article 1 OECD MTC 2003), Whether the more remote possibility that the publication of these departures will result in a more harmonised multilateral approach to international taxation or whether the existence of these departures is reflective of a lack of consensus remains to be seen. However, it is open to candidates to note that the MLI is replete with reservations on the optional MLI provisions and so this could support the idea that there is a growing movement to multilateral approaches that seek to slowly co-ordinate (and perhaps ultimately harmonise) the approach to international taxation.

Question 2

Candidates are required to demonstrate their understanding of the Common Reporting Standard, the mechanisms by which it operates and also the key objectives which are behind its formation and use in the international tax landscape. Candidates should also provide their views on the usefulness of CRS data in promoting tax transparency and combating tax evasion by multinationals.

While candidates may make reference to Automatic Exchange of Information (AEOI) or the Foreign Account Tax Compliance Act (FATCA) when formulating their answers (e.g. in providing overall context), the question explicitly asks for an analysis of CRS and so no additional marks will be awarded for analysis on AEOI or FATCA.

Common Reporting Standard

The Common Reporting Standard (CRS) is a form of Automatic Exchange of Information (AEOI), which was approved by the OECD in 2014 and came into effect on 1 January 2016, with the first exchanges of information taking place in 2017 (OECD, Standard for Automatic Exchange of Financial Information in Tax Matters - Implementation Handbook - Second Edition, 2018, [156]). The CRS requires jurisdictions to obtain information from financial institutions operating in that jurisdiction and automatically exchange that information with other jurisdictions on an annual basis. The CRS sets out the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions (OECD, Automatic Exchange Portal, Common Reporting Standard, Further Guidance, 2022).

CRS is aimed at ensuring that taxpayers properly report their financial assets and income, thereby reducing opportunities for tax evasion. As of October 2022, there are over 4900 bilateral exchange relationships activated with respect to more than 110 jurisdictions committed to the CRS (OECD, Activated Exchange Relationships for CRS Information, 2022).

Operational Aspects of CRS

The CRS draws extensively on the Foreign Account Tax Compliance Act (FATCA), with some modifications to remove U.S. specificities and take into account the multilateral context of the CRS. CRS requires financial institutions to identify accounts that are held directly or indirectly by persons who are resident for tax purposes in countries or territories other than the jurisdiction in which their financial account(s) is located. These financial institutions must then report certain financial account information to their local tax authorities, who automatically exchange that information with tax authorities in other jurisdictions on an annual basis (OECD, Standard for Automatic Exchange of Financial Information in Tax Matters - Implementation Handbook - Second Edition, 2018, [105]).

The exchange relationships used for CRS are typically based on the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the Convention) and the CRS Multilateral Competent Authority Agreement (CRS MCAA). Jurisdictions may alternatively rely on other legal instruments, such as Double Tax Treaties or Tax Information Exchange Agreements, as long as these allow AEOI (OECD, Standard for Automatic Exchange of Financial Information in Tax Matters - Implementation Handbook - Second Edition, 2018, [77]). The relevant EU Directive (2014/107/EU) could also be relied upon.

Implementation of CRS involves multiple steps, including translating the reporting and due diligence requirements into domestic law, selecting a legal basis for exchange of information, putting administrative and IT infrastructure into place, and ensuring the data is safeguarded and confidentiality is ensured.

Some key objectives of CRS include:

- Transparency - increasing transparency in the global financial system through the automatic exchange of information, helping tax authorities identify discrepancies;

- Prevention of tax evasion - CRS makes it more difficult for individuals to evade tax by hiding income and assets offshore;

- Globalisation of tax administration cooperation - the international nature of CRS increases cooperation among tax authorities at a global level, enabling them to work together to combat tax evasion;

- Neutralise mismatches in domestic tax systems - jurisdictions can work together to identify and rectify loopholes or mismatches in their tax systems, thereby reducing the effectiveness of offshore tax evasion strategies;

- Taxpayer compliance - the knowledge that financial information will be exchanged between countries may act as a deterrent for taxpayers to engage in tax evading activities, as the risk of detection (and penalties) is increased;

- Global reach - widespread adoption of CRS increases its effectiveness as a tool to combat international tax evasion, contributing to the equitable distribution of the tax burden;

- CRS aims to create a more transparent, accountable, and fair global tax environment by enabling countries to collaborate in identifying and addressing instances of tax evasion and non-compliance.

Effectiveness of CRS in promoting global tax transparency and combating offshore tax evasion

There are several ways CRS has been effective in promoting global tax transparency and combating offshore tax evasion, including:

- Global adoption. Because tax evasion is a global issue, CRS needed to have a global reach to be effective and not merely relocate the problem from one jurisdiction to another, rather than solving it (OECD, Standard for Automatic Exchange of Financial Information in Tax Matters - Implementation Handbook - Second Edition, 2018, [6]). To date, CRS has been adopted by over 100 jurisdictions (OECD, Automatic Exchange Portal, AEOI Standard's Implementation by Jurisdiction, 2023). Widespread adoption ensures information is shared across a vast network, leaving fewer places for taxpayers to hide assets and evade taxes.

- Broad scope. CRS covers a broad scope of financial information, equipping tax authorities with a greater level of information on their residents' offshore assets than ever previously available. The opportunities for taxpayers to circumvent reporting is therefore limited because of tax administrations having access to a holistic picture of individual and corporate taxpayers (OECD, Standard for Automatic Exchange of Financial Information in Tax Matters - Implementation Handbook - Second Edition, 2018, [1]).

- Anti-abuse provisions. A vast majority of jurisdictions participating in CRS have put in place anti-abuse rules via secondary legislation and/or published guidance, with further limits the ability for taxpayers to circumvent the reporting requirements (OECD, Automatic Exchange Portal, AEOI Standard's Implementation by Jurisdiction, 2023).

- Support from OECD Secretariats. The work of the Global Forum in the OECD is paramount in ensuring the confidentiality of the financial data collected under CRS. Furthermore, the OECD has a dedicated mailbox for receiving information on potential CRS avoidance schemes. The Global Forum put in place a "Staged Approach" to monitor, assess and assist the implementation of the Standard during the implementation process and as part of its mandate to ensure the effective implementation of tax transparency standards worldwide, the Global Forum has moved to conduct peer reviews of the effectiveness of the implementation of the AEOI Standard in practice, starting in 2020. This ongoing input from the OECD lends credibility to the importance of CRS and ensures the overall integrity and effectiveness of CRS is maintained, and may act as a deterrent for tax evasion.

- Ongoing review and adaptation. In 2022 the OECD published amendments to CRS, demonstrating the ongoing monitoring of the standard and the ability for it to be adapted as required. Firstly, new digital financial products (such as digital currencies) are now included in the scope of the CRS. In addition, light of the development of the crypto asset reporting framework (CARF), changes are also made to the definitions of Financial Asset and Investment Entity. There are also new provisions to ensure efficient interaction between CRS and CARF to limit instances of duplicative reporting where each standard may ask for similar information (OECD, Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard, 2022)

- Reliance on FATCA. By building on the automated and standardised nature of FATCA, jurisdictions were able to implement CRS quickly and easily, and taxpayers were also able to adapt to the requirements easier, which benefits the tax transparency created by CRS (OECD, Standard for Automatic Exchange of Financial Information in Tax Matters - Implementation Handbook - Second Edition, 2018).

- Automatic Exchange of Information. Tax authorities receive information about their residents' offshore financial accounts and activities automatically, without having to make specific requests, which can reduce delays and assist tax administration with furthering the tax transparency agenda domestically.

- Enhanced cross-referencing capabilities. The information exchanged under CRS allows tax authorities to cross-check the data reported by taxpayers with the information received from other jurisdictions, which may enhance the detection of discrepancies and facilitate more effective enforcement of tax laws.

Failings of CRS in promoting global tax transparency and combating offshore tax evasion

Conversely, criticisms of CRS and its ability to deliver on its objectives have been made relating to, inter alia:

- Lack of participation by all jurisdictions. CRS can only be considered a success if as many countries as possible adopt the standard, and while there has been significant participation, it could be argued that it still falls short.

- Lack of participation by the US. The absence of the US as an adopter of CRS means in practice the US receives substantial information under FATCA but does not provide equivalent information to other jurisdictions. The United States appears to have used its strong position to unilaterally shape the obligations of other states without reciprocity (Matras, 2023).

- Increased responsibility placed on financial institutions. The onus to verify customers and aggregate and transmit relevant data to national tax administrations falls on the financial institutions. This has required changes to IT infrastructure, increased workload for staff, increased due diligence, and in some cases the employment of specialists, resulting in both a time and financial burden.

- Use of data by tax administrations. The practical use of data received by individual countries is uncertain (Matras, 2023). Although the automatic exchange of CRS information means millions of pieces of information are being transmitted each year, there is a requirement for the tax administrations to connect such data with the relevant taxpayer and to analyse that data to identify fraudulent taxpayers. However, in practice, tax administrations are under-resourced, and it is not yet clear whether the data that is being exchanged is actually being used effectively, or at all, as we are yet to see significant analysis of the collective impact of CRS data on tax revenues for specific jurisdictions. Given the requirement for taxpayer confidentiality we may never be able to adequately bifurcate the impact of CRS data versus other sources of data available to tax administrations.

- Limiting bank secrecy. Bank secrecy is a fundamental element of banking which allows taxpayers to have confidence that their financial data is being treated confidentially but this is somewhat challenged by the data required to be reported under CRS, which historically would've been considered confidential and not appropriate for automatic exchange. While the vast majority of individuals with offshore bank accounts do not engage in tax evasion, CRS places a burden of disclosure on all foreign tax residents, which may lead to increased levels of distrust between state and taxpayer. (Matras, 2023).

- Overly narrow scope. Different jurisdictions have different views as to the successes and failures of CRS, and some such criticism of CRS relates to the scope, which may be viewed by some jurisdictions as overly narrow and thereby leaving open the possibility of tax evasion as a result of some of its more ambiguous provisions. One such criticism relates to the manner of reporting account balances, which does not allow tracking of international financial flows carried out over a specific time period and allows fraudulent taxpayers to manipulate funds to reduce the account balance before the reporting date (Matras, 2023).

- Data quality. The CRS does not enforce any specific controls on financial institutions in order to ensure the quality of the data provided to national tax administrations. Financial institutions are free to collate the data however they see fit, and are not specifically required to audit its contents, which may impact the usefulness of the data for identifying fraudulent taxpayers.

Potential further areas of work

CRS is not a perfect standard and further work could be undertaken to improve its usefulness. Some areas of work could include:

- Reviewing the effectiveness of CRS – while work is undertaken by the OECD and the Global Forum in assessing the financial impact of CRS, further work could be done to better understand the effectiveness of CRS in practice and the benefits achieved by jurisdictions.

- Capacity building for developing economies – work could be undertaken with jurisdictions where the barriers to entry for implementing CRS are high. In addition, for those developing economies where CRS is in force, capacity building activities should be undertaken to train tax officials in how to properly analyse the data they are receiving on exchange.

- Ensuring participation of the US – in order to achieve the objectives of, convergence and reciprocity with FATCA needs to be achieved.

Conclusion

CRS has had wide (although potentially not wide enough) adoption and has a scope of exchange that is significantly broader than anything that has come before it, such as FATCA (US specific) or indeed just sharing such information on request (versus automatically). In 2020, the OECD announced in a press release that in 2019, participating countries automatically exchanged information on 84 million financial accounts worldwide, covering total assets of EUR 10 trillion and EUR 107 billion in additional tax revenue has been identified through voluntary disclosure programmes, offshore tax investigations and related measures since 2009 (OECD, International Community Reaches Important Milestone in Fight Against Tax Evasion, 2020). As CRS standardises and therefore simplifies the exchange of financial information, this has resulted in more efficient adoption, such that newer jurisdictions committing to CRS can be supported better by those who have already implemented CRS. Furthermore, CRS could be described as having a deterring effect on tax evasion, in that bank secrecy no longer exists to the same extent as it did previously, since information is now exchanged automatically (and not just on request), and the scope of CRS is much broader than FATCA. As such, it could be said that CRS has been useful in promoting global tax transparency and combating offshore tax evasion.

Notwithstanding the positive role played by CRS, it cannot be denied that CRS has a few failings, most importantly the vast amount of data which is now sent to tax administrations automatically, and where requirements significant investment in training and resourcing in order to ensure tax administrations are utilising the information they are receiving through exchange to combat fraudulent activity. Further work (e.g. those listed in the “potential areas for further work” outlined above) will no doubt be required to ensure CRS reaches its full potential. Notwithstanding the scope for improvement, CRS arguably provides a strong starting point from which to continue its work in promoting global tax transparency and combating offshore tax evasion.

Question 3

The question requires candidates to consider the shift in the global tax landscape that has necessitated a stronger focus on reducing harmful tax competition. In doing so, candidates should clearly define and demonstrate their understanding of what harmful tax competition involves.

Candidates should be able to articulate the problems caused by harmful tax competition and the work of the OECDs Forum on Harmful Tax Practices (FHTP). Reference should be made to how, the work of the FHTP has expanded and evolved to include additional areas of work (exchange on tax rulings, peer review, substance requirements, etc.) since the inception of the FHTP in 1998 as the issue of harmful tax competition has become more prolific. Candidates should identify some of the key changes that have led to an increase in global tax complexity and link this to the expansion of work within the FHTP. Candidates should be able to correctly identify the inclusion of Action 5 in the BEPS Action Plan as a key milestone in the evolution of the work of the FHTP, noting that while Action 5 forms part of the overall workstream of the FHTP, that work is much broader than just Action 5 and has been ongoing since 1998. Candidates should also make reference to the challenges faced by the FHTP in respect of their work in addressing harmful tax practices.

As the work of the FHTP is extensive, candidates are not required to provide an exhaustive analysis of all areas of the FHTP programme of work. Marks will be awarded where candidates demonstrate a reasonable knowledge of the FHTP workstreams, making reference to the expansion since 1998. As such, there are a number of approaches candidates may take in their answers, and the below represents one possible approach.

Introduction

Harmful tax practices have been at the forefront of the OECDs work plan since the publication of the 1998 Report Harmful Tax Competition: An Emerging Global Issue and this work remains relevant to this day.

The continued importance of the work on harmful tax practices was highlighted by its inclusion in the 2013 BEPS Action Plan as a Minimum Standard (OECD, Action Plan on Base Erosion and Profit Shifting, OECD Publishing, 2013, [p.18]). The primary objective of the Forum on Harmful Tax Practices (FHTP) has been addressing harmful tax competition and promoting fair taxation practices among member countries.

Harmful Tax Competition and Preferential Tax Regimes

Harmful tax competition refers to a situation in which a jurisdiction engages in practices to attract business activity/investment by way of offering preferential tax treatment. Such treatment can be considered unfair or detrimental to the broader tax system globally. Tax competition is not inherently harmful but becomes so when it erodes the tax base of countries and undermines the fairness of the international tax system (OECD, Harmful Tax Competition: An Emerging Global Issue, 1998, [28]). When jurisdictions adopt such preferential tax regimes in order to attract mobile activities, they create a “race to the bottom” (OECD, Harmful Tax Competition: An Emerging Global Issue, 1998, [43]). resulting in a situation where countries spiral down to low corporate tax rates in a bid to outdo each other while failing to produce economic growth.

The OECD’s 1998 report, Harmful Tax Competition: An Emerging Global Issue, identified key factors for determining harmful tax competition by way of preferential tax regimes, which included a zero or low tax rate, lack of transparency, no effective exchange of information, and lack of substantial activities for tax havens. Preferential tax regimes may include features such as reduced tax rates for certain businesses/activities, tax credits or incentives, tax holidays, or tax exemptions (OECD, Harmful Tax Competition: An Emerging Global Issue, 1998, [46]).

Work of the FHTP

The FHTP was established by the OECD in 1998 to review preferential regimes in order to determine if such regimes could be harmful to the tax base of other jurisdictions. Preferential tax regimes have the potential to cause harm by, for example, undermining the integrity and fairness of tax structures, discouraging compliance by taxpayers, and increasing administrative costs and compliance burdens on tax authorities and taxpayers alike (OECD, Harmful Tax Competition: An Emerging Global Issue, 1998, [30]). However, where some but not all of these effects are resent, the degree of harm will vary, hence the need for the work of the FHTP in making such a determination (OECD, Harmful Tax Competition: An Emerging Global Issue, 1998, [31]).

Furthermore, the FHTP has been tasked with monitoring the implementation of Action 5, which is a Minimum Standard in the BEPS Action Plan (Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD, 2015). It aims to combat situations whereby certain jurisdictions create unfair advantages by offering preferential tax regimes or regimes that artificially attract profits without substantial economic activities and builds on the work started by the 1998 OECD report. The Action 5 Final Report, OECD, Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report) reiterates the

underlying concerns of the 1998 OECD report, while also defining two priorities for moving forward: (i) Further effort should be made in respect of transparency, namely enhancing transparency of tax affairs through compulsory spontaneous exchange on rulings related to preferential tax regime and (ii) To reduce the incentives for investment flow with no economic substance, substantial activities for all preferential tax regime should be required.

The current work of the FHTP comprises the following:

- Assessment of preferential tax regimes (non-Action 5). Involves identifying features of such regimes that can facilitate BEPS activities, and therefore have the potential to unfairly impact the tax base of other jurisdictions. The FHTP utilises certain criteria to evaluate preferential regimes, such as ring fencing of specific types of income/activities for preferential tax treatment, and lack of substantial activities required to receive tax benefits which enables them to distinguish between legitimate and harmful tax competition.

- Peer Review and monitoring of Action 5 transparency framework. Involves monitoring the Action 5 transparency framework through the compulsory spontaneous exchange of relevant information on taxpayer-specific rulings which, in the absence of such information exchange, could give rise to BEPS concerns. Such rulings include unilateral APAs, rulings on preferential regimes, permanent establishment rulings, and a catch all provision for any other rulings the FTHP deems relevant in the future. The FHTP is also responsible for the Action 5 Minimum Standard peer review.

- Scheme for exchange on tax rulings (non-Action 5). Involves developing the Exchange on Tax Rulings XML Schema and User Guide, which is a standardised electronic format for the exchange on tax rulings between jurisdictions.

- Review of substantial activities requirements in no/nominal tax jurisdictions (both Action 5 non-Action 5 related). Originally included in the 1998 OECD report but never applied, this global standard means that mobile business income cannot be parked in a zero tax jurisdiction without the core business functions having been undertaken by the same business entity, or in the same location. In doing so, the Inclusive Framework will ensure that substantial activities must be performed in respect of the same types of mobile business activities, regardless of whether they take place in a preferential regime or in a no or only nominal tax jurisdiction (OECD, Action 5 Harmful Tax Practices, 2023).

<u>Changing global tax landscape</u>

The increasing complexity of the global tax landscape has necessitated a stronger focus on reducing harmful competition, in order to maintain fairness and transparency for all. Some of this increased complexity may be attributable to the following:

- Globalisation of business. Multinational enterprises (MNEs) continue to expand their operations across a greater number of jurisdictions, meaning it becomes harder to determine where economic activity and value creation actually occur.

- Digital economy. MNEs have the ability to operate in a jurisdiction without the need for a physical presence, which again makes it harder to determine where economic activity and value creation actually occur.

- Unilateral measures adopted by some jurisdictions. For example, unilateral digital services taxes adopted in certain jurisdictions have the impact of increasing complexity in the global tax landscape. Such unilateral measures can lead to double taxation issues.

- Base Erosion and Profit Shifting (BEPS). The use of tax planning strategies to exploit gaps and mismatches in tax rules and thus artificially shift profits to low/no tax jurisdictions is a key driver of the increase in complexity in the global tax landscape, and one that the OECD BEPS project sought to address. Implementation of rules and standard to address BEPS has increased complexity for jurisdictions and their governments, while managing the application of these rules has increased complexity for taxpayers.

These challenges have directly impacted the work of the FHTP, which has evolved over the years to adapt to the increased complexity posed by harmful tax competition. The impact of this evolution can be seen through the following:

- Enhanced transparency and information exchange. FHTP has increased transparency and exchange of information (EOI). The FHTP now requires more comprehensive information to be provided on preferential tax regimes and also promotes the use of multilateral agreements for EOI. This increases the effectiveness and efficiency of the standard and reduces the burden on jurisdictions.

- Increased substantial activity requirements. The FHTP introduced the modified nexus approach, demonstrating an evolution in how we assign taxing rights. This focus on aligning taxation with substantial activities has been a key focus of the FHTP over the last number of years.

- Regular reviews and updates. The FHTP continues to review and update substantial activity requirements in response to the changing landscape and as new challenges emerge. Flexibility has therefore been a key tenet of the evolution of the FHTP's workstreams. This flexibility is crucial to ensure preferential regimes do not evolve in ways that enable exploitation of any gaps in the rules.

- Widening the scope. The evolving nature of the economy, such as the move towards digitalisation of business activities and the associated work by the OECD on the digital economy, means the FHTP continues to evolve to explore how digital business models interact with preferential tax regimes.

- Capacity building. The work of the FHTP now involves capacity building activities for developing economies, to ensure that member countries have the requisite knowledge and resources to implement changes effectively.

- Increased participation. The FHTP has expanded its network of participating countries, which reflects the growing importance of addressing harmful tax competition. This broader cooperation of states results in increased results in the fight against harmful tax competition.

- Monitoring and enforcement. It is not enough to create rules and standards without monitoring their implementation and effectiveness. The increased focus on peer reviews is a newer element of the work of the FHTP and ensures countries implement recommendations effectively. This enforcement is essential to ensure action.

- Response to new evasion techniques. As the rules on combating tax avoidance and evasion evolve (e.g. through the BEPS project, the work of the FHTP, etc.), so to do the techniques for evasion. The FHTP continuously monitors for new evasion techniques should they emerge, in order to adapt and seek to address challenges in close to real-time.

<u>FHTP challenges moving forward</u>

Despite the significant progress made in addressing harmful tax competition, through the inclusion of Action 5 as a BEPS Minimum Standard and through the significant workload of the FHTP (ss detailed above), the FHTP still faces significant challenges, reflective of the complex and evolving nature of harmful tax practices:

- Implementation. The FHTP must ensure countries implement recommendations and guidelines, particularly those arising as part of the peer review process, while continuing to respect the concept of tax sovereignty in individual jurisdictions. Jurisdictions cannot become complacent with carrying recommendations indefinitely.

- Adaptive practices. As tax avoidance tactics evolve, the FHTP must continuously monitor and adapt workstreams to address emerging concerns.

- Global cooperation. The effectiveness of the FHTP depends on international collaboration, and so ensuring that countries work together to combat harmful tax competition is crucial. The FHTP must continue to expand its global reach and monitor harmful tax competition, for example through an increased number of jurisdictions being covered by the peer review process.

- Differing interests of member countries. Countries have different economic and political interests, which can cause difficulty in developing common standards and getting countries to adopt such standards. This is particularly true for jurisdictions that have historically benefited from preferential tax regimes or for those that argue that tax competition is inherently not harmful.

- Resource constraints. Not all jurisdictions have the requisite resources or expertise to effectively implement and enforce changes (such as developing economies), which can hinder the practical implementation of FHTP recommendations.

- Balancing tax competition and fairness. Striking the balance between promoting healthy tax competition which fosters economic growth and avoiding harmful tax competition can be challenging. The FHTP must continually defend the moment at which fair tax competition becomes harmful, i.e. when it moves from being a mechanism to drive economic growth and into being a mechanism to poach another jurisdictions tax base (OECD, Harmful Tax Competition: An Emerging Global Issue, 1998, [31]).

- Digital economy. The work on the digitalisation of the economy is ongoing and creates its own challenges in adapting tax practices. Determining where value is created in a global, digital business and aligning taxing rights with this value creation is a complex process.

- Opposition from stakeholders. Tax advisory firms and MNEs may resist reforms that reduce their ability to minimise the effective tax rate. Such opposition may influence the views of certain jurisdictions and create obstacles to change.

Conclusion

While the work of the FHTP has significantly evolved since its inception in 1998 – largely in response to the growing complexity of the area of harmful tax practices - and this evolution has proved successful in addressing harmful tax competition, the global tax landscape continues to increase in complexity, and the work of the FHTP to eliminate harmful tax competition is an area that must also continue to evolve. While the work of the FHTP initially consisted of a broad mandate to ""develop measures to counter the distorting effects of harmful tax competition on investment and financing decisions" (OECD, Harmful Tax Competition: An Emerging Global Issue, 1998), the work has since expanded into specific, actionable workstreams to meet that initial mandate, such as the programme for reviewing preferential tax regimes. In addition, with the establishment of the Inclusive Framework in 2016 and the commitment of its participating countries to implement BEPS Minimum Standards (of which Action 5 is one), the work of the FHTP has expanded globally to cover a wider array of jurisdictions. As a result, the FHTP has become more robust, adaptable, and responsive in order to meet emerging challenges head on. Its workstreams now address a broader range of issues while ensuring the principles of transparency, substance and fairness remain at the forefront of global tax discussions.

But there are still a number of challenges the FHTP faces in its mission to combat harmful tax practices. These challenges range from political and economic interests to practical implementation issues and continuing to stay alert for new and as yet unknown tactics for tax evasion and avoidance. Overcoming these challenges requires continued commitment from Inclusive Framework member countries, a willingness to adapt and implement changes, and strong international cooperation. Although jurisdictions have the right to tax sovereignty, it is in the best interests of both taxpayers and tax administrations to counter harmful tax competition and foster healthy economic growth in a way that does not enable tax avoidance or evasion.

Question 4

Tax treaties (DTAs) offer a range of tax advantages that countries agree to grant to each other in order to prevent double taxation and eliminate the barrier that double taxation would create to cross-border trade, investment, movement of persons etc. e.g. exemption from tax in one or other of the countries; reduced withholding taxes on dividends, interest and royalties, and a foreign tax credit or exemption to eliminate double taxation (Baker, 2013). More recently the text of the OECD MTC 2017 has adopted a new title and incorporated a newly worded Preamble that outlines that the purpose of the OECD MTC is not limited to the elimination of double taxation and that the contracting states do not intend to create opportunities for non-taxation and reduced taxation through tax avoidance or evasion, which includes through DTA shopping arrangements aimed at obtaining reliefs provided in this DTC for the indirect benefit of residents of third states.

It is clear from the stated objects of the OECD MTC 2017 that there is a concern that DTAs may be accessed by persons who are not the intended beneficiaries of the relevant DTA's reliefs and exemptions. Such behaviours are considered to be undesirable because they may lead to, for example: a breach of the principle of reciprocity by extending DTA benefits negotiated between Contracting States (CS) to residents of a third state in a way the CS did not intend. This in turn causes third states (i.e. a non-CS) to have less incentive to enter a DTA with the jurisdiction of source since their residents can indirectly access DTA benefits, without an obligation on such third states to provide reciprocal benefits (OECD on Action 6). However, notwithstanding the importance of minimising opportunities for DTA shopping, it is also necessary to ensure that instances of double taxation are reduced and cross border trade is thereby facilitated whilst ensuring that the position of taxpayers is as certain as possible.

The question may be answered in a number of different ways and the following provides one possible schematic that considers how effective the text of the OECD MTC 2017 is in addressing improper use of DTCs (DTA shopping) and is focused upon a consideration of: the Preamble; aspects of Article 1; the entitlement to benefit provisions in Art. 29 and the beneficial owner requirement in Arts. 10 – 12. Whilst these elements of the OECD MTC 2017 are considered separately below it is important to note that both the Preamble and these provisions may interact in such a way that they apply together and some of the discussion below may be relevant to one or more of these elements.

Definition of DTA shopping: There is no universally accepted definition, thus, whilst the OECD (Glossary of Tax Terms) refers to DTA shopping as "[a]n analysis of DTA provisions to structure an international transaction or operation to take advantage of a particular DTA, the term is normally applied to a situation where a person not resident of either of the DTA countries establishes an entity in one of the DTA countries in order to obtain DTA benefits", the OECD has also cautioned that the explanation of the terms is very condensed and may not be complete and is not considered to reflect the official position of the OECD In interpreting tax terms for example in a DTA context. For the purposes of this suggested solution, DTA shopping is taken to be behaviour that results in benefits of a DTA being obtained indirectly by residents of third states where this is unintended by the relevant contracting states.

History of DTA shopping: The USA was concerned with DTA shopping in the 1960s and introduced a policy of including limitation of benefit provisions in its DTAs. The OECD produced some work on the topic in 1986 (CFA, "DTCs and the use of base companies" and "CFCs, DTCs and the Use of Conduit Companies"). In 2002, a further report was issued this time entitled "Restricting the Entitlement to DTA Benefits" and the following year the Commentary on Article 1 was amended to include sample provisions that could be included in contracting states' DTAs to counter abusive DTA shopping. However, the OECD did not include such a provision until the 2017 update of the MTC. As a direct consequence of BEPS Action 6, the OECD MTC 2017 includes a Preamble that refers to DTA shopping and introduces an anti-abuse rule in Article 29.

Preamble: by stating that the objectives of the OECD MTC 2017 include preventing opportunities for double non-taxation or reduced taxation through tax evasion or tax avoidance, the OECD MTC 2017 sets out its position on the improper use of DTCs, making it clear that it seeks to prevent arrangements leading to such outcomes including treaty shopping arrangements aimed at obtaining reliefs provided in the Convention for the indirect benefit of third jurisdictions. This is important because under Art. 31(2) of the Vienna Convention on the Law of Treaties (VCLT), the context of a treaty for purposes of interpretation includes its Preamble and as such should be considered in interpreting the treaty. Therefore, the objectives espoused in the Preamble to the OECD MTC are important in interpreting and applying the provisions of the convention, such that the OECD MTC should not be construed in a manner that would encourage tax avoidance or evasion.

Since the recommendation for the introduction to the OECD MTC of a Preamble in the BEPS Action 6 report, there has been widespread adoption of the recommendations of Action 6. The Preamble wording ("[i]ntending […] third States)") forms part of the BEPS minimum standard and as such the relevant Preamble wording modifies all relevant DTAs that all relevant pairings of contracting jurisdictions have determined to be "covered tax agreements". (CTAs). As at 31 May 2022, more than 1,050 DTAs (that are CTAs) concluded by members of the Inclusive Framework comply with the minimum standard in Action 6, (OECD, Prevention of Tax Treaty Abuse – Fifth Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6, OECD/G20 Base Erosion and Profit Shifting Project, 2023).

Despite the significance of the Preamble, the Preamble alone is not sufficient to tackle the menace of improper use of DTAs, a priori DTA shopping, as the Preamble is to be interpreted in the context of the rest of the OECD MTC provisions. There is support for the view that just because the prevention of tax avoidance is now listed among the objectives of the OECD MTC this does not mean that a DTA must be construed to achieve that objective (De Broe, 2017). The justification for this view is that the object and purpose of a DTA is only one of the elements that need to be considered when interpreting DTA terms and it cannot override the DTA's clear substantive provisions (De Broe 2017). In other words, the Preamble should not be used to deny DTA benefits beyond the text or scope of the potentially applicable treaty anti-avoidance provisions (Danon, 2017). This approach can be seen in Alta (citation below) where the Canadian court was not prepared to "read in" substance requirements in relation to Articles 1 and 4 when there was no such explicit text in those provisions in the relevant DTA. However, it is to be noted that the DTA in Alta was a pre-MLI DTA and so the objects of the DTA did not refer to DTA shopping, etc. It is possible that a "reading in" of substance requirements may have been more likely had different Preamble been included in the relevant DTA.

Whilst it could be said that there may be DTA provisions that leave open opportunities for DTA shopping, the operation of both specific (e.g. beneficial owner in Articles 10-12) and general anti-abuse provisions (e.g. Article 29) means that the objects contained within the 2017 Preamble are significantly reinforced. It is perhaps too early to say how effective the new Preamble will be when considered alongside both specific and general anti-abuse rules in DTAs that are MLI modified (i.e., covered tax agreements) but arguably when looked at in isolation the Preamble may not be considered to be sufficient to fully address DTA shopping and as such must be read jointly with the provisions of the OECD MTC.

Article 1 - Article 1(1) of the OECD MTC 2017 provides the category of persons to whom the provisions of the OECD MTC (or the provisions of any Double Tax Convention (DTC) based on the MTC) apply. Under Article 1, the DTA is applicable to persons who are residents of one or both Contracting States (residents being defined under Article 4). In 1977 a short section was added to the Commentary of the OECD MTC in 1977 on the "Improper Use of the Convention" with the CFA noting that there was a need to further consider such issues (OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, 2014, [8]). As a result of a 1986 report on Conduit Companies (OECD, Double Taxation and the Use of Conduit Companies, 1986), further changes to the Commentary were made in 1992 including the addition of alternative provisions in [13]-[19].

While the OECD MTC recognizes residence as a tax nexus, as seen from the Commentary on Art. 1, [1], the mere fact of being a resident of a Contracting State does not automatically entitle a person to DTA benefits. It is important to note that the Commentary on Art. 1, [1] was amended to its current form in November 2017, post outcomes from the BEPS process, which had made recommendations on measures to tackle tax avoidance including improper use of DTAs. Article 1(2) seeks to ensure that DTA benefits are not granted where neither CS treats the relevant income under its domestic law as income of an entity or arrangement as the income of one of its residents. This extends to situations where CS cannot verify whether the relevant person is entitled to the relevant DTA benefits (Commentary on Article 1(2), [5]). Whilst this provision is targeted at fiscally transparent entities, it can be described as supporting the proposition that benefits are, prima facie, intended to be accessible to residents of one of the CS. Article 1(3) provides a general principle that (unless an exception applies) CS are free to tax their own residents. Exceptions include where it is anticipated that the ability to tax one's own residents may be affected by the operation of the DTA include Article 24, Article 7(3), Article 9(2) and Article 23A and 23B.

Various countries have made a reservation on Article 1(3) e.g. France, Germany, Hungary and Ireland (Reservations on Article 1, [117]). Notably, the US has a reservation that applies "with certain exceptions, to tax its citizens and residents, including certain former citizens and long-term residents, without regard to the Convention" (Reservations on Article 1, [111]). This then again reinforces the idea that the OECD MTC 2017 operates on the basis that the resident state may tax their residents (i.e. residence based taxation), albeit with some modifications to this position where the objectives of the DTA would be otherwise frustrated (e.g., relief from double taxation). Clearly, the definition of resident in Article 4 interacts with Article 1 and as such these articles may be considered together.

In a recent Canadian case, the majority (6:9) in Alta Canada v. Alta Energy Luxembourg S.A.R.L 2021 SCC 49 (Alta), determined that (i) the object, spirit and purpose of Articles 1 and 4 is to allow all of the persons that are residents under the laws of one of the CS to claim benefits under the DTA if their residence status could expose them to comprehensive liability in that CS and (ii) the objectives of the relevant DTA were to prevent double taxation and by so doing to facilitate cross-border trade. Whilst the Alta case considers a pre-MLI DTA and also Article13(4) and broadly whether a "substance" approach should be read into the relevant DTA, the case provides an example of the tension between the denial of DTA benefits in cases of "suspected" or "real" instances of improper use of DTAs, and therefore DTA shopping, and the need to rely on DTA provisions to eliminate double taxation and facilitate cross-border trade. The majority was not prepared to read in such a requirement into Article 13(3) and focused upon the competing objectives of a DTA. This approach contrasted with the view of the minority in Alta who considered that the object, spirit and purpose of the DTA provisions were to assign taxing rights to the state with the closest economic connection (broadly, a "substance" requirement) to the taxpayer's income and because Alta had no genuine

economic connection with Luxembourg it could be thought of as a "a mere conduit interposed in Luxembourg for residents of third party states to avail themselves of a tax exemption under the treaty," and accordingly this was a case of improper use of a DTA (Alta, para 177).

Other cases have arrived at different results and have considered the need for "substance" requirements to be read into DTA provisions (e.g., Methanex). This reading into existing DTA provisions of a "substance" requirement or similar (Methanex and Molinos) or not (Alta) may be influenced by the wording of the relevant Preamble and as such it is hard to draw any conclusions as to the effectiveness of Article 1 alone as a means of preventing DTA shopping as it is arguable that once cases are brought before the courts that are MLI modified then it is at least possible that such a "substance" requirement may be read into the relevant DTAs through a combination of the MLI Preamble and also the relevant general anti-abuse rule (Article 7 MLI) where this is not already happening.

Although it is hard to draw any conclusions as to the effectiveness of Art. 1 alone as a means of preventing DTA shopping, Art. 1 is one of the key provisions in the OECD MTC through which the intention expressed in the Preamble to the MTC is put in effect.

Beneficial owner (BO) requirement in Articles 10 – 12 - Note that the following focusses on Article 10 but the concept of BO is found in Articles 10-12. The concept of BO was introduced into the OECD MTC in 1977 to address basic DTA shopping situations (OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, 2014, [8]). although the BO requirement is seen by many as the initial response to DTA abuse, whether it was initially introduced in the OECD MTC for this purpose and whether the requirement is really a genuine Specific Anti-Avoidance Rule (SAAR) or merely a condition of application of the distributive rules in Arts. 10 – 12 is controversial (Danon, 2017 and Kuzniacki, 2023). Candidates may note that cases that involve the BO concept in a DTA setting are likely to pre-date the MLI.

Before the publication OECD MTC 2017, there was some conflicting case law on the scope of application of the BO requirement. On the one hand, there was the view that the BO requirement is narrow in its scope of application as it applies specifically to conduit company situations involving the interposition of a recipient who is obliged to pass on the benefit of the dividend to someone else - and therefore may not be capable of addressing or dealing with more complex DTA abuse scenarios, such as abusive restructurings (Danon, 2017 and Prebble et al., 2014) or the more recent dividend stripping/Cum-Ex transactions involving the movement of a share position just before the dividend payment date potentially leading to multiple refunds of WHT that is only paid once (however, see the recent German Federal Fiscal Court's (Bundesfinanzhof) recent ruling, which included a consideration of whether a pension fund was a BO in relation to the relevant shares and determined that it was not and so could not claim a WHT refund, (Heinrichs, 2022).

Some cases interpreting the BO requirement narrowly, have held that there was a distinction between the BO requirement and general prohibition of abuse provisions because the BO requirement only called for an objective element, i.e. whether there was an agent, conduit or nominee between the payer of the dividend and the final recipient, and did not include a subjective element, i.e. underlying purpose/reasonableness of the arrangement or transaction (see the Swiss Court decision in CH: Federal Tribunal (FT), 5 May 2015, ATF 141 II 447 (Total Return Swap case). See also: Prévost Car Inc. v. The Queen, 2008 T.C.C. 231 and Canada v. Prévost Car Inc., 2009 DTC 5721, 2009 FCA 57) and Velcro Canada Inc. v. The Queen, 2012 TCC 57 cases where the Canadian courts determined that the term "BO" is not an effective tool to challenge situations the government considers to be DTA shopping aside from mere nominees cases for which it was initially intended.

On the other hand, in some jurisdictions, the BO requirement has been described as having been construed more broadly such that the connection between the BO requirement and DTA abuse has been more clearly established (see the French case of Royal Bank of Scotland case Conseil d'État (CE), 29 Dec. 2006, No. 28314, where the court considered that a UK bank was not the BO (rather it was the US parent): of a usufruct payment because (i). the sale of the usufruct was a disguised loan made by the UK bank to its US company), with the French subsidiary reimbursing the loan to the UK bank for the US company through the payment of dividends and (ii) the temporary cession of the usufruct in respect of non-voting preferred shares was an arrangement made with the only intention of obtaining DTA benefits).

Other examples where the approach of the courts has been described as effectively introducing a purpose test into the BO concept e.g. in the Real Madrid cases (a series of Spanish cases) where it was decided that royalties paid from Spain to Hungarian companies that were then redirected to residents of numerous other countries where not paid to the Hungarian companies as BO and so WHT was required to be withheld (AN 18 July 2006, JUR/2006/204307. JUR/2007/8915, 1110/2003 And JUR/2007/16549, AN, 10 NOV 2006, JUR/2006/284679, AN, 20 July 2006, JUR/2007/16526, AN, 13 Nov 2006, JUR 2006/284618 And AN, 26 Mar. 2007, JUR/2007/101877). (Hagmann, 2017). These "wider" approaches to interpreting BO have been described as blurring the role of BO and anti-abuse rules in a DTA context. The concept of BO has been criticised as not exhibiting legal certainty ("a strange tax animal"; having a "malleable nature" with tax authorities having an unjustifiably "broad, economic and anti-abuse

understanding of the concept") (Kuzniacki, 2023). Notwithstanding these criticisms, it is perhaps unlikely that the BO concept will "cease to be a potent anti-abuse tool in the hands of the tax authorities" (Kuzniacki, 2023) any time soon. As noted above, when considering the OECD MTC 2017, Articles 10-12 can be described as working together with the Preamble, Article 1 (and Article 4) and the general anti-abuse rule in Article 29 to limit the beneficiaries of DTA benefits to those intended to benefit from the contracting states' entering of the relevant DTA.

Art. 29 & entitlement to benefits: The Principal Purpose Test (PPT) and Limitation of Benefits (LOB) recommended as part of the Action 6 report, as with the Preamble, have been widely adopted by members of the BEPS IF. According to the latest peer review on the implementation of Action 6 Minimum Standard, as of 31 May 2022, more than 2,385 agreements concluded between members of the Inclusive Framework are either compliant, subject to a complying instrument, subject to steps taken by at least one treaty partner to implement the minimum standard, or the object of a general statement by one treaty partner that it intends to use the detailed LOB, together with a mechanism to address conduit arrangements, to implement the minimum standard in all its bilateral agreements (OECD, Prevention of Tax Treaty Abuse – Fifth Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6, OECD/G20 Base Erosion and Profit Shifting Project, 2023). Beyond its widespread adoption, perhaps, the most significant point that works in favour of the potency of Art. 29 for addressing improper use of DTAs is the extent of the scope of Art. 29, which is so broad that it provides an opportunity to address forms of DTA abuse not addressed by other provisions of the OECD MTC aimed at tackling DTA abuse, including the LOB rule (Buriak, 2019). The following considers the PPT as it is the most widely adopted of the tests.

Article 29(9) applies notwithstanding any other provisions of the OECD MTC and as such it complements the operation of other rules to address DTA abuse. The PPT can be described as being wide in scope, which may be advantageous but may also disincentivize genuine business transactions. By providing that DTA benefits be denied where one of the principal purposes of an arrangement is the obtaining of DTA benefits, Art. 29(9) fails to recognize the fact that a tax benefit may be one of several genuine business and commercial reasons necessitating that arrangement, thus making it easier for tax administrations to assume abuse and deny DTA benefits to bona fide business arrangements (Danon, 2017). In addition, while the widespread adoption of the provisions of Art. 29 (noting inclusion of an anti-abuse test in a CTA is part of the Minimum Standard) means to some extent that there will be a broadly consistent approach in the application of the Art., there appears to be some uncertainty as to the interaction between the objective purpose threshold of the PPT and the potential for the test to include a subjective element. For instance, the PPT provides for a "reasonableness" criterion in determining whether one of the principal purposes of an arrangement is to obtain DTA benefits. However, Art. 29 does not make provisions on circumstances when it would be reasonable to draw this conclusion, thus leaving it open to the discretion of tax authorities. While the Commentary to Art. 29 [e.g., 182] attempts to provide examples where it might be reasonable to conclude that one of the principal purposes of an arrangement is to obtain DTA benefits, these examples do not cover all possible scenarios and the determination of reasonableness ultimately falls within the discretion of tax authorities. The foregoing and comparability concerns between Art. 29 and domestic anti-avoidance provisions (EU Law, for instance provides for a "main purpose" requirement as opposed to the OECD MTC's "one of the principal purposes" requirement and the extent to which it is possible to read in a subjective element into the PPT have led some commentators to opine that there is an inherent conceptual difficulty in applying the PPT rule and this may result in increased levels of uncertainty. Such uncertainties may then impact the effectiveness of Art. 29 for addressing improper use of DTAs in practice (e.g. Danon 2017 and Buriak 2019).

Whilst a broad test may well have been necessary from a practical level i.e. in the interests of compromise and reaching political consensus, it has been suggested that a better, more clearly defined anti-abuse standard would be more effective for addressing improper use of DTA e.g. making the PPT more effective may require further work clarifying the scope of the PPT and extending Peer Review to include domestic GAARs / judicial doctrines; (Jimenez, 2022). The likelihood of such initiatives being taken on is itself uncertain but it is at least possible that the benefits may be denied where the "shall not be granted" wording applies to a CTA and so the PPT may have "punitive consequences" (Duff, 2018).

<u>Conclusion</u>

It is arguably too soon to be certain whether the updates introduced to the OECD MTC 2017 because of the BEPS project has led to significant improvements in the effectiveness in addressing the improper use of DTAs by preventing DTA shopping. As has the OECD MTC 2017 includes provisions that operate so as to impose certain limitations on persons and situations in which DTA benefits may be granted under the OECD MTC 2017, these provisions may be viewed as operating together to increase the likelihood that instances of DTA shopping are prevented. However, each of these provisions are not without their shortcomings and there is a view that not all of the provisions are necessary (e.g. "It is doubtful that the inclusion of a PPT in a [DTA] is necessary", Rust, 2022 citing Lang, 2014). As the analysis above shows, while the Preamble to the OECD MTC 2017, Art. 29, and the beneficial owner requirement in Arts. 10 – 12 all address improper use of DTAs to some extent, factors such as their restrictive scope and uncertainty surrounding their application leave room for drafting improvements, which in turn may increase the effectiveness in preventing DTA shopping. However, it is also clear that given that the Preamble and PPT are relatively recent additions to the OECD MTC, a practical assessment of their effectiveness may be difficult especially

as a lot of jurisdictions (as seen in the latest peer review report on Action 6) are still implementing the provisions and navigating the process of making them part of their tax law. It may therefore be too early in the process to assess the extent to which these provisions are effective for addressing improper use of DTAs.

Question 5

Introduction

Historically, the United Nations (UN) has been involved in international tax matters through the work of its Committee of Experts on International Cooperation in Tax Matters (initially the Ad Hoc Group of Experts on International Cooperation in Tax Matters) (the UN Tax Committee). Originally set up to promote the conclusion of tax treaties between developed and developing countries, the UN Tax Committee is reputed for its "developing country centric" approach to international tax issues and is responsible for working on and drafting the United Nations Model Double Taxation Convention between Developed and Developing Countries (the "UN MTC"), Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries and the UN Transfer Pricing Manual for Developing Countries. Being "developing country centric", a large part of the work of the UN Tax Committee has been focused on international tax issues affecting developing countries. Recently, there have been calls from some of those developing countries (specifically the Africa Group led by Nigeria) for the UN to become more directly involved in ongoing global tax reform discussions.

Overview and background to calls for more UN participation in international tax matters

In November 2022, Nigeria (on behalf of the U.N. member states that comprise the Group of African States) proposed Resolution 77/244 that sought the direct involvement of the UN in global tax reform discussions, including the international tax negotiation framework, to ensure inclusive tax cooperation and coordination. Proposal for the adoption of Resolution 77/244 came on the heel of the failure of some developing countries (Nigeria, Kenya, Pakistan, and Sri Lanka) to sign up to the OECD/G20's Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy adopted in October 2021, citing concerns about revenue leakage and local economic circumstances that made the two-pillar proposal unfavourable for developing countries. Resolution 77/244 was adopted by the UN General Assembly on 30 December 2022. In its essence, Resolution 77/244 argues for a deeper and broader commitment of UN Member States to using international cooperation, through fiscal harmonization and/or coordination measures, to allocate the global profits of multinational enterprises (MNEs) among tax jurisdictions. It mandates the UN Secretary-General to consult with UN member states, the UN Tax Committee, the Platform on Collaboration on Tax (PCT) and other relevant stakeholders in analysing the status of international cooperation (including an analysis of the work of the UN Tax Committee, the OECD/G20 Inclusive Framework on BEPS) and to offer alternatives to increase inclusion and effective participation, especially by developing countries.

The resolution also mandates the UN to prepare a report of its analysis including recommendations and options for strengthening the inclusiveness and effectiveness of international tax cooperation and to consider the report at the 78th session of its Second Committee (the Economic and Financial Committee, which oversees economic and financial matters including international taxation and the work of the UN Tax Committee). On 26 July 2023, the UN Secretary-General's report on "Promotion of Inclusive and Effective International Tax Cooperation at the United Nations" was published. The report found that there were certain barriers to engagement in the OECD's process for Pillars One and Two and recommended three options for enhancing international tax cooperation namely: (i). creation of a legally binding multilateral agreement that determines which countries get to tax which profits of multinational companies (Option 1); (ii). a legally binding agreement that sets a process for incremental changes to tax rules that are less comprehensive than the first option (Option 2); and (iii). a non-binding approach to setting tax norms where voluntary bilateral or regional approaches are the implementation mechanisms (Option 3). Recently, in November 2023, at the 78th session of the Second Committee, the UN voted in favour of commencing work on a UN framework convention on international tax convention and for the establishment of a member state-led, open-ended ad hoc intergovernmental committee to draft the terms of reference for the framework convention. The votes in favour (from 125 countries) where mostly from developing countries while votes against (48 countries) were from developed countries. Whilst it is open to candidates to cite these more recent developments (July and November 2023) in their answers there is no requirement to so do.

Importance of inclusivity in international taxation

Inclusivity implies that all countries effectively participate in developing the rules that affect them, by right and without preconditions. It implies effective participation which means that procedures must consider the different needs and capacities of all countries to meaningfully contribute to the norm-setting processes, without undue restrictions, and support them in doing so. All countries should have an opportunity to participate in agenda-setting, debates, and decision-making, either directly or through country groupings, according to their preference, while preserving their tax sovereignty which allows countries the right not to participate in a process and to choose not to be bound by the outcome thereof. According to the UN, only such participation in international tax efforts, which is freely chosen, ensures that countries can provide an input to and take ownership of the substantive outcomes, thereby confirming their legitimacy and enabling a fully inclusive and more effective system for all stakeholders (United Nations, Promotion of Inclusive and Effective International Tax Cooperation at the United Nations: Report of the Secretary-General, 2023).

A country's domestic tax system reflects its values and national priorities and is a fundamental aspect of its exercise of national sovereignty. Participation in the international tax system, e.g., entering tax treaties, tend to limit countries exercise of its tax sovereignty. Where there is no treaty in place, countries retain unconstrained taxing rights over most of the income earned in their jurisdictions. A country's decision whether to restrict its unfettered taxing rights by entering tax treaties in exchange for facilitating investments in its jurisdiction, eliminating double taxation, and cooperating with its treaty partners to address concerns of tax base erosion, is an exercise of tax sovereignty. Such tax sovereignty implies that a country has the right not to participate in each process and to choose not to be bound by the outcome of that process. According to the UN Secretary-General's report on promotion of inclusive and effective international tax cooperation at the United Nations (2023), only such participation in international tax cooperation efforts, which is freely chosen, ensures that countries can provide an input to and take ownership of the substantive outcomes, thereby confirming their legitimacy and enabling a fully inclusive and more effective system for all stakeholders.

Will a UN-led global tax reform initiative promote greater inclusivity and effective international tax cooperation compared to OECD initiatives? The UN's broad membership does work in favour of promoting inclusivity in international tax policy negotiations, thereby enhancing international tax cooperation. Compared to the OECD's 38 member countries, the UN has 193 Member States (nearly all the countries of the world), and each member has a vote. With its membership base, the UN could achieve greater participation in international tax reform discussions, put member countries at ease about the transparency of the decision-making structures and place member countries on an "equal footing" procedurally, since each member country would have an equal right to be heard on their opinion regarding specific issues. This would help to address concerns about the non-inclusive nature of the OECD. While there has been significant acknowledgement of the impact that the OECD/G20 BEPS has had on global tax reforms, there have been consistent concerns that lower-income countries have not had an equal footing in negotiations regarding the OECD/G20 BEPS program, compared to their higher income counterparts (Foss, 2023). One example of such commonly cited concerns is that many developing countries have joined OECD international tax reform initiatives like the Inclusive Framework, not with the intention of influencing tax policy standards, but rather in pursuit of technical assistance or prestige, or under coercion from the European Union through the EU's blacklisting process (Christensen et al, ICTD, 2020). The UN offers member countries the freedom to exercise a choice to participate in international tax reform negotiations and to freely decide to extent to which of such participation.

Certain organisations believe that lower income countries are systematically disadvantaged by the absence of a universal or broadly inclusive forum or body for global coordination on international taxation matters, which has led to the process of setting international tax norms and standards being largely led by the OECD and the G20, which has long been considered to be primarily focused on the 38 large, well-funded, developed OECD countries (Foss, Africa Group (2022) & Katz-Pearlman). Short timelines which leave developing countries with inadequate timeframe to evaluate the risks of adopting proposed policies/standards; language barriers; lack of technical resources to ensure effective participation in negotiations, inadequate representation of developing countries on OECD technical working groups, and neglect of developing countries in final work programme outputs (e.g., significant economic presence principle proposed by the G24 countries to the Pillar 1 discussions are alleged to have not been considered in the OECD's final output for Pillar 1) are some of the systematic challenges which a UN-led initiative would address. The need for developing countries to have a voice and be able to raise and have their specific concerns addressed is precisely the reason that Resolution 77/244 seeks the involvement of the UN, which has historically protected the interests of developed and less-developed jurisdictions through the work of the UN Tax Committee, which has historically included pushing for more source state taxing rights to improve domestic resource mobilization for developing countries (e.g. UN Model Tax Convention and Art. 12B of the Convention) and has since been seen as the voice of developing jurisdictions.

On the other hand, the OECD believes that it has put in efforts to address barriers to participation for developing countries, especially through the BEPS Inclusive Framework (IF) platform. The IF provides an inclusive platform for international tax cooperation on business taxation. It brings together 142 countries in total, who participate on an equal footing and the invitation remains open for other countries to join. The governance of the IF is diverse, the Co-chairs and two Vice-Chairs are from developing countries, as are half of the Steering Group. In addition, there are a range of actions (including briefings, consultations, and capacity building for developing countries) undertaken to empower all countries to participate meaningfully in the IF (OECD submission in response to call for written inputs on the resolution on the promotion of inclusive and effective tax cooperation at the United Nations, March 2023).

On the international tax cooperation front, the UN believes that effective international tax cooperation is predicated on an inclusive process. If countries have opportunities to participate in agenda-setting, debates and decision-making either directly or through country groupings, they are more likely to collaborate with other countries to implement the outcome of their deliberations and decisions (UN Sec. Gen.'s Report, 2023). International tax cooperation for development has featured prominently on the UN's development agenda over the years. In 2013, the ECOSOC adopted a resolution making intergovernmental deliberations on international tax cooperation an annual event instead of on an ad hoc basis (UN ECOSOC Website). In addition, the UN Tax Committee which is tasked with work on international tax cooperation has among its core mandate, the review and update of a Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries, enhancing and promoting cooperation

among national tax authorities and developing commentaries and appropriate recommendations on international tax cooperation. On the other hand, the strides made by the OECD/G20 in facilitating international tax cooperation cannot be ignored. The OECD/G20 initiatives on global tax reforms have brought jurisdictions together in an unprecedented manner to work collaboratively on international tax matters. The Inclusive Framework on BEPS (IF) was specifically developed to allow interested countries and jurisdictions work with OECD/G20 members on developing standards on BEPS related issues, and to review and monitor the implementation of the whole BEPS package. Improvements and strides in exchange of information, dispute resolution and the MAP process, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (the MLI) and adoption of the BEPS 4 minimum standards, are testament to the progress that the work of the OECD/G20 on international tax reforms has achieved (see OECD submission in response to call for written inputs on the resolution on the promotion of inclusive and effective tax cooperation at the United Nations, March 2023).

Currently, opinions are divided as to whether a UN-led global tax reform initiative would promote greater inclusivity and effective international tax cooperation. On the one hand, certain commentators appear to take the view that a UN-led initiative is the best option as the UN is considered to be the only intergovernmental organization where all voices can be heard as it considers the great differences in economic and social circumstances across countries, the rising economic power of big emerging markets and the twin global challenges of coping with the COVID-19 pandemic and moving forward on the 2030 Agenda of the Sustainable Development Goals (Eden, 2023). The fact that the UN constitutes a broad membership of 193 member states, who freely participate at the UN, may eliminate concerns around the motive for member country participation in international tax deliberations and so increase inclusivity. In addition, the fact that the UN Tax Committee consists of 25 members serving in their personal capacities, eliminates the seeming bias that the OECD is ordinarily set up to protect the interest of its 38, G20 members. More recently, the fact that the UN Resolution on the Development of a Framework Convention on international tax cooperation received an overwhelming number of votes in support (125 member countries voted in favour of the framework convention) has been cited as evidence that the work of the OECD may not be as widely supported as initially thought.

On the other hand, there is the view that a UN-led initiative would derail the progress that has been achieved on inclusivity and cooperation in the international tax space so far by the work of the OECD. News reports have pitched ongoing events in the international tax space as some kind of “war” between the UN and the OECD. Currently, countries are polarized regarding their position on the push for the UN to take over the work on global tax matters. While developing countries are championing the cause, developed countries (especially the US and EU countries) are leaning more in favour of having the OECD finish the work it started, expressing concerns that the UN initiative has the potential to undermine the OECD’s work, especially considering the advanced stage of the OECD’s efforts (Katz-Pearlman, 2023). Such polarization may lead to greater uncertainties for taxpayers and in the most extreme case, leave taxpayers stuck navigating different standards in parallel for any given cross-border transaction (Bunn, 2023).

Conclusion

As the OECD/G20 work on BEPS and the two-pillar solution for addressing tax challenges arising from the digitalization of the economy has shown, coordinating an international agreement on tax policy is extremely difficult, as countries have varying motivation and objectives that they hope to achieve from the process. A UN led global initiative on tax reforms may not necessarily make the process easier. The complexities of the political landscape around global international tax matters make it difficult to make a clear-cut case for a UN led global tax initiative or that such an initiative will promote greater inclusivity and effective international tax cooperation, especially since such an initiative would involve largely the same players as the OECD led initiative and their position on issues of international tax are not likely to change overnight. The three options suggested in the UN Secretary General’s report each depend on differing levels of political consensus among members, and it is easy to see how negotiations may stall due to differences in political ideology and policy preferences even at the UN. Despite this, there is some optimism that a UN-led initiative may afford countries a fresh opportunity to agree on an equal footing on a framework: that promotes international tax cooperation; establishes a framework that is robust enough to meet the needs of developing countries; accommodates differences of approach; and provides procedural transparency which taken together may make clearer how all countries can influence the setting of international tax policy (Hearson, 2023).

PART B

Question 6

Whilst there a number of issues to address in this question, the focus is on the appropriate delineation of Article 6 OECD MTC 2017 and its interaction with a number of other distributive provisions within the OECD MTC 2017. The following considers the operation of Article 6 and then addresses the various circumstances in the fact pattern in order to determine whether Geronia and / or Fragonia is likely to be entitled to tax the relevant amounts of income / gains under the Fragonia-Geronia DTA and under which DTA provision in the relevant tax year(s). The situation with respect to the capital levy is considered separately below but can be incorporated into a consideration of the position in each tax year.

Article 6

Article 6 OECD MTC 2017 (and UN MTC 2017) operates so to allocate to the state in which immovable property (as opposed to movable property) of a non-resident (Angelica) is situated (Fragonia) the right to tax the income generated by the use of that immovable property. The relevant immovable property must be situated in the other contracting state (Geronia) and so does not apply where it is situated in a third state or in the resident's state (Commentary on Article 6, [1]) Article 6 has been described as providing an open distributive rule in that it leaves open both the residence (Fragonia) and situs state (where the immovable property is situated i.e Geronia) to tax the relevant income (Reimer, 2022). The residence state (Fragonia) will need to either exempt the relevant income from tax in the hands of its resident (Angelica) or provide a foreign tax credit. Whilst initially both the Mexico (1943) and London (1946) Draft Model Tax Conventions provided that the state of situs had the exclusive right to tax such income, this was changed in 1959 when the then OEEC presented a "more elaborately worded provision", which went on to form the basis of the OEEC/OECD 1963 MTC and subsequent Models. The provision is described as having a structure and numerous textual details that have remained unchanged since that time (Reimer, 2022). Article 6 provides a partial definition of immovable property by both referring to the meaning under domestic law of the country in which the immovable property is situated (Geronia and by also providing examples of property that will be (and will not be) immovable property for the purposes of Article 6. Given that certain types of property are specifically included in (and excluded from) Article 6 then income from these certain types of property will fall within (or outside) Article 6 irrespective of the domestic law of the state in which the property is situated (i.e. Geronia).

Once the property is classified as immovable property in accordance with Article 6 there is then a need to determine whether income has been generated by the use of that immovable property. Article 6 provides some examples. Whether income derived that is "incidental" or "ancillary" to the use of the immovable property should fall within Article 6 is not specifically addressed in Article 6 or in the Commentary. Whilst it would appear that a sideline business would not fall within Article 6, the situation is less clear where the activity generating the income is incidental to the income generated by the use of the immovable property. When considering Article 6 it is also necessary to consider the extent to which the relevant amounts derived by the resident (Angelica) fall within Article 7, 13, 21 or 22 both in terms of how these provisions interact with Article 6 and also with each other.

Delineation of Article 6

The scope of Article 6 must be distinguished from that of Articles 7-22. Article 6 takes priority over Article 7-21 but there is no priority with regards Article 6 and 22 (Reimer, 2022). Article 6 can be said to prevail over Article 7 when an enterprise uses immovable property in the other contracting state without constituting a permanent establishment (PE) in that other state and typically immovable property remains below the PE threshold where there is no active business in the other contracting state but has for example rented out that immovable property (Reimer, 2022 and Commentary on Article 7). This means that the state in which the immovable property is situated will have the right to tax the relevant income even where there is no PE in that state (Commentary on Article 6, [4]).

In the context of the scope of Article 6 relative to Article 7, candidates could note that the scope of the Article has been recently considered in a DTA context (Royal Bank of Canada v Commissioner for HMRC [2023] EWCA Civ 695 where the Court of Appeal held that assigned rights to payment did not fall within Article 6 as the payments could not be said to have a source in the land nor any interest in land and as there was no permanent establishment Article 7 operated to provide exclusive taxing rights to the resident state – note that there is no expectation this case would be referenced in candidate's responses. Article 21(2) OECD MTC 2017 states that Article 21(1) operates subject to Article 21(2) such that where Article 6 applies then it takes priority over Article 21. It is also necessary to consider how Articles 7, 13 and 21 interact (this is considered below). Article 13 is concerned with the alienation of immovable property as opposed to income generated from the use of immovable property, which falls under Article 6 (note that that Canada and Latvia has a reservation on Article 6(3) – they reserve the right to expand Article 6(3) to include income from the alienation of immovable property.

Tax year 1

Here there does not appear to be any nexus with Geronia (i.e. unlikely to be a permanent establishment based on Felicity making initial enquiries etc) and therefore any business profits arising from Angelica's activities are likely to be subject to tax in Fragonia. However, there is no information about any business profits being generated and it is clear that the warehouse is not acquired until tax year 2.

Tax year 2

Article 6(3) provides that Article 6(1) applies to income from the direct use of immovable property and letting property is specifically referenced. Article 6(1) provides that Geronia may tax income derived by a resident of a contracting state (Angelica) where that income is generated the use of immovable property situated in Geronia (warehouse). Article 6(4) provides that Article 6(1) applies to income from immovable property of an enterprise and Article 6(2) provides that the definition of immovable property is taken to be that of the Geronian domestic law as Geronia is contracting state in which the immovable property is situated. The warehouse would be likely to fall within the domestic law definition of immovable property in Geronia i.e. land, buildings and fixtures. As such, Geronia is likely to have the right to tax the rental income of $200,00 under Article 6 as it is derived from the use of that property (letting is explicitly referenced in Article 6). Fragonia will either exempt the rental income from tax or provide a foreign tax credit. In terms of the interaction with other provisions, Geronia does not appear to be carrying on a business through a permanent establishment (PE) in Geronia and as such that there is no need to consider the Article 6 / Article 7 interplay (note that Article 6(4) provides that Article 6(1) and (3) also apply to immovable property of an enterprise, which means than an enterprise can generate income from immovable property under Article 6 and so the state in which the immovable property can tax the relevant income where there is no PE but this is unlikely to be the case here. There is no alienation of the warehouse in tax year 2 and as such Article 13 does not need to be considered. Article 21 operates subject to Article 6 and as such where the rental income falls within Article 6, Article 21 will not apply. There would not be expected to be any overlap with Article 22 and as such Article 6 is likely to apply to the rental income and therefore Geronia is likely to be granted taxing rights over the rental income.

It is also necessary to consider whether the income generated by charging an additional $20,000 to the tenant (at a cost of $15,000 to Angelica) i.e. the surplus, might constitute income from the use of immovable property under Article 6 or whether it may fall within a different provision. The issue under Article 6 is whether the additional income is derived from the "direct use, letting or use in any other form of immovable property" as per Article 6(3). It is possible that the additional payment for the utilities may be seen as having been derived from the use of the property or more specifically the letting of the property. As the amount is insignificant relative to the amount of rental income (and one imagines from Angelica's actual business operations) and could be described as being connected to the letting of the warehouse, it may well fall within Article 6 and where this is the case Geronia will have the taxing right over that amount also (see e.g. currency gains generated from the letting of immovable property were considered to be income from immovable property and so were considered to fall within Article 6, see German BFH, 18 September 1996, BFH 1 R 69/95, BFH/NA 409(1997)). As noted above, where the income falls within Article 6 there is no need to consider the interplay with other provisions (where there is no alienation, no PE etc). However, where the additional income was not considered to fall within Article 6, it may fall within Article 21 as other income (and were this to be the case, Fragonia, as the resident state, would have the exclusive right to tax the additional income).

Tax year 3

Here the main issue is that whilst the warehouse is being used for assembly and storage purposes for 1 month of the tax year and then solely for storage purposes for the remaining 11 months in the tax year, there is no income generated during tax year 3. Although the warehouse constitutes immovable property, there does not appear to be a need to allocate taxing rights over any income as there is no indication that any income has been generated. Whilst there is still a theoretical question to answer as to whether the warehouse constitutes a PE in Geronia and if it does what the interaction between Article 6 and Article 7 would be in such a case, on a practical level this would not affect taxing position in tax year 3 as there do not no appear to be any profits to attribute to a PE in any event.

It is open to candidates to note that any income derived from the sale of products assembled in Geronia may have fallen within Article 7 as business profits rather than being income with the requisite nexus to immovable property. Whether Geronia would have been able to tax such profits (had they been generated in tax year 3, which they were not) then the question would be whether the warehouse constituted a fixed place of business PE. Such an outcome is uncertain but relevant points could include: Angelica uses the warehouse to store its own products (those "belonging to the enterprise") and its Fragonian employees assemble its products. However, the storage and assembly only took place for 1 month in tax year 3, which may point away from a PE being found. Article 5(4) could also be considered as the storage of the products throughout tax year 3 (as they belong to Angelica) may be considered to be preparatory or auxiliary. Notwithstanding the above points, there is no income generated in tax year 3.

Tax year 4

Angelica sold the warehouse in tax year four for $5 million. The question whether this amount falls within Article 6 can be dismissed as the gain has a arisen as a result of a sale ("alienation") of the warehouse rather than as a result of income generated from the use of the warehouse. The same is true of Article 22 as the calculation basis for gains would typically be different to that for capital taxes; Article 13 would not be expected to overlap with Article 22 as the tax on the gain and the tax on capital value are different in form (i.e. capital gains often involve alienation and are taxed on a net gains basis whereas capital or wealth taxes are often levied on a periodic basis on the net value of the property (Reimer, 2022)).This leaves Articles 7, 13, 21 and 22. Article 7 would not appear to apply as it is clear that gains are taxed by both Fragiona and Geronia on a realisation basis and so it appears that capital gains are taxed upon alienation. Article 13(1) may then apply to grant Geronia rights to tax the gain (which may be $3 million ($5million - $2million) depending on how the gain is calculated). Article 13(2) would not apply as there is no mention of any movable property (note that the products are shipped back to Fragonia and no relevant sales are mentioned in the facts) and the question is only addressed to the alienation of the warehouse.

Levy on capital value

There is need to determine whether Geronia can also tax the levy payable on the market value of the property in all of the relevant tax years (i.e. tax years 2 to 4). It is possible that the levy will fall within Article 22 and where it does this would mean that Geronia would be able to tax the market value of the property as Geronia is the contracting state in which the immovable property is situated and Angelica, a resident of the other contracting state, is the owner of the warehouse. First the question is whether the levy is a tax that is covered by Article 2 (arguably it is) and that it falls within Article 22 a tax on capital. The levy does have a nexus with the value of the asset (the warehouse); and is levied on the value of the property as opposed to being levied on, for example, a net income basis; it is immaterial whether the relevant amount is levied on a regular basis, whether it is an ongoing payment or only payable in certain exceptional circumstances (Reimer, 2022). Candidates may note that the levy applies whether the warehouse is occupied or unoccupied. It would appear that Geronia would have the right to tax the levy as Article 22 provides that the state of situs (Geronia) has the right to the relevant tax on capital.

Conclusion

Overall it likely that Geronia will have taxing rights under the Fragonia-Geronia DTA in respect of the rental income under Article 6, the gain under Article 13 and the capital levy under Article 22. It is also likely that Geronia will have taxing rights over the additional income under Article 6 but were the necessary nexus with the additional income not be found then Article 21 might apply.

Question 7

Whilst the below considers situations 1-3 separately, it should be noted that scenario 1 below contains some analysis that is relevant to scenario 2 and this analysis is not repeated in scenario 2.

Scenario 1

Candidates should begin by setting the scene. Whilst a discussion of Zara's tax residency should not form the focus of the question, it should be noted that: Zara plans to spend 11 months in Country X and so this means she is likely to satisfy the Country X domestic residency test. If she does satisfy the Country X residency test due to being in Country X for more than 183 day in tax year two then she may be a dual resident (however, this will ultimately depend upon how long she decides to spend in Country X (i.e. outside Country Y). Where she does in fact stay for 11 months (or longer) in Country X as she plans then she is unlikely to be a resident of Country Y and so the analysis would proceed on the basis that Zara is a Country Y national, not a Country X national but is a tax resident of Country X on the basis that she spends more than 183 days in tax year 2 in Country X (and so for the purposes of the Country X-Y DTA also). Should candidates wish to consider the tie-breaker test then they can mention this in passing to state how it would operate were she to be a dual resident but they should not spend time evaluating her residence position under the DTA as the question asks to consider her tax position where she is in Country X for an 11 month period in the relevant tax year (which would render her resident of Country X and not resident of Country Y). Therefore, the analysis below proceeds on the basis that Zara is a non-national of Country X who has satisfied the tax residence test in Country X in tax year two and is not a tax resident of Country Y in tax year two.

The focus of this part of the question is one whether Article 24(1) OECD MTC 2017 is breached. Article 24(1) provides that for the purposes of taxation, discrimination on the grounds of nationality is forbidden and that, subject to reciprocity, the nationals of a contracting state (Country Y) may not be less favourably treated in the other contracting state (Country X) than nationals of the latter state (Country X) in the same circumstances (broadly, a Country tax resident earning the same income). Note that discrimination is a reference to less favourable treatment and so does not prohibit treating non-nationals more favourably than nationals (Commentary on article 24(1), [14]). The object of Article 24 appears to be to support the development of international economic relations" (OEEC Working Party No 4 of the Fiscal Committee (Neth-Fr) Third Supplementary Report on Tax Discrimination on the Grounds of Nationality or Similar Grounds, & November, 1957, FC/WP4 (57) 4, 2.6)). Since that time there have been minimal changes to Article 24 and thus it is quite possible that this object still forms the justification for the provision.

Non-discrimination rules generally seek to protect a "common characteristic" such as in this case, nationality (Bammens, 2012). In order for there to be direct discrimination which is what Article 24 is concerned with, there is a need for the different treatment to occur on the basis of the protected common characteristic (here, "nationality"), Where for example a country has a tax regime that taxes on the basis of a "neutral" criterion (i.e. tax residence) that might well have the same effect as different treatment that is based on a protected characteristic, however the different treatment based on the neutral criterion will generally not constitute discrimination that is relevant to Article 24(1) as it would be described as "indirect discrimination", which is not the focus of Article 24(1). As a consequence, it appears that when comparing characteristics of a non-national and a national for the purposes of working out whether they are in fact in the "the same circumstances", a finding of direct discrimination would require that all circumstances other than the protected characteristic (here "nationality") are the same i.e. the analysis involves a strict interpretation of comparability criteria whereas indirect indiscrimination might involve a more "relaxed" comparability test with the result that a non-national non-resident may be considered to be in a comparable position as a resident national (Bammens, 2012).

As it appears that Zara would have a more burdensome tax exposure ($25,000 tax payable as opposed to no tax payable if she were a national of Country X and a tax resident), the focus of the question is therefore upon whether Zara, as an individual, is "in the same circumstances" with regards the taxation of Country X tax residents (taxation here is a reference to the need for the form of taxation to which she is exposed to not be more burdensome in terms of the basis, charge and method of assessment and this also extends to the rate and the formalities (submitting tax returns, making payments etc) (Commentary on Article 24(1), [15]). The Commentary on Article 24(1), [7] also states that these circumstances must be considered in light of the "[…] ordinary taxation laws and regulations in substantially similar circumstances both in law and fact."

At first blush, Zara's tax treatment looked at in isolation appears to be more burdensome than but there is a need to clarify whether Zara is "in the same circumstances" as a Country X national who is a tax resident deriving the same income for the same work etc. This necessarily involves a consideration of whether the difference in tax treatment (higher rates and no tax-free threshold for Zara as imposed by Country X domestic tax law) is due to Zara's tax residency status or due to her nationality. The facts state that the lower rate and tax-free threshold is available to those individuals who have full working rights (i.e. nationals) whilst it is clear that non-nationals who are in Country X earning income under the special visa cannot access these rates/benefits. In order for Zara to be able to come and work in Country X she must obtain the special visa (and then will be subject to the higher tax rate and no tax-free threshold). Whilst an argument can be made (and was made but rejected by the Australian High Court in Addy v

Commissioner of Taxation [2021] HCA 34 (Addy)) that a national tax resident would never hold a special visa as it was only available for non-nationals of certain countries such that Zara and as such a national tax resident could never be "in the same circumstances" with respect to the income the taxpayer earned whilst in Australia on the special visa, the court in Addy rejected this argument as there was a need to remove the "special visa" consideration (as this was a protected characteristic) and ask the question whether Zara (as a Country X tax resident earning income from working on a fruit farm) would have had the same tax treatment as a Country X tax resident earning income from working on a fruit farm and the answer was she would not. Rather and in line with the court in Addy (paras 19 and 25), the fact that only non-nationals of Country X needed to rely upon the special visa in order to be able to work (and therefore earn income that was subject to tax) resulted in a differing tax treatment as between nationals and non-nationals (i.e. a protected characteristic). This outcome appears to be consistent with the Commentary on Article 24(1), [8], which seeks to determine whether discrimination has taken place as between "two residents of the same State […] being treated differently solely by reason of having a different nationality…".

The question here, then, is does the relevant tax treatment (here the higher rates and lack of tax-free threshold for income earned under the special visa) apply to Zara (as a non-national who is a Country tax resident) as to a national who is a tax resident? This is important as where Country X is found to provide more advantageous tax treatment (e.g. relief from taxation on account of family responsibilities) for nationals who are residents than nationals who are non-resident then that state cannot be obliged to provide non-national residents with the same treatment it provides its national residents (Commentary on Article 24(1), [8]).Whilst candidates may cite the Australian case of Addy, which dealt with a similar situation to that of Zara , it is not necessary to have read this judgment in order to answer the question as it is clear that there is a situation where an individual (Zara) is a non-national of Country X, is likely to be a tax resident of Country X and has a greater tax burden than a Country X tax resident who earned $50,000 carrying out the same work; whilst Zara can only earn this income under a special visa, she would be required to pay $25,000 income tax whereas a tax resident of Country X who is a national earning $50,000 would not pay any tax on this amount of income due to their ability to access the tax free threshold. It should also be noted that there is a need to ensure that when interpreting Article 24 that the way in which the other DTA provisions operate is not impeded by the operation of Article 24 (Commentary on Article 24(1), [4]). In terms of other relevant provisions, one could consider the operation of Article 4 (residence) and 15 (employment income). It is not clear that the operation of either of these articles would be frustrated by the operation of Article 24(1) in the case of Zara.

Scenario 2

The key point here is that Article 24(6) OECD MTC 2017 provides that Article 24 applies to taxes of every kind and description and as such Article 2 ("taxes covered") does not restrict the scope of application of Article 24. According the fact that the duty is levied on the transfer value of the property does not (as a form of stamp duty and so an indirect tax) does not in and of itself restrict the operation of Article 24. There is still a need to consider whether Maryam's parents (who are not nationals of Country X nor appear to have ever set foot in Country X) would be "in the same circumstances" as a national of Country X when purchasing a residential property in Country X. Clearly Maryam's parents would face higher taxation due to the imposition of the additional 10% duty but as noted above in the discussion regarding Zara, there is a need to compare the two situations only removing the protected characteristic".

There is a need to a consider whether Maryam's parents are "in the same position" as an individual who is a national of Country X who is purchasing the same property. The rules regulating the additional duty do not appear to reference whether they apply to non-residents of Country X as well as to non-nationals of Country X, and as such it is possible that the duty will be considered to apply only to non-nationals (i.e. a Country X tax resident who does not hold a Country X passport may be required to pay the additional duty where tax residence plays no part in the operation of the rules). As the tax residence status of Maryam's parents is less certain than Zara's (they are exploring the idea of purchasing a Country X property in which they may live), it is possible that they will be non-resident of Country X (and continue to be Country Z resident) for tax purposes during tax year two, which may be a consequence of purchasing the Country X property in tax year two but then choosing to continue living in Country Z and not living in the Country X property. Candidates should consider this possibility and consider the implications of being a non-resident of Country X and whether this would result in the additional duty escaping Article 24. As noted above, it is possible that the wording of the rules on the additional duty may result in their application to non-nationals of Country Z whether they are Country X tax resident or not and as such Article 24(1) may apply to the additional duty (in this regard see the Commentary where it is stated that whilst residents and non-residents are usually not in the same circumstances for the purposes of Article 24(1), this is not the case where residence has no relevance whatsoever (Commentary on Article 24(1), [18)]. Where the additional duty breaches Article 24(1), Maryam's parents would be entitled to have the rate reduced down to the level payable by a Country X national if they decide to go ahead and purchase the property.

Candidates could note that certain countries, concerned about their over-heated property markets, have introduced tax measures that increase the cost of property for non-nationals with the hope that this may go some way to restabilising the market and make more properties available for those who are nationals (as a proxy for those who have a long-lasting connection with the relevant country). However, it is not clear that such a public policy justification

would be acceptable in the context of DTAs (cf: EU law) and it is considered that justifications on the basis of public policy (which would need to be evaluated by national courts) may well lead to greater legal uncertainty (Rust, 2022).

Scenario 3

This part of the question requires a consideration of the appropriate interpretation of Article 24 of the DTA, which is identical to the OECD MTC 2017, but includes a dividend withholding tax rate under Article 10(2)(b) of 15% (the maximum for a beneficial owner in the OECD MTC 2017 where no other special circumstances apply). The issue is that the Country X-Y DTA, whilst also being identical to the OECD MTC 2017 includes a lower withholding tax rate (10%) for dividends when paid to the beneficial owner than Article 10(2)(b) Country X-Z DTA (15%). Zara's grandmother may wish to know if she can rely upon Article 24 to access a lower rate of withholding rate (10%). In order to enable Zara's grandmother to get the advantage of the 10% rate, a most favoured nation (MFN) clause would need to be activated. The Commentary on Article 24 provides that Article 24 "[…] cannot be interpreted as to require MFN treatment" (Commentary on Article 24(1), [2]). Candidates could note that an outright rejection of MFN in the Commentary of the OECD MTC 1977, [54]-[55] was removed from the Commentary in the OECD MTC 1992, [24]-[31] (Avi-Yonah, 2018), Whilst some DTAs do contain MFN clauses - e.g. Brazil-Israel DTA was signed two years after the Brazil-Portugal DTA (contained a MFN clause) and the Brazil-Israel DTA provided for a lower rate of withholding, which led to a request by a Portuguese taxpayer to access the lower WHT rate - neither the Country X-Y DTA nor the Country X-YZ DTA appear to have included such a provision and so it may not possible for Maryam's grandmother to access the lower WHT rate were she to invest in the Country X shares. Accordingly, it is likely that withholding tax will be deducted at a rate of 15%.

Conclusion

It is quite possible that both scenarios 1 and 2 will result in a breach of Article 24(1) as in both situations nationality is the "protected characteristic" and when nationals in the same circumstances are compared to non-nationals in the same circumstances, non-nationals are subject to a more burdensome tax position. Whilst for Zara this is due to the fact that when removing the protected characteristic (nationality) she was taxed more harshly as a tax resident earning income from working on a fruit farm than a national who is a tax resident earning income from a fruit farm, for Maryam's parents this is because Article 24(1) is not restricted by Article 2 (i.e. it applies to taxes of every kind and description) and as such when tested with a comparator (that excludes the protected characteristic "nationality), Maryam's parents as non-nationals may be found to have a significantly more burdensome tax exposure than a national ($72,000 as opposed to $12,000). A further point is that whilst both Zara and Maryam's parents may be entitled to no less advantageous tax treatment as regards Country X nationals in these two instances, Country X should be advised that there are no justifications within Article 24(1) where its domestic measures are found to be discriminatory, which contrasts to the practice of some jurisdictions (Poland) and the EU (e.g. where domestic provisions area proportionate means of achieving a legitimate aim and those discriminatory measures are necessary in order to satisfy mandatory requirements re: public interests (Rewe-Central, 20 February 1979, ref 120/78).

In relation to situation 3, candidates may note that Zara's grandmother would not appear to be able to access a lower withholding tax rate i.e. she may be able to access a 15% WHT rate but not 10% as she has been advised. Candidates may also note that although the question requires a consideration of the OECD MTC 2017, numerous countries do not include non-discrimination articles in their full suite of DTAs (e.g. New Zealand). Other countries may include such a provision but then may ring-fence the taxes that would otherwise breach the provision (Bammens, 2012 citing the US's carve-out for the branch profits tax). In other words, it is generally recognised that to include such a provision may infringe a country's right to tax in a manner that best suits its interests and is aligned with its policy preferences (Tetxeira, 2006 where non-discrimination in the EU context has been described as forcing sovereign states in matters of direct taxation to adapt domestic tax law in accordance with EU principles). Notwithstanding the concerns about the use of MFN in a DTA context, a priori in relation to countries at risk of losing revenue, there is an argument that increased MFN may have the effect of "[creating] a de facto multilateral treaty without the negotiation of one" (Avi-Yonah, 2018).