Papers on Selected Topics in Administration of Tax Treaties for Developing Countries

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Taxation of Non-residents

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1. Introduction

1.1 Scope of the Paper

This paper considers the issues faced by developing countries where a person, who is not resident in a state (a "non-resident") under the domestic law of that state (the "source state"), but whose activities either in, or with residents of, the source state, attract liability under the tax laws of that state, as a resident of a state with which the source state has a bilateral tax treaty (a "treaty"). For these purposes, only taxes on income addressed in tax treaties[1], will be considered. The issues arising in these circumstances include determining if the non-resident is entitled to benefits under the treaty and, if so, how those benefits are delivered, whether by refunding to the non-resident amounts paid or withheld in excess of the treaty-mandated amounts or by reducing amounts paid or withheld to reflect reduced rates of tax provided under the treaty. A further issue, unrelated to the collection of tax from non-residents, arises out of the mutual obligations contained in most, if not all, tax treaties on each contracting state to provide to the other state information relevant to the administration of the tax system of that state and, in some cases, to provide assistance in the collection of taxes.

Because the treaty may impact on the domestic tax law provisions applying to non-residents of the source state generally, the paper will begin with an overview of the administrative provisions typically used in connection with taxing non-residents.

The following types of income will be considered:

1. Passive investment or portfolio income derived from the holding of property giving rise to interest, dividends or royalties paid by a person or entity in the source state.
2. Income from a business of providing services, whether or not attributable to a fixed base or permanent establishment of the non-resident in the source state.

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[1] Otherwise than in connection with exchange of information issues discussed below.

3. Income from carrying on other businesses, whether or not attributable to a permanent establishment of the non-resident in the source state.
4. Income from providing services as an employee which are exercised in the source state.
5. Income from gains realized by the non-resident in the source state.

1.2 Ensuring Compliance with Domestic Tax Law by Non-Residents Generally

For the purposes of this paper, it is assumed that the domestic laws of the source state impose tax on non-residents earning income sourced in that state and that there are administrative measures in place to enforce compliance with the domestic law. These measures will have three principal elements:

(i) *Identification of non-residents*

Where the income-earning activity is carried on by a non-resident directly in the state (rather than derived from passive investments made from outside the state), the non-resident will typically be required to obtain a taxpayer identification number or to otherwise register either with the tax or other governmental authority in the source state. This may be enforced through border or other immigration controls, through exchange controls, in connection with social security or healthcare regimes or as part of the general regulation of business activity. Because non-resident recipients of investment income flows (interest, dividends or royalties) are typically taxed by means of source withholding by the payer in the source state, identification of the non-resident is less important than identification and registration of the resident payer.[2] This is also the case with respect to certain gains realized, where a resident purchaser of the property disposed of may be required to withhold from the payment for the property.

(ii) *Reporting*

The reporting by or on behalf of the non-resident of sufficient information about the income-earning activity to enable a proper determination of the tax payable would normally involve the filing by a non-resident, who carries on a business, whether by providing

[2] See the discussion of the identification of relevant non-resident taxpayers in Brian Arnold, An Overview of the Issues Involved in the Application of Bilateral Tax Treaties, Paper 1-A in this collection at section 7.2.

services or otherwise, of a return, in which the profit of the business and the amount subject tax is calculated. For a non-resident providing employment services in the source state, or earning passive investment income in the source state, the primary return will be made by the resident payer, disclosing the amount paid to the non-resident. Where the domestic law allows the deduction of expenses incurred to earn the income, the non-resident may be required, but will generally be motivated, to file a return claiming such expenses. A non-resident recipient of passive investment income will normally be taxed on a gross basis and no such return would be required. A non-resident realizing a gain will typically be required to file a return calculating the gain net of any allowable expenses and the tax payable.

(iii) *Collection of tax payable*

In order to enforce payment of tax and to provide a balanced cash flow to the government of the source state, recipients of passive investment income and employment income are normally subject to withholding at source by the payer in the source state. Because investment income is typically taxed on a gross basis and deductions allowable in computing employment income are often immaterial, the amount withheld will normally approximate the actual tax liability of the non-resident. Source withholding is also often applied to amounts paid to non-residents carrying on a business of providing services. This is an effective means of enforcing payment of the tax where the presence of the non-resident in the source state is transitory. It may also roughly approximate the actual tax liability of the non-resident because expenses incurred in earning services income are sometimes relatively small. Special arrangements may be necessary in the case of certain non-residents providing services.[3] In the case of business income the non-resident will normally be subject to the ordinary domestic tax collection measures, including recourse, where necessary to assets of the non-resident held in the source state. In the case of capital gains, a resident purchaser may be required to withhold a portion of the purchase price on account of any tax payable by the non-resident vendor. However, the determination of the amount to be withheld is complicated by the fact that the purchaser will know only the purchase price not the net gain.

[3] See the discussion in Brian Arnold, An Overview of the Issues Involved in the Application of Bilateral Tax Treaties, Paper 1-A in this collection, of the treatment of athletes and entertainers at section 7.3.3.

1.3 The Connection between Tax Compliance and Source Withholding

The single most important factor bearing on the compliance by non-residents with domestic tax law is the use of source withholding by the source state. Withholding tax from the payment by a resident or enterprise of the source state to the non-resident both ensures payment of all or part of the tax liability of the non-resident and provides a strong incentive to the non-resident to comply with domestic reporting requirements in any case where the source withholding made exceeds the tax liability. While there may be some concern that source withholding, particularly where there is undue delay in processing claims for refunds by the source state, may act as a disincentive to investment or other business activity in the source state by non-residents, there are two arguments against that view. In the first place, such withholding regimes are widely, if not universally, used in developed countries and are thus not unfamiliar to potential investors. Secondly, the undoubted benefits of source withholding outweigh the possible loss of economic activity by those non-residents who would seek to avoid paying tax in the source state. There is therefore a major role for source withholding in ensuring both reporting and payment.

1.4 Effect of Tax Treaties

Tax treaties do not generally impose restrictions on the administrative policies or procedures of a contracting state. Accordingly, the source state should not be restricted by a tax treaty in imposing registration or reporting requirements on non-residents or in imposing domestic withholding requirements with respect to amounts paid to non-residents[4]. Tax treaties, however, may place various restrictions on the degree to which the source state can tax non-residents who are resident for treaty purposes in the other contracting state. In some cases, income otherwise taxable will be exempt from tax under the treaty (e.g. business income not attributable to a permanent establishment). In other cases, the rate of tax will be limited under the treaty (e.g. tax on interest, dividends or royalties). This places additional administrative burdens on the source state – determining whether a particular resident is eligible for treaty benefits, identifying the income source, which is affected by the treaty and putting in place arrangements for either reducing or eliminating source withholding to reflect reduced treaty rates of tax or for making timely refunds where tax has been withheld at higher than the treaty rate. This may also require

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[4] Providing such requirements are imposed in a similar manner on all non-residents, as discussed below under “Non-Discrimination”.

different or greater reporting by the non-resident to allow the tax authorities to effectively apply the treaty.

The remainder of this paper considers specific aspects of the effects of the treaty obligations assumed by the tax administration of the source state with respect to the taxation of non-residents.

2. Taxpayer Identification Numbers

The obligations imposed by a tax treaty on a source state to give non-residents such favourable treatment as is mandated by the treaty reinforces the need for a comprehensive tax roll, which identifies both non-residents carrying on business in the source state and resident payers of salary or wages, dividends, interest or royalties to non-residents. If it is possible to combine registration for tax purposes with any registration required for general business or regulatory purposes, there may be administrative efficiencies and it may be easier for the tax administration of the source state to access information about the activities of the non-resident, which would be relevant in determining its treatment under the treaty. This might include information about the type of, or manner of carrying on, the business of the non-resident. In a federal state, or a state where general business registration may be carried out at the regional or municipal level, consideration may have to be given to co-ordinating registration with the national (or even regional) tax authorities.

While registration for tax purposes will include contact information for the non-resident, the registration document may not disclose the actual residence of the non-resident or contain information necessary to determine whether the residence of the non-resident constitutes residence for the purpose of the treaty. It is doubtful that the registration process should be used to determine treaty residence. Determination of treaty residence at that stage may slow registration and thereby hinder imposition of tax on non-residents generally and may discourage economic activity by non-residents. Where non-tax administrators are involved in the registration process, these difficulties may be magnified.

3. Registration Requirements for Non-Residents

As noted above, registration is primarily required for non-residents carrying on business in the source state. Because source withholding will be the primary method for assessing and collecting tax on dividends, interest or royalties and on income from employment, registration of resident payers of such amounts is necessary in such cases.

Capital gains present somewhat different issues. Where the purchaser of the property disposed of by the non-resident, which gives rise to the gain, is resident in the source state, the domestic law registration and reporting provisions can be used to require reporting and, where appropriate, withholding. Where the purchaser is another non-resident, it may be possible to use indirect methods of identifying the purchaser, such as confirming non-residence status when the sale transaction is subject to domestic registration, reporting or transfer tax requirements, as would typically be the case with respect to real property transactions. In such cases, domestic law provisions may require co-ordination with the relevant tax provisions. For example, registration of change of ownership might be denied unless the non-resident purchaser identifies the vendor and, where the vendor is, or appears to be, a non-resident, withholds a portion of the purchase price. Because, under typical treaty provisions, gains from disposals of personal property by a resident of a treaty state are exempt from source state tax, the most difficult situations may involve sales of real property disguised as sales of personal property, for example, shares of a corporation whose value derives principally from real property. Where such gains are taxable in the source state, identification and collection of tax may be problematic. It is obviously important that the treaty apply to such situation, as is the case under Article 13(4) of the UN Model Convention.

4. Appointment of Local Representatives or Agents

The appointment of a local representative or agent by a non-resident of a treaty state may assist in the reporting and collection process because such persons can be required under domestic law to report relevant information and transactions and to withhold where payments to the non-resident are made through the agent or representative. While general reporting and withholding obligations may (and should) be placed on all payers in the source state, agents and representatives of the non-resident are likely to be more knowledgeable about the relevant facts and less able to avoid responsibility. Where such agents or representatives are required for

general law purposes, efforts should be made to provide the registration information to the tax authorities and to integrate that information in the general tax roll.

A secondary issue is whether the agent or representative of a non-resident should be able to determine the treaty residence status of the non-resident and therefore to withhold at the lower, applicable treaty rate. There is no obvious, or perhaps easy, answer to this question. An agent or representative may have sufficient knowledge to determine treaty residence with a high likelihood of accuracy. In that case, and where the agent or representative is not facilitating avoidance of tax by the non-resident, giving such discretion will significantly ease the administrative burden on the tax authorities and eliminate inevitable delay in assessing refund claims, in turn removing a disincentive to inbound investment in the source state. These advantages must be balanced against the risk of revenue loss by improper residence determinations and the ability of the tax authorities to penalize delinquent agents or representatives and to recover withholding shortfalls.

5. Procedures for Claiming Treaty Benefits under Various Methods of Assessment and Collection

5.1 Filing Tax Returns

Domestic tax law provisions would normally require the filing of a return where tax is imposed on a net amount which must be calculated and reported in the return. This would include business income of all kinds and, in most cases, capital gains where cost basis and expenses of sale may be relevant in computing the amount subject to tax. In tax systems where deductions are allowed in computing employment income, returns will be required to report net employment income. In all these cases, the return may also be used to claim treaty benefits, either to reduce tax otherwise payable or to claim refunds where source withholding in excess of tax payable has been made. In order to facilitate assessment of the claim, the return should state the treaty in question and, if possible, the particular article of the treaty relied on. The non-resident should be required to state the basis for reliance on the treaty, which will generally be residence as defined in the treaty, and the basis for reliance on the particular treaty article.

Because residence for treaty purposes generally turns on liability to the most general types of tax imposed in the purported residence state, the best evidence is a certificate or other statement

from the tax authority in that state that the non-resident is so liable or is otherwise a tax resident of that state. This might be accompanied by a copy of a recent tax return consistent with that status. While evidence of legal residence status or other evidence of physical residence might also be tendered, those factors are not necessarily determinative of treaty residence. Alternatively, the source state may directly request confirmation of residence status from the tax authorities of the other state under the exchange of information provisions of the relevant treaty (discussed further below). If the source state requests or requires certification from the tax authorities of the other state, it can expect to be required to provide similar certification for its own residents who in turn claim treaty benefits in the other state.

In the case of interest, dividends and royalties, the non-resident must also assert beneficial ownership of the amounts in question. While this may also be the subject of an information request to the tax authorities of the other state, an independent investigation may be necessary because the other state may use a different definition of beneficial ownership for these purposes. Facts relevant to the determination, however, may be obtained from the other state.

Where the non-resident has not been subject to source withholding, tax will almost certainly have been calculated and paid on the basis of the treaty benefit or exemption claimed. Accordingly, any delay in assessing the claim by the source state will result in delay in collecting tax owed if the treaty benefit is ultimately denied. For this reason, it is important that the domestic law provide for payment of interest on tax unpaid at the due date, regardless of delays in assessment. Conversely, interest should be payable on refunds delayed because of delays in assessing treaty claims. Provision of such refund interest should mitigate concern that possible excess withholding will discourage investment and business activity by non-residents. Delays in turn will increase the likelihood of difficulty in collecting tax assessed. This underscores the importance of source withholding wherever possible.

Although source withholding is not generally applicable in the case of income from a business other than that of providing services[5], consideration might be given to requiring some withholding in respect of payments to non-residents by government or other public bodies under construction or consulting contracts with non-residents. Such payments should also be reported

[5] As noted above, because expenses represent a smaller proportion of gross revenue in some service businesses and because non-resident service providers may have only a transitory presence in the source state, source withholding is both practical and desirable in those cases.

to the tax authorities. Consideration could also be given to requiring major contractors on such projects to report payments made to sub-contractors who are, or appear to be, non-residents. Withholding rates could be set sufficiently high to create a real incentive to report and claim treaty benefits but not so as to cause cash flow problems or act as a disincentive to carrying on business in the source state.

It is noted that claims of treaty residence are unlikely to be significant in the case of employment income, which, under a typical treaty, will be taxed wholly or largely in the source state. Returns will be relevant only for claiming deductions or other applicable credits under the domestic law provisions. The same is true for dispositions of real property.

5.2 Administrative Waivers

Where source withholding is required, the non-resident or the resident payer required to withhold may be given the opportunity to obtain a waiver or ruling from the tax authorities of the source state confirming the appropriate withholding rate. The application for such a waiver or ruling is subject to the same issues as the assessment of treaty claims in a return and the same information or evidence will be required. Where the waiver or ruling is obtained, it may be desirable to require a reference to the ruling in any return made by the payer or in the return, if any, ultimately filed. Such an application raises the same issues of claims on administrative resources and delay but may be useful where repeated payments to the non-resident are likely. Consideration should be given to requiring the renewal or refreshing of such waiver claims from time to time to ensure they remain current.

5.3 Providing Information to Domestic Payers

As an alternative to providing administrative waivers or rulings, the source state might rely on domestic payers to request information from non-residents and make their own judgment on the applicability of any treaty claim for reduced or no withholding. While this is cheaper and almost certainly faster, it will only be satisfactory if the resident payers are sufficiently diligent and knowledgeable to properly assess the treaty claim asserted. In addition, domestic law measures will be necessary to penalize resident payers who fail to make the proper withholding, including through mistake or negligence in assessing treaty claims. Typically, such a delinquent payer

would be liable for the amount, which should have been withheld, together with interest and a penalty depending on the nature of the default.

5.4 Refund Claims

Dealing with refund claims by non-residents raises the same considerations of time and resources as dealing with requests for waivers or rulings or assessing claims for treaty benefits in a return. For the tax authorities the principal issue is ensuring that delay in processing claims does not adversely affect investment in the source state.

6. Information Gathering

6.1 Typical Treaty Provisions

Typical treaty provisions for the exchange of information[6] require the contracting states to exchange any information "foreseeably relevant" to the administration of any taxes (whether or not covered by the treaty) and in respect of any person (not restricted to treaty residents of the either state). They encompass regular, automatic exchanges and exchanges made spontaneously by one of the states but in most cases, the exchange will occur in response to a request from the other state. Paragraph 3(a) of Article 26 of both the UN and the OECD Model Conventions, recognizing the open-ended nature of this obligation, provides that the requested state cannot be obliged to act at variance with its laws or the "administrative practice" of it or the other state. Paragraph 16 of the Commentary to the UN Model states that paragraph 3(a) clarifies that " a Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State." This therefore prevents conflicts between the domestic law of the state and its treaty obligations.

Paragraph 3(b) of both the UN and the OECD Model Conventions provides that a state is not required to provide information "not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State." The Commentary to the OECD Model

[6] See, for example, Article 26 of the United Nations Model Double Taxation Convention Between Developed and Developing Countries, (New York, United Nations, 2011) ("UN Model Convention") and Article 26 of the OECD Model Tax Convention on Income and on Capital, (Paris, OECD, 2010, looseleaf) ("OECD Model Convention"), and the Commentaries thereon.

Convention[7] states that this extends to a state's failure to provide sufficient administrative resources and that this would entitle the other state to refuse to respond to a request on the basis of reciprocity. The Commentary to the UN Model Convention[8] on the other hand states that paragraph 3(b) is designed to prevent the imposition of "unreasonable burdens" on the requested state and makes it clear[9] that the lack of administrative resources in a state (such as a developing country) does not allow the treaty partner (such as a developed country) to refuse to respond to a request for information on the basis of reciprocity. Paragraph 20.4 of the UN Commentary to Article 26 suggests that the contracting states may wish to address such disparity of administrative capacity explicitly in the treaty.

6.2 Exposure to Exchange of Information Requests

Where the administrative resources of a state are insufficient to respond to treaty-based requests for information, it is therefore unclear, absent specific provisions in the treaty, whether it can decline such requests, on a basis of reciprocity as noted above. This will, depending on the forbearance of the other contracting state, impair its ability to police treaty-based claims by non-residents. Where a state believes such a situation is likely to arise, it may be preferable to deal with the issue directly, either in the course of the initial treaty negotiation or in negotiating subsequent amendments, by clarifying, either by protocol or diplomatic note, the mutual realistic expectations of the parties with respect to exchanges of information.

It is also important for the state assuming these treaty obligations to consider whether its domestic law provisions with respect to gathering and disclosure of information are broad enough to encompass its treaty obligations. While the treaty obligation to exchange information is subject to any limitations under domestic law, such limitations may restrict the source state's access to information from its treaty partner on the basis of a lack of reciprocity.

[7] Paragraph 15 of the Commentary on Article 26 of the OECD Model Convention.

[8] Paragraph 20 of the Commentary on Article 26 of the UN Model Convention.

[9] Paragraphs 20.3 and 20.4 of the Commentary on Article 26 of the UN Model Convention.

7. Assistance in Collection

7.1 Typical Treaty Provisions

Article 27 of both the UN and the OECD Model Conventions provides for a potentially broad obligation of a contracting state to collect the unpaid tax debts of the other state. It is not limited to tax debts in respect only of taxes covered by the treaty but extends to any tax, the imposition of which is not contrary to the treaty. The requested state is required to collect the tax debt using the same enforcement and collection mechanism it would use for its own unpaid taxes. Article 27 assumes that the taxpayer in the requesting state has exhausted all avenues which would prevent or delay collection of the amount in question. The substantive validity of the requesting state's claim cannot be litigated again in the requested, collecting state.

Both the UN and the OECD Model Conventions note that the wide-ranging provisions of Article 27 may not accord with the domestic law or the domestic administrative provisions or practice. It is specifically contemplated that in such cases the contracting states may choose not to include such an article in the treaty. In practice, provisions for assistance in collection vary widely from treaty to treaty and might be limited to recovery of amounts, the payment of which was specifically contemplated in the treaty (such as a withholding rate) or to recovery from tax residents of the requesting state who have assets in the requested state.

A state entering into a tax treaty should consider carefully the benefits and costs of including a collection assistance article in the treaty, given the potential administrative burden involved. This consideration would include some estimate of the amount of unpaid tax, which it might recover through the treaty.

7.2 Convention on Mutual Administrative Assistance in Tax Matters

The Convention on Mutual Administrative Assistance in Tax Matters[10] (sometimes referred to as the "Strasbourg Treaty") provides for exchange of information, assistance in collection and service of documents, in terms which are generally similar to the OECD Model Convention provisions. A state, which was prepared to accept fairly substantial obligations with respect to exchange of information and assistance in collection might consider adherence to the Strasbourg

[10] The text of the Convention on Mutual Administrative Assistance in Tax Matters is available at http://www.oecd.org/ctp/exchange-of-tax-information/Amended_Convention_June2011_EN.pdf.

Treaty as a more convenient method of dealing with a fairly large number of countries simultaneously. Its relatively wide scope, however, dictates caution for the reasons discussed above relating to the administrative burdens involved.

8. Non-Discrimination

Paragraph 1 of Article 24 of both the OECD and UN Model Conventions provides that "nationals" of a contracting state shall not be subjected in the other state to "any taxation or any requirement connected therewith, which is other or more burdensome" than such requirements applying to nationals of the other state in the same circumstances. The administrative provisions discussed in this paper should not be considered non-discriminatory for two reasons. In the first place, they would be imposed on the basis of residence, not on status as a "national". In the second place, most of these provisions, such as source withholding and reporting requirements, are applicable to residents of the source state, not to non-residents. Furthermore, provisions applicable to non-residents, such as tax filing requirements for non-residents carrying on business in the source state or the requirement to apply for refunds, apply equally to residents and to non-residents.

9. Anti-Avoidance Rules

In general, there should not be a conflict between domestic rules designed to prevent tax evasion or inappropriate tax avoidance and the provisions of a tax treaty given the prevailing view that a treaty should be interpreted broadly to prevent use of the treaty to defeat the object and purpose of its provisions.[11] It would also be possible to specifically exempt domestic anti-abuse provisions from any treaty limitation.

The more difficult issue, particularly for a developing country, is managing the enforcement of complex anti-abuse provisions, such as transfer pricing rules, which require a high degree of expertise and administrative capacity. These rules apply to residents of the source state but their application typically requires information about transactions with non-residents. If a country has the capability to administer such rules, assuming treaty obligations, such as exchanging

[11] See Brian Arnold, An Overview of the Issues Involved in the Application of Bilateral Tax Treaties, Paper 1-A in this collection, supra note, at section 8.

information relating to the activities of non-residents in those areas may not place an unreasonably heavy additional burden on the tax authorities. If the country does not have that capacity, adding treaty-related obligations will only aggravate the situation. As noted above, it may be possible to mitigate the burden by negotiating administrative limitations on those obligations.

One of the difficulties in assessing anti-abuse provisions generally is their possibly negative effect on investment in the country (or at least insinuation by non-residents that this would be the case). To the extent that this is a real concern, additional delay caused by a country's administrative difficulty in enforcing such provisions would reinforce that effect. The same issue arises, as noted above, with respect to delays in providing refunds or waivers in the case of withholdings

10. Time Limits

In some instances, a treaty may contain time limitations on the ability of a contracting state to assess or reassess a non-resident, which are shorter than those applicable under the domestic law. Because of the additional pressure this places on the tax authorities (and the incentive it creates for the non-resident taxpayer to intentionally delay in hope of triggering the limitation) a state should consider carefully before agreeing to such a provision. In general, the benefit of having more time to assess should outweigh any additional burden created for its own residents facing audit or reassessment in the other state as a result of the additional time period applying reciprocally. Consideration should also be given to providing in the domestic law of the state longer time limitation periods where the taxpayers are non-residents or where transactions involve non-residents. This reflects the added difficulty and delay in obtaining information, which is often the case with cross-border transactions or non-residents. Such provisions will not be contrary to the non-discrimination provisions of Article 24 of the UN or the OECD Model Conventions because they apply to residents of the source state or to non-residents, such as those carrying on business through a permanent establishment in the source state, who are affected in an identical manner to residents of the source state.

11. Burden of Proof

Because the taxpayer has the best knowledge of the transactions it has participated in, and the reasons for entering into them, it is reasonable to impose the initial burden of disproving a proposed reassessment on the taxpayer, as a matter of domestic law. If this is the case in the domestic law, treaty provisions should not reverse that burden (and this would not normally be the case under standard or model treaty provisions). Similarly, the standard of proof (likely on a balance of probability, but possibly differing in the domestic law) should neither be relaxed for the taxpayer nor made more demanding for the tax authorities by the provisions of a treaty.

12. Conclusion

Entering into tax treaties raises a number of issues for a developing country, principally related to the demands a typical treaty makes on the administrative capacity of the country's tax authority. Efforts should be made to identify those demands prior to entering into treaty negotiations. If negotiations proceed, due attention should be given to limiting those demands where desirable and possible, either in the treaty or by protocol or note. Such limits might include relaxation of the exchange of information obligation or omission of mutual enforcement provisions. In appropriate cases, it may even be better to forego the benefit of the treaty based on such a cost-benefit analysis.