THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

December 2021

MODULE 1

SUGGESTED SOLUTIONS

PART A

Question 1

Candidates should begin by outlining the proposal for (and agreement) on a global minimum corporate tax rate (MCTR) and place it in the context of the OECD's work on the Digital Economy under Pillar Two (and to a lesser extent Pillar One).

Given the relatively recent agreement to the MCTR (October, 2021) it is open to candidates to reference the agreement but not a requirement. Candidates' answers should, however, include a consideration of the challenges that are anticipated by choosing to agree to the MCTR - as part of the wider proposals. Answers may also reference any specific challenges that may impact DCs. Candidates could then conclude by considering the extent to which the challenges they have outlined in their answers are resolvable in the short to medium term.

This suggested solution includes a brief section summarising the OECD's position in relation to the October 2021 agreement but, as noted above, there is no requirement for candidates to include this information in their answers.

Introduction

Whilst countries have always needed to raise revenue from taxation to fund public services, the need for many is particularly acute at the present time with many countries desperately needing to replenish depleted funds following huge Covid-19 related expenditure. The OECD's work on profit shifting and base erosion and more recently on the digital economy has focused on (i) preventing further use of unilateral tax measures to address these issues and (ii) securing "fairness and equity in ... tax systems" by ensuring large internationally operating and profitable business pay their fair share [of tax] and in the right place" (OECD/G20 Inclusive Framework, October 2020).

The work on Pillars One and Two has taken place over a number of years and has been released in stages with public consultation along the way. Blueprints for both Pillars were released in October 2020 and since that time there has been a public consultation with two "agreements in principle" by the G7 (Statement, June 2021) and the OECD/G20 Inclusive Framework (July 2021). Both Pillars envisage multilateral agreements (OECD/G20 Inclusive Framework, October 2020) to effect the changes countries would need to make to their double tax agreements (DTAs) and aspects of their domestic law to ensure that tax is paid at the correct amount (overall) and in the right location.

Pillar One

At a general level, Pillar One expands the taxing rights of "market jurisdictions", where the "largest and most profitable" MNEs may or may not have a physical presence. It is possible that the types of business included would be significantly wider than those providing "automated digital services" or "consumer facing businesses". Given the revenue thresholds, it is anticipated that no more than 100 MNEs would fall within this category. In order for Pillar One to be effective, digital service levies or other similar measures would need to be removed and a multilateral agreement envisaged to effect the re-allocation of taxing rights.

Pillar Two

Referred to as the "global anti base erosion proposal" (GLoBE), it is anticipated that Pillar Two will be implemented in 2023. It focuses on addressing tax avoidance through global minimum taxation and is intended to further limit the incentives for businesses to locate functions & activities (and profitability) in low tax jurisdictions. GloBE is anticipated to raise approx. US$150bn of additional revenue per year by way of a 15% minimum tax on companies whose headquarters are in the relevant jurisdiction. Final details are due to be released with various technical aspects, including the minimum agreed upon rate in October 2021. However, some aspects are likely to remain or at least not be too different from those agreed upon "in principle", namely:

1. Two interlocking domestic rules (together the GloBE rules):

   (i) an Income Inclusion Rule, (IIR) which imposes top-up tax on a parent entity in respect of the low taxed income of a constituent entity and extends residence-based taxation so that the income of a foreign branch or a controlled entity becomes subject to tax in circumstances where the effective rate of tax in the source jurisdiction is below a minimum rate (Elliffe, 2020); and

   (ii) an Undertaxed Payment Rule, (UTR) which denies deductions or requires an equivalent adjustment to the extent the low tax income of a constituent entity is not subject to tax under (i).

2. A treaty-based rule (the Subject to Tax Rule, (STR) that allows source jurisdictions to impose limited source taxation on certain related party payments that are subject to tax below a minimum rate, which, in turn, would be creditable as a covered tax under the GloBE rules.

<u>Potential challenges to adoption</u>

There are numerous challenges:

- Political obstacles – not least the encroachment on a country's ability to set its own tax rules according to its own circumstances. The potential obstacles have been described as being predominantly "political" (Devereux and Vella, 2021). Furthermore, the IIR could be described as directing the taxing of accrued profit to the location of the parent or alternatively placing a floor on source state taxation, which raises further sovereignty issues. (Devereux et. al, 2020).

- Technical complexity – the MCTR would probably sit "on top" of extant anti-avoidance and profit allocation rules that are unlikely to be removed.

- Critical mass – whilst many countries have signed on "in principle", they have not formally agreed to any of the rules and thus there is no indication how much buy-in there will be when more specific details are released. Furthermore, certain countries have not agreed even "in principle" (including Ireland that is the European base of a number of US tech giants). Nine countries did not sign. (Devereux and Vella, 2021)

- Strict application – the MCTR needs to operate at a substantial rate and there should be no carve outs.

- Robust – Pillar Two – must be difficult to "game". The UTR and STR support robustness concerns but the extent of their "robustness" depends upon formal agreement.

- Tension – the two objectives appear to be curbing profit shifting and limiting tax competition; with the latter seemingly at odds with the previous BEPS policy consensus. ((Devereux et. al, 2020).

- US approach – President Biden's recent proposals are considered to impose more burdensome tax rules on US MNEs than those discussed at the OECD level. It is still unclear whether his approach will be adopted and there is a view that the US approach has been put forward in order to ensure that US MNEs are not discriminated against vis-à-vis other MNEs. (Bunn, 2021)

- Need for revenue and unilateral measures – countries in need of revenue may still introduce a digital service tax (DST) to supplement their budgets as they may be mindful that OECD initiatives frequently take a number of years to be introduced. This would create an obstacle to successful implementation.

- Investment – there is the potential for negative impacts on cross-border investment and certain countries will be particularly conscious of this potentiality. The "substance based carve out" (exempting certain tangible investment assets and employment costs) from the base is considered to ameliorate the position and appears to be less distortionary than the Biden Proposal (Bunn, 2021). However, there are also concerns that distortions will arise in spite of this carve-out with countries, a priori certain DCs, looking to attract investment via alternate means (e.g. reduced rates of personal income tax or consumption taxes; real investment incentives etc.) and the introduction of policies to attract foreign investment that falls outside the remit of the Pillar Two and the MCTR. (Bernasconi-Osterwalder, International Institute for Sustainable Development (IISD, 2021),

- DCs – whilst the MCTR might help at a "global level", it is unclear exactly how beneficial it would be for DCs. The 15% rate may not only operate as a floor but also as a ceiling (Bhattacharjee, 2021) and thus may not have the desired effect in terms of revenue collection for DCs. Furthermore, there has been reported to be a desire for certain governments to continue granting tax incentives (e.g. in some African countries, Ministers have been reported as being supportive of tax incentives as recently as 2019 (Ndubai, 2021). Another area of challenge is that of "tax-stabilsation clauses" in investment treaties and the potential difficulties in attempting to reconcile signing up to Pillar Two, and the MCTR in particular, with these clauses. (Lassourd, IISD, 2021). The ordering of the GloBE rules (i.e. IIR then UTR) has been raised as an issue given that it appears to direct the taxing of profit to the location of the parent, which is invariably in a developed country. (Munanda, African Tax Administration Forum, 2021).

<u>OECD Update 2021</u>

On 8 October 2021, the OECD reported that 136 countries and jurisdictions (of the 140 members of the Inclusive Framework) agreed to a MCTR of 15%. The OECD states that it anticipates that $150 billion in new annual revenues will be collected and that the resulting stabilisation of the international tax system and increased tax certainty for taxpayers and administrations will generate further benefits. (OECD, 2021).

The OECD has reported that OECD countries are aiming to sign a multilateral convention (MC) during 2022 with effective implementation in 2023 (OECD, 2021). According to the OECD, the MC was reported in October 2021 to already be underway and is described as the vehicle for implementation of the newly agreed taxing right under Pillar One and standstill/removal provisions for existing Digital Service Taxes and other similar unilateral measures. In relation to Pillar Two, the OECD reports it will develop model rules for bringing in Pillar Two into domestic legislation in 2022, to be effective in 2023. The OECD has further stated in terms of next steps: (i) both the GloBE model rules as well as a model treaty provision and commentary to give effect to the STTR will be developed by the end of November 2021 and (ii) a multilateral instrument will be developed by the IF by mid-2022 to facilitate the implementation of the STTR in relevant bilateral treaties. (OECD, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy, 2021)

In relation to DCs, the OECD reports that DCs have played an active role in negotiations and Pillar Two is described as containing features that will ensure the "concerns of low-capacity countries are addressed" and pledges to (i) "ensure the rules can be effectively and efficiently administered" and (ii) "offer comprehensive capacity building support."

<u>Conclusion</u>

Notwithstanding the recent agreement on the MCTR, there are numerous challenges to a successful adoption of the MCTR not least because as yet the OECD has not finalised a Multilateral Convention (MC) that will implement Pillar One (this is "under development" OECD, 2021) nor has it yet developed the model rules it states it will develop in relation to the MCTR (OECD, 2021). As such there are still some important aspects to finalise. It is therefore still too early to know the extent to which the challenges outlined above will be resolved in the short to medium term. As noted above, concerns have been aired about the added complexity, lack of guiding principle (other than attempting to make sure profit is taxed somewhere), the potentially damaging effect on foreign investment and the encroaching on the sovereignty of countries to set their own tax rules. Whilst the OECD anticipates certain unilateral measures (such as digital service taxes) being removed, (see, OECD Update 2021 above) it remains to be seen exactly how the forthcoming MC and model rules for the operation of the MCTR will operate and whether the challenges described will be overcome by the OECD's work in this area.

Question 2

It is expected that candidates will discuss how Covid-19 has impacted businesses and revenue authorities in relation to transfer pricing (TP). It is open to candidates to reference country practice in this area, where this is available. Candidates should also highlight the major areas addressed by the OECD's Guidance on the Transfer Pricing Implications of the COVID-19 Pandemic, December 2020 (the Guidance) noting any areas of interest.

General: Covid-19 and TP

Businesses need to consider the impact of the pandemic on their TP policy and whether there is a need to change anything. Some businesses have experienced significantly reduced demand and losses and others have experienced significant increases in revenue. Further differences in experience may be due to some businesses reorganising their operations (such as moving aspects of their supply chains onshore in order to reduce reliance on international transport of goods (Grant and Thornton, 2020)) as well as from government assistance programmes. Accordingly, their TP policies may no longer adequately reflect their business structure and / or cash flows intra-company. There will also be a need to consider which entity should bear the risk associated with legal costs arising from the changed environment including redundancies and non-performance of contracts as well as the potential need to advance intra-group loans to assist certain entities within the group.

From a revenue authority perspective, there is a need to collect revenue, whilst simultaneously acknowledging that the relevant pre-Covid tax rules may not now be appropriate and factoring in the manner in which the changed environment may impact existing approved arrangements with businesses e.g. Advance Pricing Agreements (APAs). Revenue authorities are also likely to be alive to the fact that certain changes are necessary in the short-term and may also be considering relevant BEPS measures alongside adjusted TP policies such that "concessional policies" may remain a short-term rather than a medium-term measure such that businesses will need to review their policies and ensure that supporting documentation is available for all changed positions. In sum, for both businesses and revenue authorities the changed environment results in a significant administrative burden at a point in time where many businesses need to ensure that they can weather the uncertainty of the changed environment and revenue authorities have sufficient funds to rebuild depleted revenue such that they can assist more generally with the recovery from the Pandemic.

The OECD's Guidance

The OECD cognisant of the impact of Covid-19 released general guidance related to certain international tax aspects that may have been impacted by Covid-19 (e.g. residence and permanent establishments) relatively early in 2020 but the TP guidance was not released until the end of 2020 (OECD's Guidance on the Transfer Pricing Implications of the COVID-19 Pandemic, December 2020, hereafter "the Guidance"). Perhaps unsurprisingly, some countries had already introduced their own specific Covid-19 related TP guidance prior to the Guidance.

Released following an agreement by 137 members of the Inclusive Framework on BEPS to address issues that may arise or be exacerbated by the "application of the arm's length principle (ALP) and the OECD TP Guidelines" in the context of the Covid-19 Pandemic. The stated intention of the Guidance is not to replace or amend the 2017 Guidelines but to provide examples of how revenue authorities and taxpayers should review ALP in the context of Covid-19 and thus the approaches provided in the Guidance are all grounded in the ALP. Given that agreement was reached across 137 countries, it is unsurprising that the Guidance refers to general principles.

The following outlines some aspects of the Guidance:

- Covid-19 may have a significant impact on the pricing of some transactions between independent enterprises and it may reduce the reliance that can be placed on historical data. Comparability data from other crises (e.g. GFC) is not sufficient as the Covid-19 Pandemic is unique and unprecedented. There is a need to consider numerous factors, e.g. impact on sales volumes; data regarding incremental or exceptional costs; extent and impact of any government assistance or interventions; and macro-economic information.

- Losses – identifies three specific loss/allocation of costs related issues:

  (i) Ensuring the allocation of risks is at arm's length;
  (ii) Determining how exceptional, non-recurring costs should be allocated; and
  (iii) The potential application of force majeure clauses.

- Limited risk entities (LREs) are entities that are have limited risk due to their lower level of functions and risk. The TP Guidelines do not use the term LRE but the Guidance recognises that losses may be incurred by an LRE (e.g. market risk where there is a significant reduction in demand) and that TNMM or potentially the RMM may be considered appropriate in such a case.

- Exceptional costs (such as the acquisition of personal protective equipment for staff etc.) do not include costs related to long-term/permanent changes to the manner in which a business operates (e.g. teleworking arrangements may not be exceptional where they represent a permanent change). The starting point of the analysis is the accurate delineation of the transaction and the identification of which entity has responsibility for performing the activities related to the exceptional costs and bears the risk related to said activities. The performance of the activity and the risk assumption may not be related to the same entity.

- Force majeure clauses (FMC) require consideration of the underlying legal framework and an analysis of the language of the clause as well as the conduct of the parties.

- A government assistance programme (GAP) is defined as a monetary or non-monetary programme where a government or other public authority provides a direct or indirect economic benefit to eligible taxpayers. The extent to which the receipt of a GAP constitutes an economically relevant characteristic (ERC) may vary. A wage subsidy is more likely to be classified as an ERC than the provision of local infrastructure by government. Some aspects that may be relevant to the comparability analysis include: market availability of GAP; geographic market; accounting treatment (especially for one-sided methods such as Cost Plus or TNMM).

- Advance Pricing Arrangements (APAs) require a "flexible and collaborative" approach. Existing APAs should be upheld unless a breach of critical assumptions has occurred. In other words, neither taxpayers nor tax authorities should automatically disregard the terms of extant APAs.

Observations

- Comparability Analysis – traditional databases are of limited use as a source of external comparables during the pandemic and the impact for businesses operating in various jurisdictions may be quite pronounced when considering comparability issues. In terms of testing periods for comparability purposes, there seem to be a number of approaches. Whilst ordinarily multiple year data and averages may have advantages, it may be necessary to have shorter periods that reflect the situation at the time. However, there are industry reports that a weighted average over five years approach has continued to be used since the GFC. Thus, it is possible that there will be a variety of testing periods adopted. Country practice also appears to diverge with the Canada Revenue Agency publishing guidance suggesting that single year testing is generally required unless part of an APA. This contrasts with the US, which still considers multi-year analysis is preferable.

- Limited Risk Entities – the reference to LREs has been welcomed. LREs are typically not expected to make losses on a continued basis and thus prior to the 2020 Guidance there was a great deal of concern that LREs may be pressurised to show some profit in order to avoid raising red flags for revenue authorities. The LRE issue has been described as "one of the most critical questions on the table of MNEs" (Blankenstein, 2021) but now the Guidance has provided an opportunity for some LREs to justify losses (Petkova, 2021).

- GAP – there are concerns that the benefit of any GAP should remain within the country providing the assistance and, at the business level, that the Guidance on GAP is limited (e.g. it fails to consider other forms of government intervention that may impact the fulfillment of intra-group agreements e.g. border controls. (Grant Thornton, 2021). Some countries have introduced their own guidance in relation to GAP: The Canada Revenue Agency (CRA) and the Australian Taxation Office (ATO) have made pronouncements that they are concerned about the benefit of government financial assistance being transferred out of their countries. The CRA says governmental subsidies should be excluded from TP computations and that the full benefit should remain in Canada unless the taxpayer can provide evidence that the ALP treatment of such government support would differ. The ATO has released guidance on interactions between transfer pricing and the JobKeeper program. Broadly, the ATO notes that it has concerns where the benefits of JobKeeper payments are effectively passed through to a non-resident related entity via a change in transfer pricing arrangements.

- UN Manual – the interaction between the Guidance and the UN Practical Manual on TP for DCs has not been explicitly referenced. However, the Guidance 2020 Press Release states that the Guidance should be helpful in circumstances where the UN Manual follows a similar analytical framework and allows for similar conclusions as the OECD TP Guidelines 2017 (Ernst and Young, 2020).

- Unilateral Approaches – reference is made in the Guidance to the fact that countries may have their own rules in certain circumstances (e.g. non-compliance or failure to meet a critical assumption in an APA) but there is no mention of individual country approaches to Covid-19 related TP issues. Several countries have introduced their own guidance (e.g. Australia, Canada and Singapore), which leaves open the possibility that there may be some divergent approaches to Covid-related TP issues (although Singapore subsequently incorporated the Guidance 2020 approach into its own guidance). Several jurisdictions have introduced guidance that appears to be consistent with that of the OECD (e.g. Poland and Hong Kong). Japan, Nigeria and Ireland have not issued guidance but it is expected that they will follow the Guidance.

Conclusion

It is evident that the impact of Covid-19 has been felt very keenly by both businesses and revenue authorities alike. In many instances these changes have resulted in businesses losing revenue, changing strategy to accommodate issues with, e.g. international transportation, working from home arrangements etc. However, some businesses have generated significantly more revenue than pre-Covid-19 and thus their position is also changed albeit differently to those businesses that have struggled financially. In many cases, TP policies will need to be reviewed in light of the changed environment, which will result in additional work for both businesses and revenue authorities. Although numerous countries have adopted their own approaches to the impact of Covid-19 on TP, the OECD's Guidance provides some useful general guidance. The Guidance provides evidence of a "consensus" based approach, which is new in TP. The general focus of the Guidance is on arriving at an ALP, albeit in highly unusual circumstances. Given the large number of members of the Inclusive Framework (IF), it is unsurprising that the Guidance is written at a general level and does not go into detail (the document is 31 pages). It would appear that the Guidance will be widely adopted where possible but it is also likely that some divergent practice will emerge.

Question 3

Candidates may find it helpful to set the scene; define key terms to be used in their answers; and select a number of issues governments may face given the increasing prevalence of crypto-assets. There is scope for candidates to consider issues pertaining to crypto-assets generally or to focus upon a particular sub-set such as cryptocurrencies.

Setting the scene

Crypto-assets and, in particular, a specific subset of crypto-currencies such as Bitcoin, have been described as having been "on the radar of policymakers and tax authorities for years" (Wintermeyer, 2021) with the USA's IRS being reported to be making tax evasion through the use of cryptocurrencies a "top priority" (Bloomberg, 2021). The decentralised nature of crypto-assets, their global reach and the anonymity currently afforded to holders of crypto-assets present challenges for governments (such as financial stability; concerns about money laundering and funding terrorism as well as tax evasion) seeking to regulate and tax transactions carried out involving this particular class of assets.

The OECD/G20 BEPS Action 1 Report 2015 identified virtual currencies as a development that formed part of the digital economy and advised policymakers to monitor crypto-currencies carefully and to address any potential tax policy challenges that they may generate. More recently, both individual governments and international organisations, such as the OECD, have begun to address these challenges by respectively either introducing their own regulations and tax policy or initiating a dialogue about co-ordinated approaches to regulating and taxing such assets. Cryptocurrencies have been reported to have a market capitalisation of USD 346 billion as at September 2020 (OECD, Taxing Virtual Currencies, 2020).

Definitions

There is no uniform definition of crypto-assets. It is used as a "catch-all term for digital financial assets based on distributed ledger technology (such as blockchain) and cryptography (secure technology)". Crypto-assets can refer to initial coin offerings ("the creation of digital tokens by start-up companies and their distribution to investors in exchange for fiat currency or mainstream cryptocurrencies"), which create digital tokens.

Digital tokens can be divided into three broad categories: payment tokens are intended to operate in a similar fashion to fiat money and may also be referred to as virtual currency or cryptocurrency; security (or asset and financial) tokens are asset-backed tokens representing interests in property, which can be held for investment purposes as tradeable assets; and utility (or consumer) tokens are used to facilitate the exchange of or access to specific platforms, goods and services.

This categorisation often results in different legal treatment for each category of coin. There are other categorisations (e.g. those that distinguish between crypto-currencies and tokens). The lack of a universal definition has impacts for regulation and tax policy.

When a crypto-asset operates as a digital means of exchange that is not backed by the issuer, it is a referred to as crypto-currency. Bitcoin was the first (created in 2009). Cryptocurrencies have been defined as "a digital representation of value that is (Houben and Snyers, 2018):

- intended to constitute a peer to peer alternative to government issued legal tender;
- issued as a medium of exchange independent of any central bank;
- secured by a mechanism known as cryptography; and
- convertible into legal tender.

There are currently more than 1,600 types of cryptocurrencies (including Bitcoin, Ethereum, Doge Coin, etc.).

<u>Cryptocurrency Creation</u>

Mining is the main method of creating cryptocurrency; it relies upon blockchain, which is a decentralised peer-to-peer network comprised of data blocks that:

- chronologically store data relating to transactions (this cannot be altered without the alteration of all subsequent blocks);
- adhere to an inter-node communication protocol (nodes are communication endpoints, so could be clients, servers or peers); and
- validate new blocks.

When a new bitcoin is created, the owner is provided with a unique set of keys that provides them with secure access to their bitcoin (N.B. bitcoin is a general term whereas Bitcoin refers to a specific cryptocurrency).

<u>Cryptocurrency Advantages and Disadvantages</u>

Advantages include: decentralisation and its reliance on blockchain (this is one of the major arguments in favour of cryptocurrency); fast and unlimited transactions; low transaction costs (relative to banks' fees); accepted internationally; transparent (every transaction is recorded) and anonymous. Disadvantages include: limited acceptance; high volatility; non-reversibility (making an error when entering a crypto address is irreversible); cryptocurrency storage (it is possible to lose a device or forget the private key, which could result in no access to their cryptocurrency funds); the potential for negative effect on financial markets and undermining political stability in the longer term; increased opportunities for money-laundering, the financing of terrorism and tax evasion.

<u>Tax Issues</u>

Cryptocurrencies create challenges for tax authorities seeking to capture revenue from transactions involving their use and change in value. Some tax issues that could be discussed by candidates include:

- Uncertainty/Compliance Costs – whilst the three-tier classification above provides a general framework for considering regulatory responses, it is quite possible that individual countries will classify crypto-assets differently and thus revenue authorities may subject them to distinct treatment. Currently, many countries treat cryptocurrencies as property for tax purposes. Thus, increases in value during holding may result in increased compliance costs for holders who are required to monitor changing values. Jurisdictions that define cryptocurrency differently may have conflicting views on: the timing of taxable events, the nature of the resulting income (ordinary or capital) and the source of the income. DTAs have not yet provided solutions. (Santa, 2018).
- Country Positions – Singapore has provided guidance on the taxation of digital tokens. Payment, utility and security tokens are separated. Payment tokens are treated as intangible property. Therefore, any tax will attach to the underlying value of the goods/services transferred. Deductions are allowed subject to the normal restrictions. Any appreciation/ depreciation in value is to be determined according to financial statements. Utility tokens do not give rise to income upon transfer but may give rise to deductions. Security tokens may be treated as interest or a dividend under "existing tax provisions". Note the reliance on applying existing rules. Singapore recognises that new digital tokens may be introduced that have unique characteristics and that there may be a need to review these on a case specific basis. Malta, though, has determined to treat cryptocurrencies as fiat money, with the consequence that where acquired for investment purposes any gains are not subject to tax.
- Tax evasion risk – anonymity has consequences for transparency and exchange of information. The US has focused its attention on reporting and new US tax rules are

forthcoming (Bloomberg Wealth, 2021). There are concerns that many players in the crypto markets will be unable to comply with reporting requirements, as they do not have the necessary visibility into their customers' transactions. (Matthews, 2021)

- Source of Income – it may be unclear whether income arising from a cryptocurrency transaction has a source in a given jurisdiction. Determination may also differ given the type of token. There has been some debate around the appropriate way to identify the location of exchange tokens such as Bitcoin.

  Establishing the source is complicated by the fact that cryptocurrency has been designed in order not to have a location and thus any attempts to identify a source will necessarily involve allocating an "artificial location" (STEP, 2021). Various approaches to determining source have been recommended, including:

  (i) where the wallet that holds the asset (i.e the private key) can be accessed; and

  (ii) the residence of the beneficial owner. The UK has adopted the latter approach in its revenue authority guidance manual (HMRC, 2021) but there are as yet no UK statutory rules. However, this approach has been criticised as being at odds with the source rules for other intangible property (STEP, 2021).

  There is also support for the former approach as this has been described as being more consistent with an approach to intangible property taxation (control, ability to deal and enforceability) (STEP, 2021) and using the residence of the participant that controls the cryptocurrency has been put forward as a preferable approach. This would result in the source of the asset being the residence of the private key holder. Where the cryptocurrency is indirectly held on behalf of the private key holder (such as by an exchange, trading platform, nominee etc.) then the residence of the third party may be relevant. The extent to which the residence of the indirect holder would be relevant is considered to be dependent upon whether the asset is held by, for example, a dedicated nominee or on a pooled basis. (STEP, 2021). This approach could also feature in a resident tie-breaker rule whereby the participant with the closest connection with a particular jurisdiction is resident for the purposes of a DTA (STEP, 2021 and Dickinson, 2019).

  Where source is determined, applying a withholding tax has been suggested as one option (Fryer and English, 2021).

- DTAs. The interaction between crypto and DTAs is as yet unclear. The manner in which DTAs interact with crypto may require international agreement. Whilst most countries have yet to introduce specific guidance on DTAs, crypto-assets would have the definition they have in the domestic law of the country applying the DTA (per Article 3(2)) as there is no definition in DTAs at this time and income from crypto-assets may fall within the scope of Article 7 of the OECD Model Convention. (Bernstein et al., 2020).

  As alluded to above, where countries rely on the residence of the beneficial owner or the residence of the private key holder, there is the potential for a person to be dual resident. A crypto-currency residence tie-breaker test was mentioned under the "source of income" heading above. As also noted above, the source rules may need to more specifically address issues relating to cryptocurrency at the international level. As noted under "tax evasion risk", EoI presents a challenge for revenue authorities in relation to cryptocurrency as the information they may need may not be readily available. The EU launched a public consultation in March 2021 on strengthening administrative cooperation and expanding EoI for crypto-assets. The consultation period has ended and included a wide variety of views including acceptance that there is need for reporting requirements for crypto service providers but there are considerable concerns about such requirements for privately held wallets) (Monetax, 2021).

- Digital Service Taxes (DST). Whether DSTs will capture income arising from crypto-assets is generally unclear. In some situations, it may be a non-issue in that it is possible that such crypto businesses may not satisfy the various conditions for inclusion in a DST (e.g. the UK's DST, effective 1 April 2020, applies to search engines, social media platforms and online marketplaces). The UK DST's de minimis threshold of annual revenue of more than GBP 500m (of which GBP 25m must be derived in the UK) would exclude many crypto businesses from its scope. (Fryer and English, 2021).

Conclusion

Some countries have issued tax guidance (such as the UK, Australia, Singapore and Malta) but it is apparent that there is a need for more detailed guidance nationally and internationally. There are numerous proposals that range from increasing transparency and squeezing all crypto-assets into existing tax frameworks to more radical suggestions such as a remedial global cryptocurrency tax to help fund much needed revenue assistance to jurisdictions debilitated by Covid-19 and establishing a reserve fund to prepare for possible future pandemics (Ainsworth and Hu, 2020), which would necessitate a supranational taxing authority. Issues related to source and residence also present issues that need international attention. Government intervention will inevitably impact the size of the crypto-market moving forward (Seward and Kissel LLP, 2021) and the knock-on effects for tax revenue and complexity are very much up in the air.

<u>Question 4</u>

Candidates should demonstrate an awareness of the role and work of the OECD in international taxation, and both identify and weigh the arguments for and against the proposition that the OECD limits state tax sovereignty by default and by design. It is open to candidates to highlight, separately, some of the major works of the OECD that could be used to support or negate the validity of the statement. Candidates may also want to discuss whether the OECD is a supranational, international or inter-governmental body.

Quasi-Legislation and Soft Law. Much of the work of the OECD in and out of the tax space has been described as being “quasi-legislative” or “soft law”. Quasi-legislation is not a term of art and has no one comprehensive definition. Candidates may therefore be more comfortable with using the term “soft law”. Some scholars refer to soft law as not being law but having a legal effect, which is an obligation to obey the relevant guidance.

In relation to international taxation, the influence of the OECD has been described as being due to publication of soft law (Hongler, 2019). There are many reasons why soft, as opposed to hard, law may be introduced:

- implementation is faster, so there is no need to wait for deliberation, signing and ratification (Li, 2015);
- it allows for more experimentation;
- there is no international body that has competence in international tax matters;
- the costs of implementing hard law may be higher (Abbott and Snidal, 2001); and
- it may be used as a form of compromise between groups seeking a treaty and those seeking to avoid commitment (Guzman, 2005 and Hongler, 2019).

The OECD. The OECD was created in 1961 and is an inter-governmental organisation with 34 members of equal standing. The mission statement of the OECD includes the promotion of various economic goals. The Council of the OECD consists of representatives of all members and, as such, does not include non-members. However, non-members may be involved in the work of various sub-bodies of the OECD.

From a tax perspective, the Centre for Tax Policy and Administration consists of several sub-groups, including the Committee for Fiscal Affairs (CFA). The CFA is tasked with various functions including contributing:

> *to the shaping of globalisation for the benefit of all through the promotion and development of effective and sound tax policies and guidance that will foster growth and allow governments to provide better services to their citizens ... to improve the design and operation of their national tax systems, to promote co-operation and co-ordination among [members and non-members] in the area of taxation and to reduce barriers to international trade and investment.*
> *(OECD Resolution of the Council C(2008) 147)*

There are also more specific details about how these objectives are to be achieved, such as facilitating the negotiation of DTAs to prevent juridical double taxation and counteract avoidance and evasion, encouraging mutual assistance and the elimination of tax measures that distort international trade and investment flows. In addition, the CFA is to, inter alia, develop standards, guidelines and best practices.

<u>Agree</u>

- Whilst there are no global taxes, there have been and continue to be numerous proposals for these to be introduced: Piketty (2017) proposed a global capital progressive tax;

Pogge (1999) proposed a global resources dividend; and Tobin (1972) proposed a tax on financial transactions.

- There has been a partial de facto shift from a domestic to an international sphere for tax law competence (Hongler, 2019). Examples of this shift include the widespread implementation of country-by-country reporting; the introduction of domestic exchange of information rules; adopting minimum standards (that narrow the scope of legislative leeway); the identification of jurisdictions that operate harmful tax practices with the surveillance of country regimes by an international body. It can therefore be said that these various initiatives have had a profound impact on domestic legislation and administrative practice (Locher, 2005).

- Combination of soft law with coercive measures (such as publishing details of "blacklisted" countries following a review of the relevant country's domestic regime) may result in countries feeling compelled to comply (Grinberg, 2016).

- Global governance exists in a meaningful way even though it is considered to be "intangible" as it is unclear who exercises it (Rosenau and Czempiel, 1992).

- Pronouncements that, for example, the G7 have agreed to alleviate poverty (or some other collective goal) by introducing a certain global tax may not be able to be enforced but, arguably, a G7 member would be estopped from diverting funds away from development aid or stating that poverty was not a concern (Klabbers et al, 2011).

- The OECD work in the peer review space may be seen as an "executive measure to supervise the implementation of (quasi) legislative proposals" (Hongler, 2019).

<u>Disagree</u>

- Countries' constitutions (e.g. Austria, Australia and Germany) may regulate (i) what government organ can levy taxes and (ii) what types of taxes can be levied by what organ. This combined with the fact that there is no global-wide equivalent rule means governments of nation states still have the capacity to self-determine their own tax rules (Hongler, 2019). Further support for the contention that governments have sovereignty in the area of taxation is also based on the fact that there is no global tax legislator nor are there any global taxes.

- In spite of all the developments in the international tax sphere via the BEPS Actions, global forums, etc, there is still no executive body that can execute international recommendations (Tomuschat, 1994).

- The test of determination to spend government revenue – as feature of a sovereign entity – is not met in relation to the OECD or other international organisations. It is for individual countries to determine whether the revenue they generate is to be spent, inter alia, domestically or not (Hongler, 2019).

- Collection of taxes remains a "central domestic competence" even though countries may agree to co-operate under Article 27 OECD Model (Collection of Taxes). This provides another example of tax rules being executed almost entirely by domestic bodies. However, not all countries include this provision in their DTAs, which further supports the view that governments are concerned with protecting their sovereignty (Hongler, 2019).

- There have been some in-roads into the adjudication of cases at an international level that impact domestic tax rules. For example, the European Court of Human Rights has decided a number of tax-related questions and the decisions of WTO judicial bodies have impacted some domestic tax rules. Nonetheless, there is little evidence of the development or existence of an international fiscal judicial system that could be compared to the complex and comprehensive judicial systems at a domestic level (Cottier, 2005).

- The work of the OECD's CFA constitutes soft law (and, as such, is non-binding) and its mission statement uses the language of facilitating, encouraging and supporting. It does not refer to any powers of enforcement, regulation or sanction. Furthermore, the language used to describe the methods to achieve the CFA's objectives are to "develop standards, guidelines and best practice", provide a forum for discussion, and supply members with relevant data (such as statistics and analysis).

- The extent to which the work of the CFA (including BEPS) has influenced domestic tax policy is dependent on whether the examined domestic country is a "norm maker" (in that the recommendations are consistent with their pre-existing laws) or a "norm taker" (in that they will need to amend their domestic laws). The extent of the CFA's influence may therefore be said to be positively correlated with the extent to which a country is a "norm taker" with the converse also being true (e.g. for a discussion of the extent of influence on China's domestic regime see Li, 2015).

<u>Conclusion</u>

Candidates could conclude by weighing up the relevant strengths of the arguments they have made, which may result in a determination that international bodies such as the OECD have limited "sovereignty" in some discrete areas of international taxation de facto even if not yet de jure.

Question 5

This question requires candidates should consider both the significance of DTAs for developing countries (DCs) at a general level and more specifically the role of information that is available in certain datasets for negotiators derived from DCs. Whilst it is not required that candidates have familiarised themselves with the new "Tax Treaties Explorer Dataset" developed in conjunction with the World Bank and the G-24, it is open to candidates to focus on this particular dataset. There are other datasets that could be referenced also (e.g. IBFD's tax treaty database, Tax Analysts' Tax Treaties Research Tool and ActionAid Tax Treaties Dataset).

DTAs and DCs: General

Entering Tax Treaties

Bilateral DTAs are intended to create a stable and attractive tax environment, encouraging trade and investment while providing revenue authorities with tools for mutual assistance and dispute resolution (World Bank, 2021). There are currently over 3,000 bilateral DTAs in force and it has been reported that over 2,000 of these have at least one DC signatory (Hearson, 2017).

Advantages

Exchange of Information (EoI) articles in DTA are considered to improve opportunities for revenue generation. (Quak & Timmis, 2018). However, there is also some evidence that EoI reduces foreign affiliate sales. (Blonigen, 2011); some evidence that tax sparing clauses available in DTAs may have increased FDI levels up to the level of revenue saved in the source state (Hearson, 2018); existence of a DTA may increase foreign presence. (Merlo, 2011) but this is not the same as increasing FDI. However, some evidence points to FDI increasing following a DTA but this has been limited to countries with low initial levels of FDI (Milimet and Kumas, 2007) and at a general level middle income countries appear to benefit more in FDI terms than lower income countries (Quak & Timmis, 2018). The results relating to FDI have been described as "inconclusive." (Sauvant and Sachs, 2009).

Disadvantages

The OECD MTC and to a lesser extent the UN MTC are skewed to resident state taxation. Whilst some source articles have been strengthened, entering a DTA may still reduce revenue generated from income with a capital importing source state (e.g. reduced WHT rates). (Quak & Timmis, 2018). DCs have been advised to exercise caution when entering into DTAs where one of the contracting states is a capital importing country (IMF, 2014) and there is a view that one of the main tax advantages of a entering a DTA for a capital importing country may be for exchange of information purposes (EoI), which as noted above, may increase revenue. It may be preferable for a DC to enter into a EoI agreement without entering a DTA. (IMF, 2014). FDI levels for DCs may not increase following the entry into a DTA but there is some evidence that mergers and acquisitions may increase. (Giovanni, 2005).

The bilateral nature of DTAs may a result in a DC entering a DTA that exposes the DC to many other countries' tax regimes. This connectivity between DTAs may create issues that can only be resolved effectively at the international level; international tax co-operation may hold the key to improved tax outcomes for DCs with initiatives such as raising the awareness of how certain countries' policies can compromise the interests of DCs in an international context. There have been some initiatives that recognise that capital exporting countries need to be aware of "spill over effects" arising from DCs entering DTAs (EC, 2017) and implicit in this is that DTAs may not be beneficial for DCs and that the issue cannot be resolved by the DC alone. Furthermore, there is a general concern with DTAs and the international tax framework more generally that there is a mismatch between tax and development policies (need for increased sufficient resources to achieve sustainable development goals). (Harris, 2019).

The possible disadvantages of DCs entering DTAs can broadly be split into two categories: (i) the potential for DTAs to be misused by granting benefits that were not contemplated at the time of entering the DTA; and (ii) revenue costs that limit countries' taxing rights are outweighed by the non-tax gains from entry into the relevant DTA. Countries will typically engage in cost benefit analysis prior to entering into a DTA. Numerous more specific recommendations have been made including: strengthening African Model Tax Conventions as opposed to the OECD and UN MTCs; evaluate how much tax revenue has been foregone due to entering DTAs and include this figure in tax expenditures (Hearson, 2015) and strengthening the negotiation / review position of DTA negotiators from DCs from both a DC and non-DC perspective. Arguably, for these policy issues to be adequately addressed, relevant data and research based upon such data is needed. Accordingly, improved access to data may assist countries to minimise negative and increase positive outcomes.

<u>DTA Datasets Purposes: Significance for DCs in Negotiation Process</u>

<u>DTA Negotiation and Review</u>

DTA negotiation requires negotiators to be in the strongest position possible during the negotiation process. The combination of data that a country needs for a cost/benefit analysis of entering into or reviewing a DTA (or set of DTAs) will vary for each country. A dataset that provides detailed and comprehensive data on DTAs entered into by all countries is an invaluable tool for DCs. Examples of issues of particular concern to DCs in relation to DTA negotiation / review include: administrative capacity to negotiate and administer DTAs, i.e. technical expertise and significant levels of resources to administer DTAs, including mutual agreement procedures (PCT, 2021); the possibility that the country has not developed a model DTA or an integrated and coherent policy framework; potential for much-needed revenue to be lost due to restrictions on source taxation via reduced Withholding Tax (WHT); and the ability to match certain policy outcomes with DTA provisions.

With these concerns in mind, the UN has introduced guidance for DTA negotiation: the UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries 2019 (UN Manual, 2019) and, more recently, the Platform for Collaboration on Tax's "Toolkit on Tax Treaty Negotiations" (PCT, 2021). However, the availability of comprehensive, detailed data on the DTA network is becoming increasingly important for DCs that need to (i) re-examine their existing DTA network; (ii) better understand the potential costs and benefits of entering into DTAs; and (iii) access relevant data to strengthen their capacity for negotiation and renegotiation (World Bank, 2021).

<u>Comprehensive Dataset Significance</u>

Both the PCT 2021 and UN Manual 2019 consider that it is highly advisable to prepare for (re)negotiations by reviewing one's own recent DTAs (perhaps, considering the thresholds for construction and service PEs that are too high, e.g. 18 months in Mongolia/China DTA) and also those of the putative/existing DTA partner, a priori the DTAs they have entered into with countries in the same or similar regions or income groups. Such data is also important not only for negotiating new DTAs but also for reviewing existing DTAs, which is considered to strengthen both the process of DTA-making and the outcomes of the negotiation process (Mutava, 2019).

Accessing comprehensive data on DTAs may not always be straightforward or viable without a hefty subscription service fee. Whilst some DTAs may be freely available on government websites, these may be difficult to find and/or may not have been translated into an accessible language. Furthermore, even where DTAs are readily available, the process of analysing the multitude of DTAs entered into is both time-consuming and requires specialised knowledge (World Bank, 2021). Given the potential financial constraints in DCs, allocating revenue to such endeavours may not be a priority cost.

In-roads have been made into the limited availability of comparable data (e.g. WHT rates have been extracted from DTAs and tabulated). However, these give too narrow a picture of the DTA network and are insufficient as a treaty negotiation tool. The reasons for this include: existing databases having too narrow a focus on quantitative DTA provisions at the expense of other potentially relevant non-quantitative provisions; may not take account of the fact that taxing rights may be established in places other than the provisions of a DTA such as in a Protocol or other amending instrument and so may not provide a comprehensive insight into the workings of the DTA at issue and as noted below interpretative issues may not be addressed (World Bank, 2021).

Interpretation rules for DTA provisions may require a purposive interpretation study across numerous DTAs, which is time consuming, and the results are not amenable to tabulation. The Tax Treaty Explorer Dataset uses purposive interpretation, which means ascertaining the intention of non-standard wording as opposed to just checking for specific words/phrases and offers guidance when an element of subjectivity is included (World Bank, 2021).

DCs need to be clearer about the impacts of entering into/renegotiating DTAs from a foreign direct investment perspective. The 2000s saw some research in this area but the results have proved to be inconclusive (Sauvant and Sachs, 2009). Since more precise data has become available, some firmer conclusions have begun to be drawn, e.g. certain domestic provisions pertaining to foreign income (such as CFC rules) appear to absorb the benefits to investors derived by way of the resident state signing a DTA (World Bank, 2021).

<u>Specific Data Examples</u>

The Tax Treaty Explorer Dataset reveals a DTA WHT rate reduction in recent years, a priori in relation to dividends, e.g. Benin, Burundi, Equatorial Guinea, The Gambia, Guinea, Mauritania and Nigeria have concluded treaties that eliminate all or most WHT (World Bank, 2021), and greater source state taxing rights (other than WHT rates). PE definitions have expanded. This points to a shift from gross to net basis taxation, which is described as being more challenging for resource constrained revenue authorities (Leduc and Michielse, 2021). Further, whether a DTA partner has included non-Model provisions in their network (e.g. MFN clauses) may be useful to know in advance as it is possible that such provisions may have “disruptive effects on a DC’s treaty policy long after a DTA negotiation is concluded” (PCT, 2021).

Earlier research, relying on the ICTD Government Revenue Dataset and the ActionAid Tax Treaties Dataset, found that (i) DCs that raise more corporate income tax are more likely to sign DTAs with higher income countries and are more likely to negotiate higher WHT rates but these DCs do not achieve a better negotiated result overall and (ii) DCs that raise more revenue in total and are more likely to negotiate better outcomes in other clauses of the DTA that are more obscure and technically complex. As the outcomes for countries falling under (ii) increase the more DTAs they enter – perhaps because there is more collective expertise in relation to the operation of these more complex provisions, which may encourage DCs to revisit their existing networks as their understanding of the fiscal costs grow (Hearson, 2017).

<u>Conclusion</u>

There has been some research on whether there are sufficient benefits for DCs to enter DTAs with some commentators considering whether radically overhauling or even abandoning DTAs could be a better option (e.g. Dagan, 2000 and Pistone, 2010). Such a line of enquiry has provided some useful data, which itself can also be incorporated into the “dossier” of data that countries need at their disposal in preparation for the (re)negotiation of a DTA. In the words of Zolt (2018) “while the traditional focus has been on whether DCs should enter into DTAs with developed countries, the better questions may be what form the treaties should take and with whom DCs should enter into tax treaties”. Arguably, increased data levels in the hands of DTA negotiators from DCs may play a useful role in enhancing the outcomes of DTAs for such countries. At the very least, it does not appear that there is anything for DCs to lose when it comes to having access to comprehensive datasets.

There are clearly informational gaps when it comes to negotiators having the information they need in order to make informed decisions to enter / review a DTA. These gaps are wide-ranging with even the number of DTAs in existence having been described as an estimate found in the literature (Quak & Timmis, 2018). The datasets explored above may, therefore, assist DCs (re)evaluate whether a particular DTA or even set of DTAs would be or continues to form an important feature in their suite of international treaties.

PART B

Question 6

The focus in this question is on the relevant source of Rita's employment income and whether, according to the relevant article of the Trivia/Purcia DTA, Rita is entitled to exclude a proportion of her gross income from her Trivian tax return because it has a source outside Trivia. As Rita is a tax resident of Purcia for the purposes of the DTA, there is a need to determine whether Purcia has the sole taxing right in relation to her gross salary or whether Trivia may also tax some of her income (or all her income as alleged by the Trivian Revenue Authority (TRA)) under Article 15 of the Trivia / Purcia DTA. The focus of this question is therefore on Article 15 and there is no need to determine Rita's residence status under the DTA as the question states she is resident in Purcia.

It should be noted that whilst the facts are similar to those in a recent South African case (Mr X v Commissioner for the South African Revenue Service Case No.14218, 9 March 2018) and that it is open to candidates to reference the case, there is no need for them to do so. There has been some criticism of the way the judge arrived at the decision in that case and the prevailing view is that the case may be appealed. Furthermore, as it stands it has persuasive value at best. The case is considered in the latter part of this solution.

Article 15

OECD MTC 2017, Article 15, provides for the possibility of taxing rights being distributed between the employee's state of residence (Purcia) and the state in which they perform their employment (Trivia) where the latter state is party to a DTA with the employee's resident state. The issue to resolve is where the source of Rita's employment income is for the purposes of the DTA.

The wording of Article 15 is arguably less clear than it could be and may result in taxpayers being confused as to its operation. It is therefore important for candidates to carefully analyse its content and application to the fact pattern in the question. The Article 15(1) Commentary [1] provides that Article 15 establishes a general rule that employment income is taxable in the country in which the employment is actually exercised. This general rule is subject to a number of exceptions: (i) the remuneration of crews of ships or aircraft operated in international travel (Art.15(3)); (ii) pensions (Art.18); (iii) remuneration and pensions in respect of government service (Art.19); and (iv) non-employment remuneration for boards of directors of companies subject to Article 16. Rita's circumstances do not fall into any of these four exceptions. Furthermore, the nature of Rita's employment means that there is no need to consider other Articles (such as Art.17 for sportspersons, etc). Accordingly, the question of whether Rita has grounds to appeal TRA's adjustment can be restricted to an examination of Article 15(1) and (2).

Candidates could note that the relevant article of the Trivia/Purcia DTA refers to "Dependent Services" whereas the OECD MTC 2017 refers to "employment ". The Commentary notes that the term "employment" is more commonly used and the change in terminology is not intended to affect the scope of the article in any way. Thus, there is no need for candidates to focus upon the difference in terminology, although it is open to them to highlight the change in 2000 (Art.15(1) Commentary, fn.1).

Article 15(1)

The general rule arising under Article 15(1) is that the residence state has the exclusive right to tax the employment income unless the "place of exercise" test applies. This means that per the Trivia / Purcia DTA, Purcia will have the exclusive right to tax Rita's employment income unless the TRA can demonstrate that she rendered services in Trivia (i.e. the place of exercise" test was satisfied in Trivia). Accordingly, per Article 15(1) there is a need to consider whether Rita exercised employment in Trivia as well as other jurisdictions. Where her employment was exercised only in Purcia and a third state, Purcia is likely to have the exclusive right to tax her salary under the Trivia / Purcia DTA. Where, however, the TRA can demonstrate that Rita exercised her employment in Trivia then the TRA may be able to tax some or all of her gross salary. As per the question, the TRA have claimed that they are entitled to include all her salary in her Trivian tax return as all her employment was exercised in Trivia. Rita, on the other hand, claims that she exercised her employment in Purcia whilst she physically present in Purcia (i.e for 90 days in the relevant tax year) and thus she is not required to include her full salary in her Trivan tax return.

Notwithstanding the general rule in Article 15(1), Article 15 complicates matters somewhat by adding an exception to the above position (i.e. Article 15(2) must be read in conjunction with Article 15(1)) such that even if the TRA is able to satisfy the “place of exercise” test under Article 15(1), the residence state (i.e. Purcia) will still have the exclusive right to tax all Rita’s salary if all three conditions (see below) in Article 15(2) are satisfied. Where the conditions are satisfied, Rita would not need to include any of her salary in her Trivian tax return. It is acknowledged that she is not alleging that she has a right to exclude all her salary from Trivian tax but candidates should nevertheless explore this possibility to be clear about which of the two contracting states has the right to tax some or all of her salary per the DTA. Where Article 15(2) is satisfied, Rita would be able to appeal the TRA’s assessment on the basis that she has no tax to pay in Trivia.

Where, however, Rita’s circumstances do not fall within all three conditions in Article 15(2), Trivia may tax the portion of income that was generated by her exercise of employment in Trivia. It is open therefore for the TRA to assert that some or all of Rita’s gross salary is subject to tax in Trivia where Article 15(2) is not satisfied. Where the TRA is able to demonstrate that Rita’s situation does not fall within Article 15(2) and where they are able to demonstrate that a portion of her salary has a Trivian source, the TRA will need to demonstrate how they are seeking to apportion her salary between the two states.

Accordingly, in order to determine whether the TRA can claim that Rita should include all or some of her gross salary in her Trivian tax return there is a need to consider whether all three conditions are satisfied.

<u>Article 15(2)</u>

The three conditions that when satisfied result in Rita’s salary only being subject to tax in Purcia are found in Article 15(2):

1) Rita needs to be present in Trivia for a period of fewer than or equal to 183 days in any twelve-month period commencing or ending in the fiscal year concerned;

2) Rita’s remuneration is paid by, or on behalf of an employer that is not a resident of Trivia; and

3) Rita’s remuneration must not be borne by a permanent establishment or a fixed base that Rita’s employer has in Trivia.

In relation to condition (1): As noted above there is a need for all three conditions to be satisfied such that if one condition is not satisfied then Article 15(2) is not met and Purcia will not have the exclusive right to tax Rita’s salary or rather Trivia may tax all or some of her gross salary.

As per the question, Rita spends 275 days in Trivia during the tax year. On this basis it is therefore unlikely that condition (i) is satisfied as she is unlikely to be present for a sufficiently short time in Trivia (“fewer than 183 days in a twelve-month period in Trivia commencing or ending in the fiscal year concerned”). In previous versions of the OECD MTC (1964 and 1977), the testing period was a tax year (as opposed to a twelve-month period commencing or ending in the fiscal year concerned) and this was changed to avoid opportunities for tax avoidance (Art.15(2) Commentary, [4]). In spite of the fact that there is no mention of dates of presence in either Trivia / Purcia or when the relevant tax year begins or ends, the fact that her presence in Trivia is significantly more than 183 days points to her being highly unlikely to satisfy this condition.

Whilst not required, it is open to candidates to mention (i) the OECD's updated guidance on concerns related to day-counting in condition (1) where a taxpayer is in an overseas jurisdiction as a result of public health orders and (ii) guidance published by some countries in relation to the 183 days test during this period (e.g. Australia, Austria, Ireland, New Zealand and the UK). Generally, this guidance is there to assist taxpayers who have not remained in overseas jurisdictions for extended periods by choice but because of public health measures. It is also open to candidates to refer to the US Guidance, which states that for the purposes of the 183-day test, the Covid-Emergency Period will be treated as a medical condition that prevented the individual from leaving the USA. The Covid-Emergency Period is a period not exceeding 60 consecutive days starting on or after 1 Feb 2020 and ending on or before 1 April 2020 during which the individual is physically present in the USA on each day. Whilst there is nothing in the question to suggest Rita was unable to travel due to public health measures (or other potentially extenuating circumstances) nor that she would have typically would have spent significantly more time in Purcia, it is open to candidates to refer to the fact that countries have been making special concessions in relation to Article 15(2).

Given that (a) it is likely that (outside of a specific exemption related to emergency periods of presence in a jurisdiction) Rita's presence in Trivia is sufficiently long to prohibit the exception in Article 15(2) being satisfied and (b) Article 15(2) requires all three conditions to be met, it appears that Article 15(2) is unlikely to be met and thus Trivia may tax the income Rita derived in relation to employment exercised in Trivia.

Accordingly, there is no need for candidates to explore conditions Article 15(2)(b) and (c). However, for the sake of completeness they could reference the fact that it has been accepted that the employer is the Trivian branch and that the branch is a separate entity for tax purposes such that it is likely that neither Article 15(2)(b) nor (c) would be satisfied. Candidates could also note that the object and purpose of Article 15(2)(b) and (c) is to ensure that source state taxation of short-term employment contracts is not levied where the employer is denied a deduction for the cost of said employment because they are not subject to tax in the source state due to their non-residence or due to not having a PE therein (Art.15(2) Commentary, [6.2]).

Given that it is unlikely that all three conditions are met, Article 15(2) is unlikely to be satisfied, which has the result that Trivia is justified in including Rita's employment income under Article 15(1) to the extent that it is exercised in Trivia. Thus there is a need to consider where Rita's employment is exercised in order to determine how much of Rita's salary is likely to be included in her Trivian tax return.

<u>Where the employment is exercised</u>

In order to determine the portion of her employment income to be included in her Trivian tax return, there is a need to establish the source of her income. For employment income the source is determined by ascertaining where Rita's employment was exercised. The expression "exercise of employment" is not defined within the OECD MTC 2017 and so the rules of interpretation should apply to this expression as it features in the Trivia / Purcia DTA. This expression acts as both a threshold condition and as a criterion for the allocation of Rita's income (De Broe, 2000).

The Commentary on Article 15(1), [1] provides that the expression is a reference to the place where the employee is physically present when performing the activities for which the employment is paid. This appears to be quite self-explanatory in that Rita can only be said to be exercising her employment in a contracting state if she is physically present in that state. On this basis where Rita has exercised her employment in both contracting states there is a need to ascertain how to apportion her salary across the two contracting states. A reasonable basis, and seemingly the default basis, is that of allocating her salary on the basis of working days spent in each contracting state where the employee has been required, under the contract, to perform said activities (See Commentary on Article 17 [9.2]). More specifically, a time apportionment rule can involve a fraction where the numerator is the actual days in which Rita was present in Trivia to exercise her employment and the denominator is the total number of working days in the relevant period i.e. tax year or twelve month period (Potgens, 2007).

However, where evidence as to a more appropriate allocation of Rita's salary is available and this conflicts with the default basis above, the more appropriate allocation may be relied upon (De Broe, 2015). In the question the TRA has sought to include all of Rita's salary and not relied upon any apportionment. However, where the TRA sought to allocate a larger part than that apportioned on a days of work basis then it would bear the burden of proof. (De Broe, 2015) e.g. where the level of work carried out by Rita in each country is substantially different.

The above approach to interpretation relies upon an autonomous meaning being given the "exercise of employment". However, where the source state (Trivia) determines to apply its domestic law to the expression in its capacity as the state applying the DTA, it is possible that unless the context other requires, Trivia's domestic law definitions to the extent they conflict with the autonomous meaning outlined above, should be applied. The question does not provide details of Trivia's domestic law definitions in relation to this expression but it is open to candidates to read into the question the fact that the TRA would appear to be relying on a different notion of source of employment income to that of the OECD. In order for the TRA to assert that Rita's total salary should be included in her Trivian tax return it would need to establish that when Rita was in Purcia she was exercising her employment in Trivia. This is clearly at odds with a physical presence test and thus it would appear that the TRA may be either (i) relying on a domestic definition that relies on formal aspects of the employment such as where the employer is based or where the contract was entered into or where her salary is paid from etc. or (ii) they have misapplied the DTA.

Notwithstanding that, the TRA, as a representative of the putative source state (Trivia) may seek to assert that it should apply its domestic law to ascertain the extent to which Rita's employment has been exercised in Trivia, unless the context otherwise requires. However, there is also a view that preference should be given to an autonomous meaning to any undefined terms in Article 15 (Lang, 2009). The OECD Commentary refers to the state applying the DTA should apply its terms in relation to terms such as "employer" and "employment".

The Commentary on Article 15 [2.2], also provides that the condition for source state taxation is that salaries etc be derived from the exercise of employment in the source state applies regardless of when that income may be paid to, credited to or otherwise definitively acquired by the employee. Accordingly, the key is where the employment is exercised and not how Rita is paid, credited or acquires her salary. This is in order to ensure that the location where her work is exploited is not taken as the Trivian branch is her employer and it appears that she is paid her salary by her employer. The requirement for her to exercise her employment in Trivia before Trivia has taxing rights over her salary, or any part thereof, is the only relevant factor.

Rita would appear to have asserted that an application of the physical presence test results in her excluding income arising from her employment in Purcia from her Trivian tax return on the basis of the physical presence test and apportioned her gross income accordingly, which appears to be a reasonable basis. However, it is open to the TRA to question this basis and it may be able to query the basis used. Accordingly, it is advisable for her to appeal the TRA adjustment and ensure that her method of apportionment is robust.

<u>Mr X v Commissioner for the South African Revenue Service</u>

This case had similar but not identical facts. The case was heard in the Tax Court, Western Cape Division and involved the South Africa/USA DTA 1997 and, in particular, Article 15 "Dependent Services". The taxpayer argued he should not pay tax in South Africa (SA) on the portion of income he derived whilst exercising his employment in the USA. The South Africa Revenue Authority (SARS) argued that he was subject to tax in SA on his gross annual salary and did not accept that any amount of income should be allocated as non-taxable foreign source income due to Article 15(1) proving a general rule that employment income is subject to tax in the state in which the employment is exercised. Allie J. concluded that SA had the right to tax all of Mr X's gross annual salary and rejected the argument that any amount representing income derived from the same employment whilst Mr X was in the USA should not be subject to tax in South Africa (du Toit, 2018).

Whilst the decision has been described as a win for the revenue authority in relation to including more of Mr X's salary in the SA tax return, the reasoning has been described as devastating for SA jurisprudence as well as proving an opportunity for SA expatriates to pay less tax in SA. The concerns of commentators include the fact that whilst Allie J. correctly focussed on the concept "where the employment is exercised" and dedicated some considerable time determining the "source of the employment income", he appeared to ignore relevant South African jurisprudence, treaty rules of interpretation and the OECD Commentary. More specifically, Allie J.'s conclusion was based upon, inter alia, the fact the source necessarily emanated from the taxpayer's employment contract, due the contract being entered into in South Africa; the contract being governed by SA law; the SA company being provided with the taxpayer's services; and the source of income for the taxpayer was the same whether he was in or outside SA. The extent of the impact of this judgment is as yet unknown: whilst only of persuasive value, it may yet be appealed as it goes against "historic interpretation and prevailing practice" (KPMG, 2018). One concern with the judgment as it stands is that there may be a concern that SA expatriates may claim exemption from taxation based on the fact that they have overseas employment contracts in spite of the fact they perform relevant services in SA (du Toit, 2018).

<u>Conclusion</u>

Candidates could conclude by summarising their view – and supporting arguments - as to whether Rita has a case to argue that any portion of her employment income is not subject to tax in Trivia. Candidates may also mention that the issue of taxing rights of employment income is arguably more complicated than needed and that Article 15 is an example of a provision that could benefit from re-drafting.

Question 7

There are a number of ways that candidates could approach this question. The below provides one possible schematic.

Overview

The question provides candidates with an opportunity to consider the manner and extent to which contracting states (CSs) can assist each other in the recovery of tax where they have entered into a DTA that mirrors the OECD MTC 2017. Broadly candidates could begin by outlining ways in which the BRA may seek assistance from ARA and CRA in relation to tax it claims is owed by Sorren. The focus of the question is on a particular form of assistance (assistance in collection under Article 27) but it is open to candidates to refer to other forms of mutual assistance such as exchange of information (EoI, which often forms a part of an assistance in collection request).

A starting point for the subsequent discussion of assistance in collection (AIC) under the OECD MTC 2017 is the Revenue Rule and its limitations. Following this, Article 27 OECD MTC 2017 should be outlined and then applied to the facts in the question, where relevant. It is also open to candidates to reference any recent developments in the area of AIC but this is not required. Whilst candidates may be minded to include details of other agreements pertaining to mutual assistance such as the Convention on Mutual Administrative Assistance in Tax Matters; the question only requires a consideration of the relevant DTAs in the fact pattern.

Types of Assistance

Candidates can make mention of various methods of assistance that contracting states (CSs) can provide by way of entering a DTA that mirrors the OECD MTC 2017. As noted above, both EoI and AIC can be referenced but it is anticipated that candidates will focus on the latter method. Candidates may note that both EoI and AIC are included in “special provisions” within the OECD MTC 2017, respectively Articles 26 and 27.

The Revenue Rule

Before embarking on an examination of Article 27, candidates may briefly consider an old established rule pursuant to which foreign tax debts are not enforceable in other jurisdictions, known as the “Revenue Rule” (Baker et. al, 2011). The justifications for the rule range from the principle of sovereignty in earlier cases to it avoiding the danger of the courts of one state having to consider whether the tax laws of another state infringe public policy to the fact that the more recent international tax principles have been formulated on the assumption that the Revenue Rule exists (Baker, 2002). Whilst there were some limited exceptions (such as cross-border insolvency) (Baker, 1993)) to the Revenue Rule, there have been some more recent inroads into the notion that states will not enforce each other’s tax debts. Of particular relevance is Article 27 OECD MTC, which (i) was introduced into the OECD MTC in 2003 and (ii) forms the focal point of the question and solution.

Exchange of Information

Article 26 OECD MTC 2017 has wide application in that it provides for EoI in a manner that is not restricted by Articles 1, 2 or 4 i.e. persons, (non)residents and taxes covered. Should a request be made by the BRA for AIC in relation to Sorren’s tax debt then EoI pertaining to that request would be governed by Article 26. See Commentary on Article 26, [3]. There is no need to dedicate much time to this co-operative DTA provision as no information about any information requests has been provided in the question but it is open to candidates to briefly mention some of the requirements under Article 26 - e.g. “foreseeably relevant” information, no fishing expeditions etc.

Assistance in Collection (AIC)

As noted above, the inclusion of Article 27 OECD MTC 2017 (hereafter Article 27) in OECD MTC in 2003 provides rules pertaining to the ability of CSs to assist each other in the collection of each other's tax debts (using the terminology in the question) or more specifically "revenue claims" (using the terminology in the OECD MTC 2017). Furthermore, where Article 27 is included in DTAs there are some important features to note:

(i) Article 27 OECD has been referred to as a "lex specialis" of Article 25(3) in that Article 27(1) allows CSs to reach a mutual agreement as to the details of the mutual assistance in collection to be provided. (Dourado y Zamabala, 2015). Candidates may note that there are no details of a mutual agreement between any of the CSs in the question.

(ii) There are a number of international legal instruments, in addition to DTAs, including Article 27, that provide AIC including various multilateral instruments such as the Nordic Convention on Mutual Assistance in Tax Matters. However, only a consideration of Article 27 is needed.

(iii) Not all CSs will be in a position to include Article 27 in their DTAs (e.g. their domestic law may not allow such assistance). Those CSs that have agreed to include the AIC article, will carefully considered to what extent they will provide AIC. Factors to consider may include: (a) the relevance of the domestic law rules pertaining to collection of other states' taxes; (b) the similarity of the two CSs' tax systems etc.; (c) the extent of taxpayer protection esp. in relation to taxpayer rights; (d) the benefits to each of the CSs under AIC; and (e) the extent to which the taxes to which Article 27 applies should be limited. Given that the OECD MTC 2017 version of Article 27 has been followed it can be said that the scope of the AIC between the CSs is broad (see Article 27(1) below) and more specifically "comprehensive collection" assistance is envisaged (Commentary on Article 27, [2]).

(iv) Where the relevant conditions in Article 27 are met, there is an obligation on a CS that is requested to assist ("requested state", here Antillo) the state making the request (the "requesting state".\, here Bistria). Where the obligation arises there is a need to consider Article 27(3) and (4), which provide the two forms of assistance that can be provided: (i) collection and (ii) freezing or seizing of assets held in the other CS. (Commentary on Article 27 (1), [3]). Accordingly, the ARA / CRA may be required to either collect Sorren's tax debt on behalf of the BRA or freeze / seize any assets Sorren holds in Allinto / Cryptio (also referred to as "conservancy measures). See Article 27(3) and (4) below.

Allinto / Cryptio DTA

It should be noted that the fact that Sorren has assets in Cryptio is relevant for the purposes of the A/C DTA but not relevant for the purposes of the A / B DTA. Given that Bistria does not have a DTA with Cryptio, Cryptio is not under an obligation to provide AIC under a DTA even where the BRA makes such a request. Both the wording of Article 27(2) and the literature appear to support the view that Article 27 does not cover triangular cases (Article 27(2) provides that a revenue claim is "an amount owed in respect of taxes of every kind and description imposed on behalf of the CS or their political subdivisions or local authorities". See also Oberson, 2018, Ismer and Sailer, 2003 and Dourado and Zambala, 2015.

Allinto / Bistria DTA: the following provides an overview of the operation of Article 27 and its application to the facts in the question in relation to the A/B DTA.

Article 27(1)

Where Article 27 is satisfied, Allinto will be required to assist Bistria (note the mandatory nature of the obligation to provide AIC is expressed by Article 27(1) (see the use of "shall")). As noted above, the scope of the obligation is broad in that AIC must be provided to a broader range of persons and payments than envisaged by Articles 1 and 2 (persons and taxes covered). This means that whilst Sorren is a resident of Bistria and a citizen of Antillo, these factors are not directly relevant to the validity of an AIC request by the BRA. As also noted above, Article 27(1) provides that Antillo and Bistria can enter into a mutual agreement to settle the details of the AIC mechanism and scope. As applied to the facts, Article 27(1) A/ B DTA may be satisfied but there is a need to consider the remainder of Article 27 and in particular Article 27(8) – which provides some exceptions to the obligation to provide AIC - to determine which assistance route (collection / conservancy) is likely to be made / granted. As noted above the fact there is no mention of a mutual agreement between BRA and ARA means that candidates will need to work with the few facts provided in the question but may mention that it would be typical for the CSs to have a mutual agreement in place that detailed the scope of the AIC more fully.

<u>Article 27(2)</u>

This provision provides details about the term “revenue claims” (RC). Whilst there is no mention of the type of tax Sorren is alleged to owe in Bistria, it is highly likely to fall within the notion of RC: RC is wider than “taxes covered” under Article 2 and wider than “tax” more generally. Rather it includes related payments such as interest and penalties (under Article 27(3)) as well as any costs associated with conservancy measures (considered in Article 27(4) below). Accordingly, prima facie the BRA will be able to include any tax owed plus any interest or penalties etc. in a request for AIC under Article 27(3) and (4). There is no mention of the date of entry of the B/A DTA and thus it is not possible to determine whether the revenue claim arose before the entry into force of said DTA. However, candidates could note that where the tax owed by Sorren existed prior to the entry into force of the A/ B DTA then assistance could seemingly still be provided on condition that the relevant assistance is provided after the entry into force of the DTA. (Dourado and Zambala, 2015).

<u>Article 27(3)</u>

This provision is of potential relevance to Sorren as it is clear that the BRA has assessed Sorren to tax in Bistria and Sorren has challenged the BRA’s assessment. Prima facie, under Article 27(3) where (i) the revenue claim by the BRA is enforceable In Bistria and (ii) Sorren is not able to prevent the collection of the revenue claim under Bistria’s domestic laws, the ARA will be required to accept the validity of the request by the BRA to provide AIC. Accordingly, where Article 27(3) is satisfied there will be a need for the ARA to collect the relevant revenue claim in accordance with Antillo’s domestic law as if the revenue claim were a claim of its state. As applied to the question, the tax debt claimed by the BRA will need to be enforceable in Bistria (according to Bistria’s laws) and it will need to be shown that Sorren has exhausted all options for contesting the tax debt. The question states that Sorren has challenged the assessment in Bistria but it is not clear whether there is still scope for him to contest the assessment in Bistria.

A contested claim has been described as being “enforceable” as long as the contest does not result in a “suspensive effect” in the requesting state (Bistria). (Krabbe, 2008). As there is no mention of Sorren’s challenge having a suspensive effect, it would appear that the tax debt may well be enforceable in Bistria. (Put another way, the two conditions need to be “kept alive” during the whole of the AIC process). This means that were there to be a suspension or interruption in the enforceability of Sorren’s Bistria tax debt, Bistria would need to communicate the (temporary) non-enforceability of the tax claim and it would need to determine whether to suspend or terminate its request. (Ismer and Sailer, 2003). If Bistria decides to suspend its request, the suspension will continue until such time as the enforceability prerequisites have once again been met such that the requested assistance can recommence. (Ismer and Sailer, 2003) and Dourado and Zambala, 2015).

As there are no details in the question relating to either condition (i) or (ii), candidates may assume that the conditions are satisfied and Antillo would be required to provide AIC. However, there is the possibility that an exception may apply that would remove the obligation on the ARA to provide AIC. Firstly, it is possible that an exception under Article 27(8) may apply and also there is a need to consider whether any statutory time limits may apply when considering Article 27(3). The question advises that Allinto has a 36-month statutory time limit beyond which such claims cannot be enforced or collected. As the question does not provide full details of dates or details of the existence of any time limits in Bistria, candidates can note that it is possible that Sorren’s tax debt may not be subject to any time limit in Bistria. Candidates may also note that were Bistria to have a time limit and (i) Bistria's limit has passed then Allinto would not be able to grant the request and (ii) where Allinto's 36-month has passed then Allinto cannot rely on its domestic time limit to prevent assisting the BRA in recovering Sorren's tax debt. See below for Article 27(5) in relation to time limits.

<u>Article 27(4)</u>

This is also of potential relevance as it is possible that the BRA may request that Allinto freezes or otherwise seizes assets held by Sorren in Antillo (request for a "conservancy measure"). In order for such a request to be granted the following two conditions must be satisfied: (i) the claim is not yet enforceable in Bistria / it is possible that the collection in Bistria may be prevented by legal means and (ii) Bistria's laws foresee and will apply measures of conservancy in the specific case. It should be noted that the question states that Bistria's domestic law does not provide for the freezing or seizing of assets such that Allinto will not be required to apply freeze or seize Sorren's assets in Allinto even where Allinto has such domestic rules in place (as condition (ii) is not satisfied). See also below at Article 27(8)(c) where an exception to Article 27(4) could be referenced but is unlikely to be relevant due to condition (ii) not being met.

Accordingly, Sorren should be made aware that where the legal position of the tax debt in Bistria is known, Allinto will likely grant the AIC request where Article 27(3) is satisfied whilst assets he holds in Allinto may be less likely to be subject to a holding levy in Allinto as arguably condition (ii) of Article 27(4) is not satisfied.

<u>Article 27(5)</u>

Provides two exceptions to the general principle that the laws of requested state apply: (i) allowing Bistria's time limits to apply rather than any time limits under Antillo's laws, which benefits Bistria (requesting state) and (ii) Antillo does not have to afford the same priority to Sorren's Bistria tax vis-à-vis other claims, which results in Bistria (requesting state) not being able to benefit from any priority under Antillo's laws. The time limit issue was considered above under Article 27(3) but it can be noted that where the right to recover has not expired under Bistria's laws the tax debt remains in existence and can be recovered. There is no mention of the priority rules in either Antillo or Bistria and so firm conclusions cannot be drawn in this regard. However, candidates may note that as priority rules are generally formulated to serve the national revenue interest they do not form part of foreign revenue claims (Engelschalk, 2008). Should Antillo and Bistria have wanted to deviate from this position then they would need to amend Article 27 A/B DTA.

<u>Article 27(6)</u>

This is fairly straightforward in that there is no option for Sorren's tax assessment to be the subject of proceedings in Allinto's courts or before its administrative bodies in relation to the existence, validity or amount of tax claimed to be owed in Bistria. Where the enforceability of Sorren's Bistria tax liability is at issue, Sorren is advised that he would need to pursue this in Bistria and not Antillo.

<u>Article 27 (7)</u>

The object of this provision is to ensure that the enforcement of revenue claims and conservancy measures are carried out by the requested state only if the prerequisites for enforcement or conservancy measures remain fulfilled in the requesting state throughout the whole AIC period, i.e until completion (Dourado and Zambala, 2015). Article 27(7) ensures this is achieved by providing a notification requirement i.e Bistria must withdraw or suspend any request it makes for AIC where Bistria is aware that either:

(i) Sorren's tax debt is no longer enforceable in Bistria and Sorren is no longer unable to prevent the tax debt's collection (i.e. Article 27(3) is no longer satisfied); or

(ii) where Bistria no longer is able to take out conservancy measures under Bistria domestic law (i.e Article 27(4) is no longer satisfied).

<u>Article 27(8)</u>

It may be possible for Sorren to argue that a request made by the BRA under Article 27(3) or (4) falls within one of the four exceptions in Article 27(8). Dourado and Zambala 2015 refer to only some of these four exceptions as "true exceptions" in that Article 27(8)(a) and (b) are considered to be respectively (a) a logical consequence of the interpretation of Article 27(3) and its "equivalence principle" on the one hand and (b) justified by the principle of reciprocity in public international law on the other. There are insufficient facts to know whether any of the "exceptions" would apply but it may be possible for Allinto to refuse a request by the BRA under Article 27(8)(a) as Bistria has no ability to impose conservancy measures under its domestic law, it is open to Allinto to decline to take such measures on behalf of Bistria (Commentary on Article 27(8), [32]). The same would apply if Allinto did not have the ability to seize Sorren's assets in Antillo. See Article 27(8)(a) "In no case shall the provisions of this Article be construed so as to impose on a CS the obligation to carry out administrative measures at variance with the laws and administrative practice of that or of the other CS". Other exceptions may also apply but more detailed facts would be required to consider these (see Article 27(8) (b)-(d)).

<u>Conclusion</u>

Candidates may conclude by summarising the possible consequences of the BRA making an AIC request to the ARA and to a lesser extent the CRA. Candidates may also note the object of Article 27 is to:

(i) combat tax evasion and tax avoidance in cross-border situations; and

(ii) assure correct taxation and allocation of taxing rights. (Dourado and Zambala, 2015). Article 27 has also been referred to as an extension of Article 26 but it operates differently to Article 26 as Article 27 is contemplated by the OECD to be an "optional" article as it is based upon reciprocity and it is acknowledged that a careful cost benefit analysis will need to be carried out before it is included in a state's DTA network.

Whilst there has been a been a relatively low uptake of Article 27 in DTAs between CSs and certain DTAs whilst including the provision limit its scope (e.g. Belgium and Greece 2008), the fact that the A/B DTA includes it means that in circumstances where its provisions apply, Antillo will be required to provide AIC on request. Basic presumptions are as follows:

(i) there must be a tax debt;

(ii) requesting state (Bistria) must take reasonable steps / exhaust all internal means to recover the tax;

(iii) the tax claim should not be in dispute e.g. where time limits for appealing against a tax assessment have expired this will be satisfied; and

(iv) where the AIC process has started and Sorren contests the claim the AIC procedure may be stopped in Antillo and conservancy measures may be adopted (Baker et al., 2011). Where Bistria objects to conservancy measures and insists on enforcement, Bistria may leave itself open to enforcement being declared wrongful by a court, which may result in both reimbursement and compensatory damages (Baker et al., 2011).