Taxation of Offshore Indirect Transfers (OIT) in Developing Countries

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Faculty of Law

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Declaration

I, Bastian Thurneysen, hereby declare that the work on which this minor dissertation is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

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CHAPTER 1. INTRODUCTION AND DEMARCATION OF THE STUDY

1.1 Introduction

In a world of globalized capital, individuals, companies, individuals, and nations, often benefit from investment opportunities in which capital is free to flow across borders and jurisdictions with limited restrictions. Foreign direct investment in developing nations is certainly one of the perceived benefits of this milieu in which capital is liberalized, as it often provides critical funds for resource extraction, industrial growth or increased agricultural output, and, supposedly, an overall influx of positive development potential (Rixen, 2015: 325). Indeed, many developing nations work very hard to attract foreign investment capital, including through tax incentives, which can create opportunities for utilizing natural resources, employment, and infrastructure development. Overall, international investment is often portrayed as win-win scenario, with some, but few drawbacks.

However, this does not mean that the international flow of capital is not without its complications. Not all pertinent actors involved in the global chains of investment, industry, and development, feel as though the international system is a level playing field for all parties. This is particularly true when it comes to the notion of taxation, which is on one hand largely a domestic issue, meaning that taxation policy is ultimately in the jurisdiction of national governments. Yet with that said, the international arena in the early part of the second millennium is a world of international business in which capital investment flows readily across and between jurisdictions, heightening the need for more robust, creative, and far-reaching policy and legislation that allows nations to capture the taxable income generated from their domestic resources in foreign destinations, because of the high degree of foreign ownership through globalized capital (Toledano, Bush, & Mandelbaum, 2017: 13).

Depending on the country in question, this can be a daunting task. The reality of the international arena is one of countries that are divided across a spectrum of wealth, from a small number of very wealthy and powerful nations, (from which stem most of the powerful corporations and other investment engines), to those who struggle to meet the basic needs of their people, and to maintain stable governance. It is those nations at the lower end of the scale that are generally recognized as being the most vulnerable to powerful international forces. The economic drivers in such nations are often found in raw resources, whether in labour, mineral deposits, or agriculture, most of which rely on some degree of foreign investment both in capital and technological capacity in order to harness and extract their value (Kosters, 2004: 7). In turn, the taxes that are generated from such activity not only play a substantial role in filling the coffers of these governments, but are one of the few potential resources for meaningful earnings for the state, in countries where they are most needed, primarily for very basic needs of infrastructure and daily governance (Marais, 2018: 611).

Increasingly over the past decades, it has been recognized that there is a great deal more that powerful countries and institutions can and perhaps should do in order to help the less powerful harness their wealth, from taxation and other sources (Kosters, 2004: 7). As of more recent years, various institutions have entered the fray in regard to development and related issues like taxation at the international level, operating via collective agreements. These include groups such as the Organization for Economic Cooperation and

Development (OECD), International Monetary Fund (IMF), and World Bank. While several international bodies, the OECD included, provide some guidance and direction for taxation, these agreements are voluntary, and do not supersede the power or responsibility of national governments to monitor the usage, flow, and taxation of national resources. Further, there is a notable critique on the somewhat conflictual nature of these institutions, in that they get their power from the same powerful nations whose business elites have been benefiting from lopsided power dynamics on the international level all along, and in many ways, despite the good intentions of some initiatives on their part, on the whole, they continue to do so, meaning that developmental needs and the ethics of equity and fairness still must fight to be recognized against a backdrop of profiteers who are in many ways loathe to surrender their advantages, whether they are deemed to be fair or not (Marais, 2018: 612).

In briefly considering the taxation landscape in regard to OITs, at present there exists a variety of approaches. On one hand there are some guidelines presented by some intergovernmental organizations, for example, the OECD, which suggests taxation of OITs in some limited cases. However, this serves as a guideline for member countries and not a regulation. It should be further noted that, regardless of policy source and orientation, any application of taxation to OITs can only occur when a nation has a suitable domestic taxation policy in place, as such taxes are ultimately under the authority of national governments where the resource resides.

This has led some researchers to comment on the distinction between developed and developing nations when it comes to the value and importance of taxing OITs, whereby it may be very much in the interest of developing countries to harness the tax on this activity, and much less important for developed nations (Lau, 2015:43) . This is owing largely to the fact that such holdings and transfers by multinationals are far more common in developing nations, and to the fact that the taxes on such. This may provide a meaningful backdrop for understanding the variance in approach to OITs from nation to nation, as well as create a focal point for understanding how developing nations in particular can use taxation as one of the tools needed to harness the power of its own resources in order to better foster development.

1.2 Aim of Research

The primary research question for this dissertation can be phrased as such: How can developing nations best tax offshore indirect transfers in order to benefit from what is ultimately a domestic economic asset?

The present research will consider this question specifically in regard to those nations that are identified as being on the lowest end of the development continuum, as measured by the WTO, which separates the world's nations into broad categories of development, roughly delineated as developed, emerging, and developing. The WTO and other institutions maintain a list of least-developed-countries (LDCs), sometimes referred to as low-income-countries (LICs). While the current research is not restricted exclusively to LDCs as identified by the WTO, it will however focus primarily on the role and importance of taxing OITs to those nations closest to that end of the scale, for whom in particular economic opportunity is most limited, making notions like taxing OITs far more critical to their nascent progress.

This question will be further broken down into sub-areas, expressed as component questions of the greater research intent. These include:

1. Is there a benefit to a single policy regarding OIT taxation (unilateral versus a bi or multilateral) that all developing nations can adopt, or, are there important distinctions in domestic economic or political circumstances that make one single-best policy unobtainable, and thus require each nation to select its own best path?
2. What are the important distinctions and definitions currently used to shape and delineate OIT taxation policy? How do these tax distinctions relate to developmental policy overall?

1.3 Delineation and Limitations

The current research focuses on issues of Offshore Indirect Transfer taxation for developing nations. While it is inclusive of context, meaning that it briefly discusses relevant economic, political, and developmental issues, these are not explored deeply, but rather presented as the context in which the OIT tax debate is taking place. While leading international institutions are often central to the discussion, it is within the context of their relationship to developing nations specifically in regard to the taxation of Offshore Transfers. Other forms of taxation, foreign investment, development, debt relief, etc, which may be vital parts of that relationship are not explored here. The same can be said of the domestic tax policies for developing nations, of which OIT taxation is a part. While other aspects of taxation and revenue policies for developing nations are referenced where applicable, they are not the focus of this research.

1.4 Research Methods

Research for this study will be exclusively literature-based, relying on the substantial variety of academic resources currently available. Relevant research literature will include, but not be limited to: case studies in international taxation, international tax law and international development journals, reports from relevant international bodies or groups, such as The Platform for Collaboration on Tax, Commentaries on the Taxation of Offshore Indirect Transfers, both of which have input from critical international bodies, such as the OECD, World Bank, International Monetary Fund, and the United Nations.

1.5 Significance of Research

Like many issues involving the generating and movement of monetary wealth on an international scale, the present study does not simply offer commentary on the functioning of taxation policy from nation to nation. Matters of international capital and investment inevitably resonate with critical matters of international development and the disparities that exist between the nations and regions of the world. At the same time, international monetary policy, generally constructed by those nations who possess the greatest share of global financial power, tends to exist in a condition of constant critique, review, and analysis, particularly when viewed through the lens of disparity and development. Understanding the international taxation regime for offshore

indirect transfers inevitably means examining the variance of policy and practices through this lens.

At the same time, global investment and the movement of capital internationally is in an era of tremendous growth, as the age of globalization continues, and various forms of information technology continue to 'make the world a smaller place', conceptually speaking. Nations, and non-governmental actors have an increasing amount of access to one another through various initiatives, investment included. This means that the norms, conventions, regulations, and directives of various global actors are being frequently revised and updated to suit a changing environment. This examination of offshore indirect transfers will resonate along the fault lines of taxation and monetary policy as part of international agreements on the flow of investment and capital, and simultaneously on the individual needs of nations in regard to harnessing resources and formulating domestic taxation policy.

In considering the significance of OIT taxation policy in an environment of international developmental disparity, a number of key issues are of particular relevance. On one hand, OITs are of greater significance to the bottom line of development for under-developed or developing nations, who typically benefit mostly from resource exploitation as a form of national wealth. This is well understood from a political, social, and investment point of view, as each nation must capitalize on what is available to it. A great many developing nations possess wealth primarily through natural resources, but rely on developed nations as a source of investment capital and technology in order to extract those resources. This means that developing nations are more likely to be in the position whereby the indirect transfer of offshore assets is a frequent occurrence, and represents a meaningful proportion of domestic economic activity (Marais, 2014).

The opportunity to tax such activity is a significant opportunity for developing countries, as the exploitation is of these raw resources is often the most prominent source of wealth for the nation, and failing to tax the shifting or selling of such resources will represent a significant loss to domestic coffers that cannot be easily compensated elsewhere. Further, in most cases, these are nations that suffer chronic budget limitations for items that impact the daily lives of their citizens, and their ability to generate domestic economic activity as a result. Investments in critical services and social programs are paramount to the successful development of many nations in the world, and the relationship is well understood. Most nations still classified as 'developing' are not interested in simply receiving investment so that there is some employment for its citizens now and in the near future. The ultimate purpose of exchanging vital national resources for investment is to create wealth opportunities that a nation can then use to advance itself toward a greater economic stability for its citizens.

The current research is not a critique of the pace and equity of global development, as much as it is an examination of current practices and emerging guidelines as to how economic activity can be harnessed by nations relying primarily on resources richness and international capital. The implications of such may focus on developing nations, but they are not exclusive to them. Most prominently in this discussion is the ongoing reality of a global environment with no central authority, meaning that items like taxation are often in a state of confusing variance across policies and jurisdictions; ultimately a potential disadvantage to all players, regardless of nation or economic prowess.

1.6 Chapter Overview

Chapter 2 of this research offers precise details on what constitutes an offshore indirect transfer, as well as delineating precisely why they are of such importance and real value to developing nations. Further, it presents the context of the international arena in which such taxation must take place, and why, in light of historic power dynamics and relations, this is such a formidable challenge to developing or low-income nations. The chapter goes on to discuss the current state of international taxation in regard to common practices, such as bilateral treaties, as well as the more recent initiative by international institutions to establish more meaningful tax regimes, particularly with the intent of addressing global economic inequities. Chapter 3 is a review of the most recent and perhaps pervasive initiative by the IMF, World Bank, OECD, and UN in particular, to establish an overarching set of guidelines for the taxation of Offshore Indirect Transfers, referred to by these institutions as a 'toolkit'. Chapter 4 returns to a more pragmatic examination of OIT taxation in practice, reviewing the specific experience of several low and middle income nations in their attempt to harness the tax wealth produced by such activity as OITs. The paper closes with a review of OIT taxation for developing nations in regard to current status and progress, as well as potential policy advancements for the future of what is ultimately a growing global initiative.

CHAPTER 2. OIT: THEORY & APPLICATION

2.1 OITs in Context

While the world of international relations in which OITs exist is very complex, involving multiple players and shifting dynamics of both politics and even history, at its most basic, both the definition of OITs and the impetus to effectively tax them are much easier to understand. At issue is the question of ownership of what are referred to as immovable assets, which are located in one country while the owner of said assets, whether a person or more commonly a business entity, resides in and is subject to the laws of another country. This meets the first criteria of being 'offshore', or, outside the jurisdiction of where the asset itself is located (Kane, 2018:332).

In a simple scenario in which there is a single person or business entity residing offshore and functioning as the owner of said assets, and that entity decides to sell the asset to another person or company, for example the mineral rights for a given location, that is considered to be a direct transfer. If, however, the assets are owned by a business entity or corporation, and that corporation or business entity is sold, that marks the distinction at which point the transfer becomes indirect rather than direct (Toledano, Bush & Mandelbaum, 2017: 6). The difference is a question of how far removed the sale itself is from the assets. In the case where a corporation owns an asset in another region, and the owners of the corporation decide to sell not the asset, but the company that owns the asset, there is a layer of separation, and, technically speaking, the asset itself has not been sold because it is still owned by the same business entity, even though that entity itself now has different owners (Kane, 2018: 333). This satisfies the criteria for what is called an offshore indirect transfer.

As much as technically speaking the asset itself has not been sold, there is still an argument to be made that a profit has been earned on said asset, which, by widely recognized law and conventional practices, is a profit on which the local government has a right to levy a tax. The core of the reasoning as to why in principle this is a taxable transaction, has to do with the fact that, presumably, the asset, such as a mineral right, has an extractable value of its own, and it is through ownership of this value that the business that owns the asset obtains its own value, at least partially (Toledano, Bush & Mandelbaum, 2017: 7).

To understand the issue with OITs, one might imagine a scenario in which a corporation owns headquartered in one country owns valuable immoveable assets in another, and, at the same time, that corporation is actually owned entirely by a second corporation. If for some reason that asset sees an increase in value, such as higher prices on the market for the associated minerals, the owners may wish to capture some of that value through resale. If the company that owns the asset directly sells the asset that is a direct transfer, which, offshore or otherwise, is fully subject to tax in the same jurisdiction as the asset (Wallace, 2018:334). However, if the owners decide to capture this value by selling the entire company that owns the asset, this presents a host of potential problems for the country in which the asset is located, not the least of which is the potential loss of all of the tax income associated with the transaction, if, as is the case with many nations at present, no legal contingency is in place to capture the tax associated with the capital gains of the OIT (Hearson, 2017: 5).

In brief, this outlines the circumstances of OITs and the associated dilemmas of taxation of OITs. However, these dilemmas themselves occur within a greater context of international relations and global development issues that are also varied, complex, and ongoing. In overview, taxation of OITs is considered to be a potential part of a bigger strategy for taxation and fiscal policy, of particular importance for developing nations in particular. Research has demonstrated repeatedly that tax associated with international investment capital through various transactions, including OITs, represents a significant proportion of much-needed income for governments of developing nations (International Monetary Fund [IMF], Organization for Economic Cooperation and Development [OECD], United Nations [UN], World Bank Group [WBG], 2015:6). For most developing nations, the presence or absence of this taxation income will literally translate into the presence or absence of education services, transportation and communication infrastructure, or even health and security services for many citizens in developing nations (Kazi, Sarker, Tumuhirwe. 2013). Overall, this highlights one of the key issues at debate around OITs that seems to resurface continually throughout an exploration of such transactions; on one hand there are the needs of international relations centred around the legality and fairness associated with tax laws and regulations, and at the same time there is an underlying question of development and basic needs in a world full of vast inequities. As many researchers in the field have pointed out by way of critique, there are a number of questions about fairness, priorities, and basic developmental needs that underly such discussions, all of which still take place within a milieu of wealth, competition, and self-interest, creating a much greater need for balance between the two than is present in contemporary circumstances (Solimano, 2018:17).

In explicating the greater international context in which taxation of OITs occurs, Shome (2018:331) describes an international arena in which there is no central authority. While many international institutions exist, for example the United Nations, the international arena is still one in which nation-states are the highest sovereign authority (Capone, 2018:388). This is a critical point of context that surfaces throughout the discussion of international trade, investment, taxation, and development. It means that in the international arena, treaties, agreements, institutions, regulations, and all other rules-based regimes are ultimately voluntary, in the sense that it is up to individual nations to sign on or not, and to interpret and enforce any such agreements within the context of their own domestic jurisdiction (Hearson, 2017: 4). At the same time, the world at present is one in which the “forces of economic globalization, the rise of wealth inequality, and the existence of...special tax jurisdictions have all created a milieu favourable to the mobility of the very rich” (Solimano, 2018:2), and to the overall mobility of capital.

This creates an environment in which notions like cooperation, consensus, and voluntary acts that may not align directly with self-interest are all potentially necessary, if progress is to be made toward developmental ideals such as equity. On the other hand, there is such vast disparity of wealth between nations, regions, and even individuals, that such ideals may ultimately prove to be an unobtainable, simply because, as some critics have observed, the current rules and practices in trade and international finance simply favour the wealthy, and the world's developed nations, keeping those less-developed countries (LDCs) in a state of constantly lagging behind, regardless of their successes (Owoeye,2016: 228). Despite whatever initiatives have and are taking place in regard to achieving greater equity, researchers point out that at present the world is one in which a little less than one per cent of the world's wealthiest people control as much as 45% of the world's wealth (Solimano,

2018:3). Moreover, these wealthy individuals align with wealthy companies and nations, all of which is highly visible when considering some basic statistics related to global capital, taxation, and OITs. For example, according to Hearson (2017; 4) up to 30% of the wealth of sub-Saharan African nations, and 22% of wealth from Latin American nations is held offshore by foreign entities, which, when compared to 4% for Europe and 10% for the United States, highlights the potential losses if offshore transfers are not soundly captured for taxation, and may in fact help to explain why such notions are of much greater importance to low and even middle income countries, much more than they are to the developed world. In contrast, Capone (2018: 386) found that in 2015, multinational corporations from the United States alone held over 2 trillion dollars in foreign jurisdictions where they had very little business activity, yet the tax policies of these locations were highly incentivized, meaning that in whatever jurisdiction such monies were actually made, the taxes were likely being avoided, and the greatest share of that loss belonged to developing nations.

As much as critics point out that inequity and struggle for developing nations are thematic to the world of international trade, finance, and taxation, it has also been pointed out that the contemporary arena is one in which there are more international institutions, regimes, and overall initiatives actively attempting to offset these chronic shortfalls. On one hand, as Hearson (2017:4) points out, following the global financial crisis of 2008, the discourse on international finance and development came to focus much more greatly on issues of inequity, including tax avoidance; a dialogue often fuelled by the ongoing pressure of various non-governmental organizations (NGOs). However, the overall agenda to make development and global equity an ethic for international initiative can more easily be traced back further to the late 20th-century, and the turn of the millennium.

In a review of the role of civil society in shaping the international tax system, Capone (2018:392) explains that in the past, largely in the era before globalization, there were two major groups in terms of industry, finance, and taxation; the public sector, or government, and the private sector, or business. These two groups often worked together in the domestic arena, with some areas of traditional conflict, such as taxation and avoidance. However, beginning in the lat 20th-century, the nations of the world experienced a period of intense globalization, of the opening of markets to foreign capital, and the easing of restrictions for the mobility of capital across the globe (Capone, 2018: 393). With the advent of the internet and staggering advances in telecommunications, business and personal transactions began to take place across the globe to the point that these tasks can now take place within seconds (Capone, 2018: 383).

As these changes took hold, however, alongside it grew an increasing awareness of issues of global disparity and development, leading to the formation of many NGOs, focused on the inequities of the international arena (Owoeye, 2016: 226). Eventually these observations and initiatives coalesced into the formation of the Millennium Development Goals (MDG) in the year 2000, by the United Nations. These ambitious goals included among them the eradication of extreme poverty, establishment of basic universal education, and to develop a global partnership for development by 2015 (Owoeye, 2016:227). In many ways this marked a turning point, and the introduction of what Capone (2018:392) called a third group, comprised of groups from civil society, who began to pressure governments and global powers to consider the “collective global good”. What followed was a period of new organizations and the addition of a new purpose to some existing ones, including the United

Nations (UN), International Monetary Fund (IMF), Organization for Economic Cooperation and Development (OECD), and the World Bank, among them (Capone, 2018: 394). These organizations in particular have joined forces under the auspices of the G20 in recent years to address issues of development and taxation, including a series of guidelines, termed a 'toolkit', in 2018, offering a series of recommendations (International Monetary Fund [IMF], Organization for Economic Cooperation and Development [OECD], United Nations [UN], World Bank Group [WBG], 2018:4). Included among the founding premises of this document are the statements that taxation of OITs represent a critical source of income for developing countries, and that the leading group of nations, those in the OECD, support the right to legal jurisdiction of developing countries to enact such taxes abroad (IMF, OECD, UN, WBG: 2018:14).

In a review of trade policy and the UN's development goals, Messerlin (2017:3) points out that the reality following the year 2000 was that overall, progress was slow, and it was more than 5 years before exact targets for many of the goals were established. This does not mean that there was inaction; rather, this was a period of increasing affiliation and organization by NGOs and work by international lending institutions to formulate meaningful long-term goals (Capone, 2018: 414). In essence, the civil society began to organize and assert itself around key issues such as international taxation (Messerlin, 2017: 5). The work that followed the MDG eventually led to the creation of the UN Sustainable Development Goals in 2010, which Messerlin (2017: 6) indicates included the notion of trade as a primary path for development, aimed at creating a better life for citizens, a language not included in the MDG.

As positive as these developments are, however, there are still many pitfalls apparent. Messerlin (2017:11) further points out that as much as trade can be a path toward development it can only be so if a trade environment exists that is respectful of developmental needs. In a recent MDG report on 'gaps' in the process, the WTO was identified as often pushing for both trade and taxing initiatives counter to the individual development needs of many LDCs (Messerlin, 2017:13). At the same time, Messerline (2017:15) notes a distinct change in the overall approach to international fiscal matters since the 2008 financial crisis. This is echoed in the observations of Capone (2018:417) who points out that the financial crisis led to a higher level of scrutiny for financial operations across the board, and as a result, tax avoidance has come into greater focus, do in no small part to the increased presence of NGOs such as the Tax Justice Network (TJN), which grew out of initiatives of the early 2000's. In a broad view, the last two decades in particular has seen a plethora of initiatives by various groups who represent a variety of interests, complimentary and conflicting, sometimes finding both within the same organizations. As Capone (2018:418) observes, this ultimately represents an international environment in which the collection of actors of varying degrees of power have yet to decide how to divide the wealth of international taxes.

As much as the OECD countries are partial drivers behind initiatives such as the OIT Toolkit (2018), they are also often referred to as the “rich country club” (Capone, 2018:391). These same countries may behave like a 'benevolent hegemon' in some ways, while seeking to hold on to their unfair advantages in others, for example, by insisting on liberalized trade borders with developing nations while making few such concessions in return (Hearson, 2017:9). The issue of unfair advantages in the relationship between rich and poor countries is widely criticized, and often seen as systemic. Taxation policy in developing countries does not take place in isolation,

but must be part of an integrated plan that includes all fiscal, social, and developmental needs (Owoeye, 2016:225). However, biases in the formation of tax and trade regimes lead to initiatives such as Trade Related Aspects of Intellectual Property Rights (TRIPS), which protects wealthy corporations and countries while in nations still being devastated by issues like HIV and AIDS, it means not being able to afford the drugs to address a pandemic (Owoeye,2016:227). With public health crises comes a loss to the work force for nations that struggle to educate their people, which undermines that nation's ability to maintain stable governance (Owoeye, 2016: 228); something deemed critical in order to successfully capture taxes such as OITs (IMF, OECD, UN, WBG: 2018:7). Ultimately, the international taxation arena is one in which each nation has to address its own collection of needs, often leading to individualized strategies in which taxation is only one of several crucial building blocks (Capone, 2018: 411).

2.2 Current Practices in Taxation and Development

As promising as the initiatives of the global financial institutions appear to be, international taxation at present in regard to OITs and other policies is a varied mixture of policies, with some low and middle income countries having OIT provisions and many others not, while those that do vary greatly, both in terms of how they are defined and how they are enforced ((IMF, OECD, UN, WBG: 2018:9). While collective initiatives build momentum, and NGOs provide services of their own to developing nations, international taxation has no overarching authority nor coordinated set of regulations. The norm that remains in place is, for the most part, a series of individual treaties struck between nations (Toledano, Bush & Mandelbaum, 2017:17).

While bilateral treaties are the most common legal foundations for international tax collection, they do not take place in an environment of complete chaos. This means specifically that even in a milieu that has no central authority and thus there are no fixed rules or regulations, there are still guidelines available that take place through norms, precedents, and conventions. The two most robust and prominent of these conventions have been established by the United Nations and the OECD (Lennard, 2009: 6). The history of establishing tax conventions in many ways follows the major initiatives of international relations dating back into the 20th-century, in which the devastating of WWI inspired the formation of League of Nations, the predecessor to the United Nations. The first models, referred to as the Geneva Models, were created under the direction of the League of Nations, and were intended to establish both a set of norms of common practices (conventions), and a process through which further models could be constructed through a collective organization, and a process of consensus (Kosters, 2004:7). In the decades that followed this process was put into practice through the fledgling intergovernmental organization, leading to several different models, the last of which for the League of Nations being the London Model, established shortly before the outbreak of WWII (Kosters, 2004:4). These models were set up not as regulations, as the League of Nations like the UN is not an authoritative body, rather, as their names suggest, these are models that attempt to build on established and agreed upon principles for setting up bilateral treaties (Lennard, 2009:7). In reviewing these practices, the connection between various tax initiatives on the international level across the years becomes more apparent, and sheds some light on what otherwise may appear as a series of ad hoc or isolated agreements.

At first glance, it may seem counterintuitive for two prominent organizations such as the UN and the OECD to produce what appears to be duplicated efforts toward a model for international taxation, particularly treaty formation. However, both of these organizations are multi-faceted and purposed, each responding to the various demands put upon it in different chapters of what might be called the growing internationalism of the 20th-century (Kosters, 2004:5-6). When the interruption of WWII had passed, and the early initiatives of the League of Nations regrouped into the formation of the United Nations, the early decades for the organization were much less concerned with creating new Model Tax Conventions as it was with other critical matters of international relations. In short, the OECD, beginning in the early 1960's and into the 1970's was able to pick up the thread of earlier initiatives, creating Model Conventions that were quickly established as standards for bilateral tax treaty negotiations (Kosters, 2004: 1).

However, taxation is perhaps just one cog in a bigger wheel of international relations, and as the progress of 20th-century history continued, it brought many changes that created a ripple effect through the field of international relations and its many components. The end of WWII was followed by the end of colonialism, and the years that followed saw the formation of many new countries out of the old colonial territories of European powers. Inevitably, this created a new series of demands, including the need for a whole series of tax treaties, however, as Kosters (2004:4) has pointed out, the treaties in this case were not between European nations of more or less equal prowess, but were between developing and developed nations. It became quickly apparent to many that the OECD Model was not a good fit for this scenario of partners of such unequal acumen and financial capacity.

It was at this point that world events and resulting pressure brought tax treaties back into focus for the UN, who subsequently established an Ad Hoc Expert Group on Tax Treatise between Developed and Developing Countries, including members from Latin America, Africa, Asia, and European countries, as well as observers from the IMF, OECD, International Bureau of Fiscal Documentation (IBFD), and other international organizations (Lennard, 2009:6). As a result of this working group, the UN released the first UN Model Double Taxation Convention between Developed and Developing nations in 1980. What is most notable about these two groups and their initiatives is that in many ways their Model Conventions are remarkably similar, however, the most critical differences noted relate to the inequities between developed and developing nations (Kosters, 2004:4). Overall, the UN Model is recognized primarily for its tendency to grant more taxation rights to 'source countries', or those that are importing the capital, meaning the developing nations, which is perhaps an understandable contrast with the OECD Model.

In the years that have followed, both organizations have been active in regard to continuing to build on past initiatives, on their own, and at times in apparent response to the initiatives and practices of the other. The end of the Cold War in the early 1990's marked another shift in global relations, in which many Eastern European states, no longer under the control of the Soviet Bloc, were now free to enter into treaty relations with OECD countries, and initiatives aimed at integrated their tax experiences with the norms of OECD and UN Models began in earnest (Kosters, 2004:4). As much as the two bodies may seem to be conflicting in regard to each forming its own state of suggested policies on the same issue, the reality is much more complimentary. During this period of integration, a third model was created, called the Utopia Model, which was in essence a

combination of provisions from both OECD and UN Models, as well as additional provisions drawn from some pre-existing contracts (Lennard, 2009:7). Work on the OECD Model has continued, with updates appearing regularly throughout the 1990's, which seemed to inspire the formation of an updated UN Model, termed the Double Taxation Convention and released in 2001. It is interesting to note that while these conventions continue to build off each other, and to reflect each other, the most notable and widely reported differences between the two relate to capital gains and taxation of offshore ownership, with the United Nations Model being regarded as the one to provide the best conditions for developing nations, including offshore capital relations of which OITs are an extension (International Monetary Fund [IMF], Organization for Economic Cooperation and Development [OECD], United Nations [UN], World Bank Group [WBG], 2018:13). While work on both models has continued in the era of the UN-MDG and into the present, both groups have released an updated version as of 2017, largely in response to global initiatives around the concept of what is called Base Erosion and Profit Shifting (BEPS), representing forms of tax evasion currently in focus for the international tax community, to be reviewed further (Toledano, Bush & Mandelbaum, 2017: 23).

While model tax treaties and conventions have been a major thrust in the effort to establish norms and conventions on the international scale, these have not been the only initiatives historically taking place. Two of the commonly reported concerns in terms of international taxation are avoiding double-taxation of profits in two jurisdictions, and tax avoidance, (Kane, 2018: 332). While most treaties include provisions for double taxation under model guidelines, many countries established policies for tax avoidance unilaterally (Shome, 2018: 331). For many countries this has meant the establishment of two forms of legislative acts known by their acronyms, SAAR, and GAAR (Specific Anti-Avoidance Rules, and General Anti-Avoidance Rules, respectively). Both of these acts are designed to capture tax losses domestically, but also provide provisions for international taxation, particularly through bilateral treaties (Rixen, 2017:327). This is been increasingly apparent in GAAR applications, which are largely designed to 'fill in the gaps' for what SAAR rules are unable to capture (Shome, 2018: 332).

While GAAR is used by some countries as part of a bigger tax strategy, overall its adoption and application is quite varied. Australia was the first to adopt GAAR rules in 1981, followed by Canada, New Zealand, and the Netherlands, but many other countries have been slower to follow, although in recent years countries such as Poland, China, India, and the United Kingdom have joined this club (Shome, 2018:333). In essence the purpose of GAAR rules is to make overarching rules that capture the principle of a transaction in order to determine its taxability, rather than setting out specific, codified rules (such as with SAAR) that outline only specific circumstances (Shome, 2018: 332). In establishing tax strategies as part of a bigger fiscal plan, countries are free to draw on guidelines, samples, and policies of all sorts in determining their best path forward, as a review of some example experiences will demonstrate later in the section. However, taxation practices and norms are sometimes better understood not in terms of their structure but in the goals they set out for themselves, acting in response to events and issues taking place in the international taxation forum.

This is certainly true of GAAR and SAAR initiatives, which, when used by various countries, are applied with unique provisions and in partnership with other initiatives often making a blended policy unique to that nation. What can be understood about these initiatives is there overarching goal to address matters of tax evasion, which largely explains the addition of general rules to the already-existing specific ones, which is that

they are intended to create principles for interpreting transactions and their eligibility for taxation, rather than specific rules (Shome, 2018: 345). For example, one of the strongest provisions of many GAAR initiatives is a statement of principle that suggests that GAAR rules are applicable when it can be demonstrated that the main purpose of a transaction is to obtain a tax benefit (Shome, 2018: 346).

Again, it should be noted that these initiatives are intended specifically to combat certain forms of behaviour that have been observed and deemed to be harmful. Other researchers have pointed out that many forms of what is sometimes called 'tax planning' are perfectly legal, in the multinational corporations who have business in various jurisdictions are as free as anyone else to take advantage of tax programs and benefits that are available, in fact, it may be simply be seen as fiscally prudent to do so (Toledano, Bush & Mandelbaum, 2017:17), as companies, like individuals, have a certain responsibility to their financial 'bottom line'. However, in the context of international relations and the disparity between developed and developing nations, this practice because one in which wealthy companies take advantage of vulnerable and poor nations, avoiding paying the tax in those jurisdictions where governments have smaller tax bases and a much weaker capacity to capture the limited taxation that is available, which, in the end can mean the difference between delivering basic needs to the population or not (Hearson, 2017:8). The amount of money in question is substantial, with some estimates of global revenue loss not only reaching as high as US$500 billion per year, but also reportedly being disproportionately owed to low and middle income countries in Africa, Latin America, and the Caribbean (Cobham & Jansky, 2018: 212).

Considering these numbers and realities as being the push behind a great deal of tax regulations such as GAAR, it seems reasonable that some of the provisions seem to be wide sweeping, and to favor the capacity of tax authorities to use their discretion when determining what is a transaction for tax benefit only. However, some have pointed out that this can be a dangerous precedent if not used with care, and can lead to an erosion of credibility for the government, which can hurt future investment (Shome, 2018: 345). For that reason, taxation strategy is an ongoing process for many countries in the same way that developing models and guidelines for best practices continues to be an active task for various international organizations and regimes. Many nations establish their policies and what follows, as with a great deal of legislation of various types, is a period of trial and error, involving legal and advisory bodies both inside and outside the domestic arena. India is a good example, in which ongoing issues to capture taxation on OITs lead to GAAR initiatives has led to a number of recommendations for how and when GAAR can best be applied, such as using it as a tool to combat abuse but only when it appears that abuse and avoidance is present (Shome,2018:345). Other recommendations include not using GAAR to over-ride other existing treaties if there is a jurisdictional conflict between them, other limitations for its application, such as financial thresholds at which point GAAR rules become relevant (Shome, 2018;346). Overall, the nuances of establishing a taxation strategy for international transactions demonstrates a certain level of necessary negotiation and flexibility, both in order to properly address the individual needs of a given country, but also to present a credible milieu of what might be seen as 'fairness' to those businesses wishing to invest capital in a given destination.

Alongside the aforementioned initiative has come a more recent plan by the OECD in particular to address the tax avoidance and planning issues often referred to as BEPS. In general, BEPS refers to broad

categories of tax planning and tax avoidance that are seen by governments across the world as being harmful. The OECD/G20 Base Erosion and Profit Shifting Project is a widely publicized initiative being undertaken by dozens of nations from OECD and G20 members to over 40 developing countries as well (IMF, OECD, UN, WBG: 2018:16). Again, observers point out that taking advantage of tax incentives and opportunities is an understandable impetus on the part of individuals and companies, however, when it comes to the international arena, this same impetus often leads to illegal and/or harmful tax practices (Hearson, 2017:5). The aim of the OECD BEPS project is to establish norms and protocols amongst the collaborating nations that remove these opportunities, and make various activities such as profit shifting disadvantageous to companies through coordinated tax efforts (Shome, 2018:353).

While taxation is a key part of an international fiscal policy for modern nations, they must be integrated within a greater tax strategy, as many scholars have indicated (Hearson, 2017., Messerlin, 2017., Toledano, Bush & Mandelbaum, 2017). Tax incentives are another common issue, and of particular relevance to developing nations. Among the documents currently being offered and produced by groups like the IMF, UN, WBG, and OECD, are not only suggestions for taxation of OITs and other transfers, but also on tax incentive policy, a review of which demonstrates both the comprehensive nature of efforts by international institutions, and the existence of overarching principles that apply throughout taxation strategy.

Similar to the aforementioned Toolkit for taxing OITs, the document titled Options for Low-Income Countries Effective and Efficient Use of Tax Incentives for Investment (2015) is a joint composition of the IMF, OECD, WBG, and UN, working under the auspices of the G20 (IMF, OECD, UN, WBG: 2018:2). The document begins with a number of key premises regarding tax strategy, incentives, and the current circumstances that developing countries face when designing tax regimes. Key among them is the premise that tax incentives must be part of a broader tax strategy that encompasses all parts of a taxation system, integrated in such a way that they compliment each other for best outcomes. The paper goes further to identify other reports by their group on issues such as OITs and the upcoming BEPS as being necessary pieces to a greater strategy (IMF, OECD, UN, WBG: 2018:4). Further, it states that policies should be carefully designed with the goals of being efficient and effective, whereas the writers point out that many LICs have tax exemptions and holidays that are perhaps more costly to them than is necessary. Finally, good governance is essential for taxation policy, incentives to work. Processes should be transparent and accountable, and should be based on rules more than discretion (IMF, OECD, UN, WBG: 2018:5).

The report observes that tax incentives are widely used in LICs, and are often the product of a tax competition environment, stemming out of a history of taxes being necessary for developing countries to attract foreign investment. However, it goes further to say that in many cases tax incentives are used when they are not necessary. Research has shown that a good deal of investment occurred under the umbrella of tax incentives when the same investment was likely to happen regardless (IMF, OECD, UN, WBG: 2018:9). Further investigation reveals that there are a number of key factors that are often deemed as more important than tax incentives, and those have largely to do with good governance. Foreign entities are unlikely to invest in countries where a requisite amount of stable governance is not present, regardless of any incentives. If key markers are not met in terms of transparency and rule of law, there is insufficient confidence in the country itself that the

investment won't be potentially lost, making tax incentives irrelevant (IMF, OECD, UN, WBG: 2018:11). At the same time, the report claims that member organizations have encouraged developing nations to scale back their incentives in recent years, and yet, reportedly, the practice is still very common, and in some ways is proliferating. For example, in 1980 tax holidays were present in less than 40% of LICs in Africa, and tax free zones did not exist, whereas, by 2005, the number of countries offering tax holidays had risen to 80% and a full 50% had established tax free zones (IMF, OECD, UN, WBG: 2018:8). This is perhaps owing to a both a continuing arena of competition, and a sense of 'political inertia', according to the report's authors (IMF, OECD, UN, WBG: 2018:6).

In general terms, a taxation initiative such as an incentive is most useful when its social benefits outweighs its social costs (IMF, OECD, UN, WBG: 2018:10). Social benefits include the size of the effect of the investment, the impact of investment on jobs and wages, and productivity spillover, which measures the extent to which new investment may boost productivity in other places within the domestic economy, such as through supply or transportation (IMF, OECD, UN, WBG: 2018:10). Social costs include any possible public revenue loss, for example if incentives were unnecessary, or if they permit other forms of loss. Further, there is an administrative cost associated with tax incentives, in terms of both application and compliance. Scarcity of public funds is another concern, and it is pointed out that $1 of tax revenue properly spent is has a greater social value than $1 of private income, and thus the shifts that such incentives and investments imply in this regard must also be accounted for (IMF, OECD, UN, WBG: 2018:10). Finally, there is a concern with all investment regarding how much the economy of a LDC relies on taxes rather than increases in productivity to make up fiscal shortfalls, as this ultimately may reduce average incomes and lower productivity, neither of which is desirable for development (IMF, OECD, UN, WBG: 2018:10).

In order to break down the necessary parameters of tax incentives, the authors examine the application of said initiative through the concepts of effectiveness, and efficiency, notions found throughout taxation strategic planning (IMF, OECD, UN, WBG: 2018:8). In regard to effective taxation, this means that a tax initiative is attaining its stated goals, the authors further pointing out that raising level of foreign investment alone cannot make an incentive efficient, as its value must be measured via social costs and benefits (IMF, OECD, UN, WBG: 2018:9). The study further reports that while studies do indicate that host country taxation can have a large effect on investment, this data is more reliable when it comes to developed nations and advanced economies.

The effectiveness of tax incentives varies both from country to country, and between sectors. The experience of Asian countries like Korea and Singapore used tax incentives as part of a broader strategy to attract investment, which led to a rapid rise in industrialization (IMF, OECD, UN, WBG: 2018:13). China had a similar experience in a period of transition between the mid-1980s and early 2000s in which special economic zones and reduced tax rates for foreign investment led to a similar rise. The opposite experience however, was found in many central African states in which increased incentives through the 1990's had no significant effect on incoming investment (IMF, OECD, UN, WBG: 2018:13).

Of more critical concern to OITs and their taxation, is the finding that multinationals are heavily influenced by the taxation arrangements between the host nation and their home country in regard to avoiding double-taxation. If provisions are not in place to define taxation on foreign investment with suitable agreements

between countries, such as through a tax treaty, tax incentives will become ineffective, since their benefit is now outweighed by the spectre of double taxation (IMF, OECD, UN, WBG: 2018:13). Policies that provide for contingencies and outline clearly in which jurisdiction taxes are to be paid are more attractive than are incentives on their own.

Efficient use of taxation refers to goals being achieved at a reasonable social cost, in essence, relating to the cost-benefit analysis mentioned. However, its measure is complex, considering issues of redundancy, costs of abuse, and administration (IMF, OECD, UN, WBG: 2018:17). Redundancy occurs in different circumstances, including when tax incentives are offered when they were not required by the investors in order to invest. In the same survey of investors aforementioned, the amount of investment that occurred with redundant incentives ranged from 37% for El Salvador up to 98% for Rwanda, with most LDCs listed toward the higher of this scale (IMF, OECD, UN, WBG: 2018:12). However, this is not the only circumstance in which redundancy occurs. For example, investment may lead to jobs but those jobs replace other ones without substantial improvement in wages or the local economy (IMF, OECD, UN, WBG: 2018:9).

Above all, the authors stress the importance of good governance behind a taxation system, meaning that authorities are held accountable and systems are in place for corrective action, which limits the opportunities for corruption (IMF, OECD, UN, WBG: 2018:23). This, in turn increases the trust of investors, particularly when they believe the taxation system is fair, and administered with transparency. Transparency must apply not only to legal branches of compliance, but also economic in that the rationale for the tax must be clear, while the administrative branch of the system must be transparent in its decision making processes (IMF, OECD, UN, WBG: 2018:24).

The issue of central importance with OITs is the value that they represent to countries for whom the funds are most greatly needed for basic necessities of development. However, as has been indicated, taxation alone cannot be a path to an advanced economy, and a healthy living standard for the population. LDCs must find opportunities to advance their economies, and enter markets in creative ways. In a study of global value chains (GVCs), Flento and Ponte (2017: 367) claim that with an integrated fiscal policy, including trade and industry are essential to allowing the economies of LDCs to advance. GVCs occur in the production of various products, in which different aspects of manufacturing and assembly occur in different locations, in different countries. For example, a personal computer might have some parts made in one jurisdiction, some in another, and assembly may take place in more than one location across the globe (Flento & Ponte, 2017:368).

The value to LDCs comes through the opportunity to participate in these chains by offering something of value, which may initially be as simple as inexpensive labour. However, by participating in the chain, the opportunity is present to gain industrial knowledge and skills, as well as technical knowledge and advancement, or opportunities to specialize (Flento & Ponte, 2017:370). Much of the early success of the so-called Asian Tigers (Singapore, Korea, Hong Kong, Taiwan) is owed to their eager participation in GVCs, and the ways in which the knowledge gained was exploited to improve industrialization and output (Flento & Ponte, 2017:372).

CHAPTER 3. OIT TAXATION, THE IMF, OECD, UN, & WORLD BANK

As much as the international arena is 'anarchic' in that there is no central authority and nation states are each sovereign unto themselves, the need for protocols and conventions to provide predictability and stability is widely acknowledged and a generally accepted practice within this context. Toward that end there is a history, albeit a short one, of international organizations establishing ethical positions and agreements that build on the premises of the past, which, in the era of globalization and developmental inequities, have begun to coalesce into a series of initiatives by global actors that attempt to establish a set of ideals, protocols, and models for rule-making in this semi-chaotic environment can rely. While the organizations and initiatives are multivariate, they sometimes occur in coordination, while at others appear to be unilateral, as some researchers or observers make the effort to add to the discourse of their own accord in what might be called a pluralistic policy creating environment. Regardless, a great deal of what occurs in international taxation, like most other aspects of international relations, often does so in reference to the most powerful of these organizations, comprised of the most powerful nations in the world, who have what might be called a de facto authority, even if it is not absolute. These organizations, as has been consistently reported, are not idle when it comes to issues of taxation and development, but rather, appear to be in a phase of negotiating, formalizing and codifying such ethics and principles.

3.1 The Taxation of OITs 'Toolkit'

Working in collaboration under the umbrella of the G20, the IMF, OECD, UN, and WBG are in the process currently of developing a series of working documents aimed at providing an increasingly robust set of practices and principles, as stated in the outset of the aforementioned paper on tax incentives, and again in a document even more germane to the present discussion, titled The Taxation of Offshore Indirect Transfers-A Toolkit (IMF, OECD, UN, WBG: 2018:2-69). In its introduction, the document makes it clear that this is one of several working documents and 'toolkits' the collaborative group intends to offer for developing countries formulating their tax strategies in the era of increasing coordination, specifically referencing the OECD BEPS project, among other initiatives (IMF, OECD, UN, WBG: 2018:3). By way of a general introduction, the authors offer a series of critical premises that underly the creation of such a document, and related initiatives. First, there a statement of recognition that taxation loss related to OITs, while the problem has been acknowledged for some time, has become an issue of increasing importance with a great deal more focus on the real costs. The issues involved are complex, and while the document makes every effort to provide increasing structure and reliability to the process, it is not intended to serve as a template for all situations, but rather to identify key problem areas and critical questions for nations to answer, and a list of practical options (IMF, OECD, UN, WBG: 2018:10). Among the most critical questions it aims to address are; what are the most important factors in deciding whether or not to tax an OIT when it occurs in the host country, what type of assets are these rules applicable to in a rationale sense, and, how can such a tax be designed and applied in an effective and legalistic manner? (IMF, OECD, UN, WBG: 2018:10). Finally, the report acknowledges the ongoing work of many different key actors in the

international field, from NGOs and civil societies, to governments and tax authorities, recognizing that this report is a step in that process, and not a final result (IMF, OECD, UN, WBG: 2018:9-10).

The authors make it clear that this paper, while not being a legal document, is intended to work toward a kind of clarity and semi-codification of principles, building on the myriad of initiatives that have already taken place, protocols and norms that have been established, and to bring these varied efforts together in a coordinated step toward clarity and suggestions for coordinating the critical aspects of taxation policy, OIT-related and otherwise (IMF, OECD, UN, WBG: 2018:10-11). With this goal in mind, the paper begins with a methodical explication of what OITs are, and what, in regard to taxation, are their most critical qualities.

In order for ownership of an asset to be considered indirect, there must be a minimum of one intervening entity between the asset and the owner that controls it. In other words, if a company or individual owns another company, and that company owns an asset, then the ownership is considered to be indirect (IMF, OECD, UN, WBG: 2018:12). In reality, while this defines indirect ownership, researchers have noted that ownership often takes place in a 'chain', meaning that there may be several intervening entities between an asset and the owner, which can make taxation more difficult, as the process of identifying whom is actually receiving the benefit can require some diligent work (Kosters, 2004:9). Transfers of ownership involves a direct or indirect change in the ownership of an asset, either in whole or in part. However, there are some important caveats to this distinction. Global business often involves a series of companies owning companies as subsidiaries, or via partnerships, and a great deal of business involves shifting assets between such entities. What is critical is determining when a taxable transfer has taken place. For example, sometimes transfers of ownership take place as a result of mergers or acquisitions that may not be taxable owing to some provisions regarding restructuring or reorganizing companies that are tax exempt (IMF, OECD, UN, WBG: 2018:12-13). Transfers themselves may be direct, as in the case that the company that owns the asset directly decides to sell it, making it, for taxation purposes, not substantially different from a sale of perhaps property between two individuals. Indirect transfers are more complicated, in that, in order to be taxable, the sale of a company that owns an asset must get its value from the asset, in whole or partially, meaning that it is the value of the asset that is being transferred with ownership, and while that may be taxable in principle, it must meet certain criteria (IMF, OECD, UN, WBG: 2018:13). First, there must be some measure as to how much of a company's value is derived from the asset in order to determine how much of the sale price is taxable by the country in which the asset resides, or, in some cases, whether or not it is sufficient to warrant tax at all (Lennard, 2009:7).

Another key factor in delineating OITs from other forms of transfer relates to the notion of moveable versus immoveable assets, a facet of many tax treaties and critical tax regimes (IMF, OECD, UN, WBG: 2018:14). In some ways this seems an intuitively simple task, as immoveable assets are clearly those that are geographically rooted in the jurisdiction of a country's tax authority, such as real estate, buildings or other structures. However, this too is more complicated aspect, as increasingly disputes are arising involving notions such as forestry or mineral rights, and in some cases things like licenses to provide service (IMF, OECD, UN, WBG: 2018:14). This is as seen for example, in the case of India versus Vodafone, although in that case the question of mobility of assets was not the disputed factor. Regardless, in an era of increasing technological advancement, immovable assets need clear definitions, that are increasingly becoming inclusive of less tangible

assets, like service contracts, but that are nonetheless attached to a specific geographical location (IMF, OECD, UN, WBG: 2018:15). Another determining factor in delineating what makes an OIT and what makes it taxable relates to location of not just the asset, but also the residence of owner and seller, the latter of which, in order to qualify as an OIT must be in another jurisdiction than the asset itself. As much as these may appear as simple criteria, experience over time has demonstrated (as seen in examples already cited) that each of these factors can have critical nuances that must be assessed in making determinations, and certainly must be clarified to their utmost in an initiative such as a 'toolkit' for such taxation.

Certainly it is acknowledged that fairness to taxpayers is one of the necessary ethics that must be a part of a taxation policy, as, on one hand while there is a realistic fear that OITs taking place without good governance can and do result in tax avoidance, private parties cannot be expected to enter into business arrangements when protection from double-taxation is not present, meaning OIT policy is not clear. Yet, for several reasons, foregoing the tax on OITs for foreign entities is not seen as a viable option either. On one hand, these are funds that are greatly needed in developing nations, but further, creating inequities between domestic and foreign markets, the authors point out, can have other unintended consequences, such as the practice known as 'round-tripping' (IMF, OECD, UN, WBG: 2018:15). In such a case as where taxes for offshore companies are less than for domestic ones undertaking the same transactions, a domestic company would be fiscally wise to locate their ownership offshore through a foreign-based entity established for that purpose. This brings into focus the notion that while, at face value, some of the aspects behind international taxation, OITs and otherwise, may appear straightforward, but in practice, has proven to be anything but.

A key issue that surrounds OIT taxation and goes right to the foundation is the question of who should have primary rights for taxing domestic assets, when they are owned abroad. As the authors indicate, this is a matter that goes well beyond the taxation of OITs as a means for combating tax avoidance, and speaks more deeply to questions of rights over domestic assets as a whole (IMF, OECD, UN, WBG: 2018:18). This reaches down into questions of ethics and equity. Taxation policies that occur between sovereign authorities must meet certain criteria if they are expected to be seen as viable for all parties. Inter-nation equity must be present, meaning that all parties feel like revenues are being fairly shared. Further, it is reasonable for parties to expect a degree of efficiency to be present, meaning that assets must be used in all forms, including taxation, in ways that are the most productive ((IMF, OECD, UN, WBG: 2018:). This too is an ideal that needs some defining, as it has different meanings when it comes to developmental needs and issues. As has been indicated, effective and efficient policies in developing nations must do more than attain profit goals; they are required to raise the standard of living for the populace toward a greater global standard (Owoeye, 216:232). Efficiency must also mean that in practical terms, a tax can be collected without incurring such administrative costs as to reduce the net value of the tax too substantially, as is also the case with administering other tax initiatives, such as incentives (IMF, OECD, UN, WBG: 2018:19). These are critical issues that must be planned in detail by developing nations and those wishing to aid them, if these policies are to authentically have the positive development impact that has been set as a goal.

One of the aims of this paper and others being drafted in the same vein is to identify and clarify the norms and conventions that have proven useful over time in taxation, so that they can be used in answering key

questions, and in constructing a series of guidelines for going forward. These can be useful in addressing challenging issues, such as inter-nation equity, in which views on what constitutes fairness in sharing tax dividends will undoubtedly vary greatly. Thus, the paper identifies three prominent norms that can be relied upon in designing such tax regimes. First, there is the general consensus that the country in which an asset is found geographically has a right to benefit from its use, and from taxes gained upon it (IMF, OECD, UN, WBG: 2018:19). This does not constitute a legal statute, but it is a critical acknowledgement, which is that, while policy and policy formation is complex, there is an underlying agreement about the right of nations to benefit from the assets in their jurisdiction. The second norm relates to the nuances of taxation and states that if, as is accepted, nations have the right to tax foreign nationals dividends on domestic assets, then any capital gains, such as those associated with OITs must also be treated as dividends as well, and are therefore eligible for taxation (IMF, OECD, UN, WBG: 2018:20).

The third norm focuses on the concept of immovable assets, and why this distinction is important. The authors point out that in some ways this distinction may be counterintuitive to basic economics, in which assets are considered assets if they have value, and not in terms of where they are located. This however, when it comes to OITs, may not be inclusive of all the relevant details, at least in terms of the practicalities of international taxation. First, while it is a pragmatic argument, part of the value of immovable assets in regard to taxation is that, in the case of dispute, immovable assets can be seized, meaning that domestic governments can rely on the ability to enforce such taxes. Second, as much as location may not be seen as important for distinguishing assets in economics, this may be an erroneous assumption, as, in many cases, assets can get their value, at least partially, as a specific extension of location. A very basic example could be real estate for purposes of reaction or personal use, the value of which is greatly increased because of its popularity, or proximity to popular destinations. This, however, is not the only complication in regard to the definition of immovable assets. This refers specifically to the concept of 'location specific rents' (LSRs). LSRs as a tax concept is, according to these authors and others, still being fully defined, however, the impetus for their use can be found in cases such as with India and Vodafone as an example, as LSRs are increasing being used to define aspects such as service contracts (IMF, OECD, UN, WBG: 2018:20). In the case of a contract to provide mobile phone service, there is a geographic location implied that by nature, cannot be changed. A license to provide cellular phone service to India cannot be carried over to Colombia with the expectation that it will be applicable, yet, at the same time, a license is not a tangible object, thus it requires a level of specific definition in order to be captured. This is one of the applications for the expansion of immovable assets as a concept in OIT taxation, which, in an era of increasing technological advancement, will undoubtedly refer more to concepts like service contracts for telecommunications and beyond. These are not small issues, as something like a service contract for vital telecommunication needs can be seen as a monopoly, which in any business application is an enviable asset, and one that cannot be overlooked by taxation authorities (Toledano, Bush & Mandelbaum, 2017:17). The authors point out that while the notion of extending immovable property definitions to include LSRs and other intangibles, it is not an easy process, and it is by no means complete in the present document, rather, it is suggested that these definitions are arising more and more out of necessity, which implies that this work will continue going forward (IMF, OECD, UN, WBG: 2018:21).

In considering efficiency as an underlying premise for OIT taxation, the authors consider some generally applicable notions. Similar to the commentary on tax incentives, these authors indicate that a good tax system is one that compliments business, but does not create opportunities to alter business practices solely for the purpose of tax gains (IMF, OECD, UN, WBG: 2018:23). Taxation must be present to capture the value of assets and business activities in a given jurisdiction without causing distortions in the marketplace, nor in the functioning of the businesses involved. This means, an efficient tax is one that allows business to be conducted in a healthy way, while providing taxation, without creating new markets of its own (IMF, OECD, UN, WBG: 2018:23). In regard to OITs, this can be partially attained by treating direct and indirect transfers equally, at least in regard to their taxation (IMF, OECD, UN, WBG: 2018:23). To clarify, this does not mean that the distinction between the two is meaningless, as defining these types of transfers is necessary in order to avoid missed opportunities for taxation as has occurred in some examples cited. What it does imply is a degree of fairness and transparency in the amount of tax that is collected on a transfer, regardless of whether it is direct or indirect, meaning, the distinction does not present a rationale for one to be taxed at a higher rate than the other (IMF, OECD, UN, WBG: 2018:24). Further, as has been pointed out, inequities within policies of this nature can lead to opportunities for business practices aimed solely at attaining tax gains, such as the aforementioned 'round tripping'.

In considering the current state of OIT taxation, the authors uphold the notion that in both the UN and the OECD Model Tax Conventions (MTCs), some provisions and guidelines do suggest that capital gains along the lines of OITs can be taxed (IMF, OECD, UN, WBG: 2018:29). In the most recent versions of these MTCs, the language regarding such transfers is identical, in both cases being found in article 13(4), which states that “gains derived by a resident of a Contracting state from the alienation of shares...may be taxed in the other Contracting state... if these shares...derived more than 50% of their value...from immovable property...” ((IMF, OECD, UN, WBG: 2018:30). The suggestion here is that the MTCs which have been used as reference points and templates for the creation of many bilateral tax treaties are inclusive of language that makes room for the taxation of OITs. Why more treaties have not readily included clear solutions along these lines (such as between the Netherlands and India) may be a matter for discussion. However, insight is offered in the report when it indicates which provisions from MTCs are more commonly found in the resulting bilateral tax treaties, and under which circumstances. As much as observers can point to the existence of article 13(4) as a provision for the taxation the transfer of immovable assets, this only serves as a suggestion in a voluntary set of guidelines. The reality is that fewer than 40% of bilateral tax treaties include this provision (which on its own is not a guarantee of tax rights). Further, the likelihood that a tax treaty will contain this provision decreases significantly when one of the countries in the treaty is a low-income, high-resource country, or, is a low-tax jurisdiction (IMF, OECD, UN, WBG: 2018:26).

There are many reasons beyond developmental inequity that make OIT taxation a difficult task to master. One fundamental issue has to do with the fact, in the case of an OIT, the underlying asset does not actually change hands, thus, determining value is very complex. On one hand an asset must be measured in terms of its value, and any value gains associated with it, for example, if a commodity goes up in market value so do any holdings of said resources even without exploitation (Toledano, Bush & Mandelbaum, 2017:36) .

These can be complex computations. But further, there is the question of how much that value of the asset represents the value of the company that owns it and has been sold, as this determines both the value of the tax that can be placed upon it, and, whether or not tax is applicable at all. For example, a company that owns an asset in one country but also other assets elsewhere, gains its value from all these accumulated values. When that company is sold for x amount of dollars, not every asset-holding country can tax the full amount of x, as this does not represent how much their asset contributes, but rather, each asset must be valued at a proportion. Determining this value must also occur with transparency in order to have a fair system (IMF, OECD, UN, WBG: 2018:27). Further, there is a question as to the threshold of value that an asset represents as a percentage of the total value of the owning company, demarcating the point at which tax becomes applicable at all. In both MTCs, this value is reported as being greater than 50%, which means that an asset must contribute more than half the value of the company that owns it, if, when that company is sold, the nation that contains the asset hopes to apply tax to that sale (IMF, OECD, UN, WBG: 2018:39).

In creating the 'toolkit' for taxation, the authors suggest two possible models for taxing indirect transfers. First, for either model to function, the domestic law of the asset owning company must have its own provisions for such taxation, as, fundamentally, a tax treaty cannot introduce such rules into the legislature of a nation, but rather, this must be done through its own political mechanisms (IMF, OECD, UN, WBG: 2018:39). This can be critical, as has been seen in cases such as India and Vodafone, in which India's own legal institutions ruled against it, specifically pointing out that it did not have the laws in place to enact the kind of taxation it was attempting to do. In designing such laws, the report suggests one of two paths. The first path is to establish rules for OITs that treat the offshore transfer as being ultimately no different than a direct sale made by a resident of the nation (IMF, OECD, UN, WBG: 2018:40). This does not mean that a country should try to apply laws for residents to foreign entities as though they were interchangeable, but rather, when a change of control or extended ownership occurs, the transaction can be conceived of as being the owning company selling and then reacquiring its own asset as part of the change of ownership (IMF, OECD, UN, WBG: 2018:40). The second model seeks to tax the non-resident seller of the asset-owning company on the capital gains, but with the provision of using a 'source of income' rule (IMF, OECD, UN, WBG: 2018:40). This would need to be accompanied by a second taxable asset rule, which, together, set out the clear parameters for determining what kind of income this represents dependant upon the details of the transaction (IMF, OECD, UN, WBG: 2018:40). In both cases, the overall rationale is to rely on practices that are already accepted and deemed as reasonable, which addresses the efficiency need to be understandable and clear to participating members in the system, without duplicating or complicated tax policies more than is necessary.

The report further states that, by way of a contingency, a nation may choose to install and apply a GAAR regime for capturing OITs (as has been the case already with several nations), however, this must be used as a last resort only (IMF, OECD, UN, WBG: 2018:41). This too speaks to the need for clarity, and transparency of policies for the taxpayer as to maintain the sense of fairness. The authors point out that in many cases, such as India, Peru, and Uganda, as previously discussed, a failure on the part of tax treaties to grant taxation rights to these nations in important cases of OITs can lead to legislative actions on the part of the government that are overly rigid, and attempt to set over-reaching laws that ultimately harm the attractiveness and integrity of their

system (IMF, OECD, UN, WBG: 2018:42). While it follows a certain logic to have a GAAR policy as a contingency, its application must be deemed reasonable, and should be used only as a last resort when other bilateral efforts have failed.

3.2 Summary

If a taxation policy is to be effective, it must include enforcement and collection rules. The authors suggest a number of possibilities, including various forms of control over the asset itself, such as making disclosure of taxation details a contingency on registration for the asset, which may vary depending on what that asset actually is (IMF, OECD, UN, WBG: 2018:49). Other options include various forms of withholding of tax, which means that the buyer of an asset must withhold a fixed amount of the sales value from the payee, with the expectation that this is paid to the local tax authority (IMF, OECD, UN, WBG: 2018:40). As the buyer has a strong interest in maintaining good relationships with the local authorities (otherwise they may face penalties, or seizure of assets) then the motivation is present to ensure that tax gets paid to the right parties. Finally, policies should include the obligation for all parties, seller and owner, to report the sale to the local tax authority voluntarily, with the proviso that failure to do so may lead to substantial penalties. This obligation to disclose could include provisions in tax treatise between nations, such that banks in both jurisdictions and taxation authorities share information directly.

The notion of information sharing as a method of combating tax evasion seems paramount for success. However, some researchers have pointed out that this is one area in which the initiatives of powerful organizations breaks down. In an effort to increase transparency, the organization known as the Tax Justice Network (TJN), a long-standing NGO and member of the BEPS committee for the OECD, put forward a proposal referred to as country-by-country-reporting (Cobham, Knobel, 2016:2). The concept is a matter of transparency, in which filing of all international tax information is uploaded to a local tax authority, who then shares that information openly with other nations. Interestingly, while work on taxation and transparency has continued over the decades, organizations like TJN have been critical of the OECD in particular for its tendency to limit the access to data, specifically in terms of sharing from the rich nations to developing ones (Cobham, Knobel, 2016:2). Reportedly, in 2013, as part of the collective work on BEPS action, members of the G8, G20, and OECD accepted this recommendations, yet, in what was referred to as a 'last minute change', removed this provision, and limited data sharing once again only to 'headquarters countries' for the OECD, meaning that wealthy nations continue to hold the data for everyone, while developing nations are blocked from information that may indicate tax evasion in their countries (Cobham, Knobel, 2016:11).

CHAPTER 4. CASE STUDIES

While countries have an increasing array of policy and guideline options at their disposal when developing a strategy for international taxation, their use and application varies greatly. Further, while international taxation and OITs are a most contentious issue for developing nations, the socioeconomic divisions that comprise the development spectrum do not always predict how tax strategies will be employed. In a review of the BRICS nations, (traditionally referring to Brazil, Russia, India, China, and South Africa, now minus Russia) Shome (2018: 335-345) demonstrates that similarities in developmental progress and socioeconomic do not necessarily add up to the same needs for taxation policy, nor the same strategy, particular when it comes to the application of GAAR.

Brazil, despite being the nation that of the four still in BRICS has the longest history of taxation experience, has no statutory GAAR, despite over two decades of attempts by the federal tax authorities to establish such rules (Shome, 2018:336). Scholars point out that while some GAAR-type rules have been amended into existing tax code, the resistance to comprehensive initiatives has been intense, suggesting that there may in fact be a relationship between high incidents of corruption at the highest levels and the overall reticence to establish a rule-based taxation strategy (Shome, 2018:337).

China is an interesting study in contrast. China established GAAR in its jurisdiction as of January 1, 2008, with a number of critical caveats (Shome, 2018:337). Most notably, GAAR in China has focused on offshore indirect transfers of equity, indicating that OITs, while not a mandatory part of GAAR, and not a part of BEPS, are targets of tax policy in developing or in this case 'emerging' economies regardless (IMF, OECD, UN, WBG: 2018:5). GAAR rules were widened by China in their language to capture even more in terms of OITs, by tightening the definitions of immovably property, foreign ownership, and transfer of equity offshore (Shome, 2018:338). Again, one of the main purposes of GAAR as stated in this case, is to erect a principle by which any transaction that takes place merely for the purpose of a tax gain, must be taxable regardless of other characteristics (Shome, 2018:339). At the same time as it has been making moves to tighten its base of rules, China has reportedly been cautious in its application, although some have suggested this may be in part due to the ongoing work internationally in regard to OITs, and further, that, as a participant in OECD BEPS, China may be hesitant to employ GAAR too heavily, given that these different policy initiatives will have to balance out at some future point (Shome, 2018:339).

South Africa is another case in contrast. Like some of its cohorts, South Africa had SAAR rules that they attempted to enforce too specifically, leading to loss in legal contests, and eventually setting up the impetus to establish firm GAAR rules to compensate for such gaps in their legislation (Shome, 2018:340). Similar to other GAAR initiatives, South Africa's focus is on activities undertaken purely for the purpose of tax benefit, and of the four nations in review here, reportedly have the strictest regulations, which in some ways may seem conflictual, considering that South Africa also has the greatest need to attract foreign investment capital of the same group (Shome,2018:340).

While the South African experience is well documented, other African nations have also had their struggles, in particular with attempt to capture OIT taxes through either judicial or legislative bodies. Historically speaking, prior to the case of Ramsay versus the IRC in 1982, tax law determinations by the courts tended to focus on a literal, 'linguistic-based' method for interpreting whose rights took predominance in taxation, and further, that in complex, multi-stage transactions, such as many that involve OIT transfers, courts viewed each step as being independent from one another in terms of taxation, and not part of a single, larger business transaction (Hattingh: 2019: 8). Perhaps not surprisingly, this method tended to favour tax avoidance schemes, on one hand, and, more conspicuously, was not consistent with the judicial methods in regard to other legislation, whereby practices tended to focus on a 'purposive approach', meaning it was one in which judicial authorities could analyze the facts of a case to determine how it fit within the greater purpose or principles of a law, not simply limited to a literal interpretation (Hattingh: 2019: 8). The Ramsay case has been significant in gradually reshaping judicial and legislative practices toward OIT taxation. The case has been cited in Kenya, Tanzania, Niger, and South Africa with mixed results overall, but a general tendency to improve the power of domestic authorities to capture OIT taxation (Hattingh: 2019: 10-15).

India is a contrasting case for GAAR initiatives as well, perhaps stemming back to what is considered an infamous case of OIT taxation and conflict, involving the company known as Vodafone. In this case involving a telecommunications (mobile phone), the 'immovable property' in this case was considered to be the license to operate within the Indian tax jurisdiction. In this case the license for service was owned by a Hong Kong-based multinational, selling a subsidiary company of its ownership (who also owned the Indian contract) to another company, all of which took place outside of India (Toledano, Bush & Mandelbaum, 2017:26). In this case, the Indian Tax Authority (ITA) sought to collect over US$2.5 billion in taxes on the transaction, claiming that it was within its authority to do so, and, that Vodafone, as the purchaser had a legal obligation to withhold tax from the seller pending assessment of tax from India (Shome, 2018:341). The case went to arbitration, all the way to the Supreme Court of India, where, perhaps surprisingly, the court sided with Vodafone, upholding that the ITA did not actually have the authority under its existing rules to enforce tax on the OIT involved. Further, it rules that Vodafone had no obligation to withhold tax from the seller, thus, leaving the government empty handed (Toledano, Bush & Mandelbaum, 2017:26). The Indian government, in response, began initiatives toward establishing GAAR rules that would capture such OITs, and further, would apply retroactively, meaning the government had intentions to change the rules and then apply them to transactions, like the Vodafone one, that had occurred in the past but taxation had not been applicable (Shome,2018:343). There was a great deal of adverse reaction from a number of sources, OECD nations among them, and, as of 2018, while GAAR rules have been implemented and updated, they do not attempt to apply for assessment years retroactively, but rather exist as a new policy (Shome,2018:344). Further, the case of India demonstrates the challenges and the time involved in formulating a fair and applicable tax policy. Credibility must be present, as well as the appearance of fairness, and the rule of law must be followed. The attempts by India to capture what it felt was just tax on the Vodafone purchase triggered a series of legal and legislative initiatives, as well as social, and international reactions that took several years to wind their way through the system. In the end, they also led, in that case, to the formation of an advisory committee for future conflicts, and for the handling of GAAR. Included amongst their

recommendations restrictions as to when GAAR can override existing arrangements or be subservient to them, as well as financial thresholds for when GAAR rules should become enforceable (Shome, 2018:335). This case demonstrates that in an environment of competing interests a certain level of conflict is to be expected, and in many cases it can lead to greater understanding, and a strengthening of the rules base. However, it also shows that complex items like OITs, despite being financial critical to developing nations, are still difficult issues to settle, and may not be manageable under a single policy rubric.

In similar cases in Peru and Uganda, the attempt to capture taxes on OITs has also proven to be a long, litigious, and often disappointing task. In 2009, Ecopetrol Columbia and Korea National Oil purchased a Houston-based company whose main holding was a Peruvian oil company whose license in Peru was valued at over US$900 million (International Monetary Fund [IMF], Organization for Economic Cooperation and Development [OECD], United Nations [UN], World Bank Group [WBG], 2018:27). In this case there was no standing provision within the legislation of Peru for taxing an offshore transfer, thus as much as US$480 million in potential taxes could not be captured. While this would likely be considered a large sum of money in any country, for a nation like Peru it represented perhaps a heartbreaking loss. It was in many ways an expensive lesson for the Peruvian government, which followed up with a Congressional investigation, and a series of legal changes aimed specifically at not missing such opportunities again (IMF, OECD, UN, WBG: 2018:27).

In Uganda in 2010, another case surfaced involving the sale of a company that owned a large mobile phone contract in Uganda, while the chain of ownership and the sale of the company occurred totally within companies outside the country. In this case, similar to India, the Uganda Revenue Administration (URA) attempted to collect tax it felt was owed to it, in this case US$85 million in capital gains. Similar to India again, the case went to court in Uganda, but in contrast, the Uganda Appeals Court ruled that offshore tax was applicable (IMF, OECD, UN, WBG: 2018:27). However, this case was not easily resolved, owing to the fact that the matter was ultimately a contest between a Dutch company and Uganda, where a treaty between the Netherlands and Uganda was already in existence, and in that treaty the exclusive right to such taxes was granted to the Netherlands (IMF, OECD, UN, WBG: 2018:28). In the end this case has demonstrated the myriad of conflicts that can arise when different policies and tax regimes are in place, and no firm rules exist for which is to take precedence under which circumstances. This underscores the necessity that Indian discovered through its experiences to set out these rules as part of new initiatives, GAAR-based or otherwise. This case remains unresolved (IMF, OECD, UN, WBG: 2018:28).

In a recent publication, Suffioti and Masihy (2019:2) review attempts by several Latin American nations to capture OITs through the application of indirect share transfer rules (ISRTs). Filling the gap left by the G20/OECD BEPS Project, these rules are meant to apply specifically to share transfers, or situations in which the value of a sale is derived from an asset contained in a host country with an offshore transfer of value (Suffioti, Masihy: 2019:3). The authors note that other OECD countries, such as Canada and Australia, have implemented similar policies in a more limited, but similar context, and further, that the foundation for such rules can be round in both the OECD and UN MTCs (Suffioti, Masihy: 2019:3).

Chile implemented ISRTs in response to the sale of the nation's biggest copper mine from Exxon to Anglo America, but transferred those shares from an offshore location, the Cayman Islands (Suffioti, Masihy:

2019:11). At the time, however, this transaction fell outside the scope of Chilean law, and thus the government passed the laws quickly before the transaction was complete (Suffioti, Masihy: 2019:11) Without these laws in place Exxon would have avoided a 35% capital gains tax in Chile (Suffioti, Masihy: 2019:11). Similarly, after losing OITs in the cases of the companies Tintaya in 2006, and both Majaz and Tomorocho in 2007, the Peruvian government established ISRT jurisdiction in its nation in 2011 (Suffioti, Masihy: 2019:12). ISRTs are generally structured as a SAAR, however they derive their strength from their focus on anti-avoidance, and extra-territoriality (Suffioti, Masihy: 2019:13).

CHAPTER 5. DISCUSSION/CONCLUSION

A review of current policies and practices in OIT taxation reveals a complex series of actors, agendas, and inter-related variables. Ultimately, in order to answer the research question as to how LDCs can best tax OITs, the answer must be mixed as well. In looking at OIT taxation policy itself, a number of important guidelines can be adopted, taken both from the recommendation of leading institutions, and from the real experience that developing countries have had with OIT taxation collection to date.

While there is no overarching authority either to establish fixed laws for all nor to oversee their fair execution, there are a growing number of conventions and initiatives that developing nations can rely upon to some extent. On one hand, the MTCs of both the UN and the OECD contain a provision whose language provides for the granting of tax rights for transfers on foreign-owned, domestic assets. The ideal situation is one in which these guidelines are followed by all parties in all treaties, but this is far from the reality. In truth, bilateral tax treaties are least likely to include this provision when one country is a developing nation and the other an advanced one. Thus, in practice, these guidelines amount to very little when applied to the power dynamics of the international arena.

While treaties are a long-standing norm for legal arrangements of taxation, they are not the only option available to a sovereign state. Laws can be enacted within the country that govern business practices within its jurisdiction, which by extension includes taxation. Increasingly, countries have turned to GAAR as an option for claiming legal jurisdiction over taxation rights of capital gains, including OITs. The purpose of the 'general' rules has been largely to reinforce the principles of specific acts (SAAR), and/or to fill in the legal gaps for such taxation that companies are able to exploit. This too, however, has proven so far to be a solution of mixed results, and perhaps at times, insufficient power of authority. Countries have attempted to use GAAR as a reaction to failures of other regimes in which they are involved, including current domestic laws, and existing tax treaties, sometimes with poor results.

These cases and others make it clear that collecting OITs will likely continue to be difficult, but there are a number of key aspects to employ. There must be a set of clear, transparent, and enforceable domestic laws that can be coordinated with other legal regimes, such as treaties. Overall, they must provide a domestic legal base for pursuing offshore transfers. Further, the transparency aspect must be in place in order to fairly alert investors to the legal implications of their business; certainly tax law transparency is a necessary requirement for the confidence of many investors in the first place. Second, each nation must find a way to integrate and coordinate its legal relationships in terms of hierarchy, meaning it should be clearly spelled out in all legal documentation which applicable laws or acts will apply in which cases, at least in terms of the intentions of that nation. This too should be codified in domestic law, giving it a basis of legitimacy, which also lends itself well to the need for transparency. Further, nations need to consider the administration, collection, and enforcement of their taxation policy as a whole, with the idea of practical effectiveness and efficiency being at the core. This is not a lofty ideal, but the suggestion that these processes must be planned realistically, as without their well functioning, policies can be all but redundant, which can further open the opportunities for corruption, and abuse

of taxation.

While following the guidelines that exist from the MTCs and other initiatives has not promised promising results to date for LICs, it is likely still advisable that wherever possible governments and tax authorities for developing nations develop a tax policy that is in line with documents such as the 'toolkit' for OIT taxation, and the suggestions for tax incentives provided by the IMF and other leading institutions. This is not to suggest that these organizations always provide the best advice, nor that their membership nations are always acting in the best interest of global development or developing nations.

At the same time, by formulating policies that adhere to these suggested regimes as closely as is advisable for a given country, there may be an advantage present in pursuing future cases against developing nations. It would seem that the leading nations, through their organizations are using stronger language all the time to offer their philosophical and ethical support for taxation rights on foreign-owned domestic assets. Even though their application of such principles is mixed, eventually there may be more pressure to behave more in line with these words; a case well made by a nation that follows the guidelines but is still denied its share of critical tax revenues.

Regardless, developing nations seem most likely to find a successful path upward through a combination of working with powerful nations and companies, and by finding advantages of their own. This may be one of the key lessons of the Asian Tigers in particular. Taxation is an important issue as it relates to OITs, both ethically and financially for developing nations, however, taxation cannot be the major source of income, as it ignore productivity and other aspects that lead to development. Developing nations need to take advantage of opportunities presented by things like global value chains, which through strategic planning can advance levels of skill, technical knowledge, and business savvy relatively quickly, by engaging in a productive business chain with companies from advanced nations. Development is also a process of 'bootstrapping'. A nation that can increase its productivity and its potential for future productivity is moving forward, and potentially creating a more powerful domestic tax base to aid in further development. With each incremental step also comes an increase in the relative power that developing nations have vis a vis the more advanced, potentially increasing their capacity to negotiate better trade treaties for themselves, and further entrench their legal jurisdiction, (provided that the rise in power is matched by preventative measures against corruption).

A sound and integrated taxation policy must be present if a developing nation is going to capture OIT taxation. At present, this is still a struggle for most, even as many developing nations continue to formulate more advanced strategies, and take advantage of what support is available. Regardless, without a sound taxation plan and a firm domestic set of legislation, attempts at capturing any OITs might seem fruitless. This underscores the reality of an international arena in which countries by and large, continue to compete for advantages, and in which there is no central authority. Despite the apparent benevolence of powerful nations at times, overall the playing field is far from equitable and entirely fair. This means that, realistically, developing nations must also act in their own interest as best they can, which, in a lop-sided power contest must mean good strategic planning at the very least.

Finally, as much as nations having coordinated taxation policies would seem an unrealistic and probably fiscally unwise, it does not mean that there may not be more room for developing nations to band together in the pursuit of common interest. Perhaps as international bodies continue to formalize there may yet come an opportunity for collective voices to be heard, or even to find a strategic opportunity to push the OECD countries to enforce their own stated ethics more rigidly. As much as self-reliance is an important ethic for a developing nation to follow at times, there is little opportunity if any without the assistance, and without the sometimes interference of the powerful nations of the world. In a sense, a study of OIT taxation and the interests of developing nations reveal a micro-cosm of that reality.

This paper set out to examine the circumstances of OIT taxation for developing nations, with the stated purpose of delineating those practices best suited to the capture of a critically absent source of government revenue. As sub-questions, the intent was stated to comment on the suitability or not of collective action on taxation for developing nations, and how do the nuances and details of OIT taxation policy relate to development.

In regard to collective action, it seems apparent that taxation policy in particular must be tailored uniquely to the circumstances of each country. A brief examination of just the BRICS countries, who share much in common but vary greatly in tax policy, reveals this reality. However, it is suggested that with an ever-growing body of international organizations with representation from many developing nations, political unity with the interests of progress with taxation issues may not be out of reach.

OIT taxation policy must be effective and efficient, meaning that legal definitions must be sound, domestic laws must clearly support the pursuit of OIT taxation in domestic courts, and a taxation model must chosen to best suit the circumstances of a particular country. Further, while tax treatise remain the norm for delineating tax relationships, developing nation must do what they can to establish their right to taxation therein. This goes strongly against the precedent that has thus far been established, whereby the overwhelming majority of taxation on offshore transfers has defaulted or been delegated to home nations for powerful countries. Jurisprudence is supported in its ideal, but without sound mechanisms at hand, a developing nation faces a steep uphill battle when it comes to OIT taxation.

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