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Swiss Policy Coherence in International Taxation: Global Trends in AEOI and BEPS in Development Assistance and a Swiss Way Forward

by

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AEOI	Automatic Exchange of Information
APA	Advanced Pricing Agreement
ATI	Addis Tax Initiative
BEPS	Base Erosion and Profit Shifting
CbCR	Country-by-Country Reporting
DAC	OECD Development Assistance Committee
DRM	Domestic Resource Mobilization
DTT	Double Tax Treaty
DWG	Development Working Group
EU	European Union
FDI	Foreign Direct Investment
G20	Group of 20
IFF	Illicit Financial Flows
IMF	International Monetary Fund
LIC	Low Income Country
LSA	Location Specific Advances
MNE	Multinational Enterprises
MoU	Memorandum of Understanding
NGO	Non-Governmental Organisation
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
PE	Permanent Establishment
SDG	Sustainable Development Goals
TIEA	Tax Information Exchange Agreement
TIWB	Tax Inspectors Without Borders
TP	Transfer Pricing
UN	United Nations
UNDP	United Nations Development Programme
WBG	World Bank Group

I. Intro

A. Background

The international community, represented by Head of States and Governments, all gathered in Addis Ababa in July 2015 supporting one common vision of the world for 2030. 17 Sustainable Development Goals (SDG) were created, inter alia with the ambitious aim to set the world free of poverty and hunger by 2030.[2] Unsurprisingly, the common vision of the 2030 world presupposes a vast amount of additional funds. The "Gretchen question" as to the financing brought taxation very much into the spotlight of the SDGs. The vital means to that end should be generated through the mobilisation and effective use of domestic resources. Those countries in need of help to improve their domestic resource mobilization capabilities will be supported by targeted international assistance (e.g. through capacity building and official development assistance) with the rational to help those countries to ultimately help themselves.[3] Additionally, for the first time representatives of all countries agreed to explicitly incorporate the enhancement of policy coherence for sustainable development as a focal point for implementing the 2030 Agenda.[4] The significance of such agreement should not be underestimated. Literally seen, it would require all countries to holistically analyse all their policies – including their own domestic tax policy - with regards to their impact on the achievement of the sustainable development goals for all stakeholders. This focal point presupposes a mechanism which cross-references and links policies to the sustainable development goals in order to inhibit incoherent policies.

At the same time, the international community recognised the devastating effect of illicit financial flows and tax avoidance techniques applied by MNE on the capability to increase domestic public resources in developing countries. In a powerful statement included in para. 23 of the Addis Ababa Action Agenda - the international community rendered the following commitment:

> "We will redouble efforts to substantially reduce illicit financial flows by 2030, with a view to eventually eliminating them, including by combating tax evasion and corruption through strengthened national regulation and increased international cooperation. We will also reduce opportunities for tax avoidance, and consider inserting anti-abuse clauses in all tax treaties. We will enhance disclosure practices and transparency in both source and destination countries, including by seeking to ensure transparency in all financial transactions between Governments and companies to relevant tax authorities. We will make sure that all companies,

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2 UN (2015), Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), A/RES/69/313.

3 Ibid, p. 11.

4 Ibid, Target 17.13 and 17.14.

including multinationals, pay taxes to the Governments of countries where economic activity occurs and value is created, in accordance with national and international laws and policies."[5]

Switzerland signed onto the Addis Ababa Action Agenda on 17 July 2015 and hence constitutes a party to the consensus on the new framework for financing and implementing the SDG. Accordingly, it is party to the agreement to globally strengthen national tax systems and to intensify international cooperation to combat tax avoidance and illicit financial flows. With $2.4 trillion in assets under management, Switzerland remains the world's biggest offshore wealth management hub. It also constitutes one of the world's leading centres for commodity trading and one of the preferred low tax jurisdictions for MNE. Due to these multiple roles occupied by Switzerland, it has an exposure to IFFs and the possible facilitation of tax avoidance strategies. As the repercussions deprive developing countries of billions in tax revenues[6] to implement their SDG, concrete measures would be needed which translate Switzerland's commitment to the Addis Ababa Action Agenda into action. Genuine efforts for policy coherence and against IFFs and tax avoidance are important to avoid being a safe haven for illicit and illegal money, and to facilitate the 2030 goals.

B. IFFs- Definition and Impact

So far, no clear agreement on a common international definition of the term IFFs has been established. This lack of agreement also results in disagreement with regard to the estimation of the volume of IFFs. However, there is prevalent consensus that every year huge sums of money are transferred out of developing countries. Thereby, the volume of IFFs likely exceed aid flows and inward investment.[7] While IFFs occur and are damaging in all countries, their impacts are more severe in developing countries due to their limited resource base and smaller, less stable markets. The most immediate impact of these IFFs is a reduction of domestic revenues, which results in fewer jobs, hospitals, schools, less infrastructure and hence less development.[8]

Global Financial Integrity for instance calculated the magnitude of estimated IFFs to $1 trillion. However, such figures are generally heavily disputed due to the term being undefined and vague.[9] Generally IFFs refer to a set of methods and practices aimed at

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5 Ibid, para. 23, p. 11.

6 See for instance Global Financial Integrity (2017), Illicit Financial Flows to and from Developing Countries: 2005-2014, available under http://www.gfintegrity.org/wp-content/uploads/2017/05/GFI-IFF-Report-2017_final.pdf.

7 OECD (2014) Illicit Financial Flows from Developing Countries: Measuring OECD Responses, p. 15.

8 OECD Development Assistance Committee (2013), Measuring OECD responses to illicit financial flows-Issue Paper, DAC Senior Level Meeting (3-4 April 2013).

9 Ibid.

transferring financial capital out of a country in contravention of national or international laws.[10] The activities mostly associated with IFFs include money laundering, corruption, bribery, tax evasion, trade misplacing and terrorist financing. Definitions of NGOs tend to be wider often including tax avoidance through profit shifting in their IFF definition.[11] However, the inclusion of tax avoidance techniques (generally known as BEPS) is mostly disputed and not generally accepted as being part of IFFs.

In practice IFFs include something as simple as private individuals transferring funds into their account abroad without paying taxes on the funds, as well as highly complex money laundering schemes involving criminal networks setting up multi-layered multi-jurisdictional structures to hide ownership and transfer stolen funds.[12]

C. BEPS - Definition and Impact

The OECD/G20 Base Erosion and Profit Shifting (BEPS) Project brings together over 100 countries to collaborate on the implementation of measures against BEPS. Thereby, BEPS refers to tax planning strategies that exploit gaps and mismatches in tax rules of different jurisdictions to artificially shift profit to low or no-tax locations, where there is usually little or no economic activity taking place. Although some of the tax schemes used are illegal, unlike IFFs, BEPS usually refers to "licit" tax avoidance strategies from MNE. The focus of BEPS rest on corporate income taxes. Due to the heavy reliance on corporate income taxes by developing countries, particularly from MNE, BEPS strategies are particularly harmful for developing countries.[13] A recent study of the IMF regarding the scale of the tax losses associated with profit shifting out of developing countries, makes an indicative estimate that developing countries lose approx. 200 billions of tax revenues.[14] Hence, there is general agreement that addressing these quantities of tax losses would go a long way in generating the resources needed for developing countries to achieve the SDG.

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10 United Nations (2016), Coherent Policies for Combatting Illicit Financial Flows, United Nations Office on Drugs and Crime (UNODC) and Organization for Economic Co-Operation and Development (OECD), Issue Brief Series from the Inter- Agency Task Force on Financing for Development, July 2016; OECD (2015), Policy Coherence for Sustainable Development (PCSD), Thematic Module on Illicit Financial Flows, Workshop, 2015, p. 3.

11 Cobham, Alex (2015) "Illicit Financial Flows Assessment Paper: Benefits and Costs of the IFF Targets for the Post-2015 Development Agenda", Copenhagen Consensus Center, 4 August 2015, http://www.copenhagenconsensus.com/sites/default/files/iff_assessment_-_cobham_0.pdf.;Grondona, Veronica, Nicole Bidegain Ponte and Corina Rodríguez Enriquez (2016) "Curbing Illicit Financial Flows and dismantling secrecy jurisdictions to advance women's human rights", http://www.taxjustice.net/wp-content/uploads/2013/04/IFF_Gender-Grondona_Bidegain_Rodriguez.pdf.

12 OECD (2014) Illicit Financial Flows from Developing Countries: Measuring OECD Responses, p. 16.

13 For more information on BEPS and the inclusive framework please visit, http://www.oecd.org/tax/beps/beps-inclusive-framework-progress-report-june-2016-july-2017.htm.

14 Crivelli, E., R. De Mooij and M. Keen (2015). Base Erosion, Profit Shifting and Developing Countries. IMF Working Paper. Fiscal Affairs Department. Washington: IMF

D. Rationale, Scope and Structure of Paper

The Swiss Federal Council has recognised the repercussions of IFFs and BEPS on developing countries, and the need to address them, especially due to Switzerland's idiosyncratic role of being the biggest offshore wealth management hub, an important hub for commodity trading and hosting a variety of MNE.[15] On 12 October 2016, the Swiss Federal Council published a report on illicit financial flows from developing countries.[16] The report provides an overview of measures which counter the cross-border movement of capital in connection with illegal and unfair activities. In doing so it covers i.a. money laundering, corruption, tax evasion and tax avoidance. The Swiss Federal Council also acknowledged that IFFs and BEPS constitutes an obstacle for the SDGs. Hence, it emphasised that measures are needed to curb these flows in an internationally coordinated approach. Additionally, on 5th June 2015 the Swiss Federal Council mandated the Swiss Federal Department of Foreign Affairs together with the Ministry of Finance to examine a suitable approach for Switzerland - be it on a multilateral and/or bilateral basis - to help developing countries to participate in the new global automatic exchange of information (AEOI) standard for financial account information for tax purposes. Since the primary goal of IFFs is to hide funds from governments, global transparency through AEOI constitutes an important antidote. Particularly for developing countries it constitutes an important tool to inhibit the loss of revenues from assets held offshore or misrepresented cross-border activities.

Against this background, this study examines possible areas of improvement for Switzerland's tax policies from a development perspective. The aim is to portray areas of improvements and possible measures for Switzerland to be more coherent with the commitment given in the Addis Ababa Agenda to help developing countries in their endeavor to increase their domestic public resources. The study will however, only focus on taxation through covering the topic of AEOI and BEPS. Other IFF topics such as money laundering, corruption, bribery, trade misplacing and terrorist financing are not covered.[17]

Accordingly, this paper starts in Chapter II with an overview of the genesis of international tax topics in development policies. The chapter is devoted to portraying the growing importance of tax reform, the main actors involved and the growing focus on international tax issues, AEOI and BEPS in particular, on the international as well as bilateral level between donor and developing countries. The growing awareness of spillover effects will also be addressed, showing existing best practices. It will then briefly depict

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15 See Swiss Federal Council (2016), Unlautere und unrechtmässige Finanzflüsse aus Entwicklungsländern, Report from 12 October 2016. Responding to Postulate Fehr Jacqueline 13.3533 Unlautere und unrechtmässige Finanzflüsse aus Entwicklungsländern, Ingold 13.3848 Schwarzgeldabflüsse aus Entwicklungsländern, 15.3920 Maury Pasquier Unlautere und unrechtmässige Finanzflüsse aus Entwicklungsländern.

16 Swiss Federal Council (2016), Unlautere und unrechtmässige Finanzflüsse aus Entwicklungsländern, Report from 12 October 2016.

17 A comprehensive and structured overview of IFFs from a Swiss perspective covering i.a. the topics of corruption, money laundering, etc. please read K. Betz, M. Pieth, Globale Finanzflüsse und nachhaltige Entwicklung: Auch eine Folge von "Panama"?, Basel Institute on Governance, available under https://www.baselgovernance.org/sites/collective.localhost/files/publications/160202_globale_finanzflusse_wp21_online_version.pdf

the focus of Switzerland's development policy with regard to taxation. Thereafter, in Chapter III, the focus will rest on AEOI. Firstly, the particular hurdles faced by developing countries to participate in the new global standard on AEOI will be presented and the corresponding international initiatives addressing these priority areas will be highlighted. Thereafter, possible bilateral measures are illustrated. The Swiss status quo will be assessed subsequently. Recommendations for Switzerland will be brought forward in the last part of Chapter III. The subsequent Chapter IV will focus on BEPS topic. The main hurdles faced by developing countries will be depicted with a subsequent overview of the international initiatives addressing these priority BEPS areas. Thereupon, possible bilateral measures are described with regard to tax treaty design and transfer pricing, together with the Swiss status quo and possible measures to be enacted by Switzerland. The last Chapter V will provide a summary of the possible measures for improving the alignment of the Swiss tax policy with its development goals.

II. The Genesis of International Tax in Development Policies

Throughout recent history, aid for tax reform has been relatively low.[18][19] This is especially surprising since international support to tax reform has, in the view of many observers and several surveys, resulted in positive and sustainable impact.[20] For instance, the World Bank deems its aid for tax reform to have been most effective.[21] Nevertheless, the share of aid, specific to tax reform, in the total official development assistance of OECD member countries constituted to approximately only 0.15% in 2014, nevertheless an increase from the figure in 2006 of around 0.05%.[22] The future looks more bright though since tax appears to have been elevated to a priority area in development assistance.[23]

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18 OECD, ITC (2015), Examples of Successful DRM Reforms and the Role of International Co-operation, Discussion Paper, p.4, available under https://www.oecd.org/ctp/tax-global/examples-of-successful-DRM-reforms-and-the-role-of-international-co-operation.pdf.

19 However, there had also been a problem of adequately tracking the amount of aid flowing into tax reform, since there was not a specific code available for DRM. This issue was resolved to be able quantify the aid flowing into tax more accurately.

20 OECD, ITC (2015), Examples of Successful DRM Reforms and the Role of International Co-operation, Discussion Paper, p.4, available under https://www.oecd.org/ctp/tax-global/examples-of-successful-DRM-reforms-and-the-role-of-international-co-operation.pdf.

21 World Bank, Independent Evaluation Group (2008), Public Sector Reform: What Works and Why? An IEG Evaluation of World Bank Support, Washington, D.C.

22 IMF, OECD, UN, WBG (2016), Enhancing the Effectiveness of External Support in Building Tax Capa city in Developing Countries, p.6 available under http://www.oecd.org/tax/enhancing-the-effectiveness-of-external-support-in-building-tax-capacity-in-developing-countries.pdf, accessed 16 February 2017.

23 One explanation of this increased focus on tax as a priority area in development assistance is the fact that the recession caused by the 2007/2008 global financial crisis resulted in a more restricted budget of the traditional donor countries (from Europe and the US). This resulting volatility of outside funding for developing countries made it clear that external sources such as aid will not be sufficient to meet the Millennium Development Goals and the subsequent agreed progress beyond the 2015 target date. Next to the aspired emancipation of foreign aid dependencies other reasons include the potential benefits of taxation on state building, trade liberalisation, increased prominence of fiscal issues in the "west" due to the financial and budgetary crisis, as well as the persisting acute financial needs of developing countries. For more information regarding the increased prominence of tax in the policy debate on development, please con-

A. *Stronger Role of Tax Reform*

Especially, the Addis Ababa Action Agenda constitutes a big step forward of the role of tax, recognising that "significant additional domestic public resources, supplemented by international assistance as appropriate, will be critical to realizing sustainable development and achieve the Sustainable Development Goals".[24] The Addis Ababa Action Agenda stresses the need for assistance to developing countries to improve their capacity to collect tax and other revenues, and contains commitments to provide international support to developing countries in reaching targets for enhanced domestic revenue mobilization (DRM) through enhanced official development assistance (ODA). The increased willingness of advanced economies to substantially increase their support for fiscal capacity lead for instance to the important commitment of the Addis Tax Initiative (ATI)[25], in which 45 countries, regional and international organizations - including Switzerland, aimed to double support for technical cooperation in taxation by 2020, and reaffirmed their commitment to promote and ensure policy coherence for development. However, it also includes a restatement by partner countries, e.g. the developing countries, of their commitment to strengthen revenue mobilization so as to achieve the SDGs and ensure inclusive development. Such ownership and commitment on the site of the developing country is undoubtedly essential, since without legislative changes and willingness by/of the government/parliament a successful tax reform cannot be facilitated, irrespective of international support.

B. *The Main Actors*

Bilateral and multilateral organizations have played important roles in supporting developing countries' tax reforms.[26] The common multilateral financial institutions include the International Monetary Fund, the World Bank, the African Development Bank, the Asian Development Bank, and the Inter-American Development Bank. They provide direct advice to developing countries and may also fund longer-term technical

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sult Giulia Mascagni, Mick Moore, Rhiannon McCluskey, Tax Revenue Mobilisation in Developing Countries: Issues and Challenges, EU 2014, available un derhttp://www.europarl.europa.eu/Re Data/etudes/etudes/join/2014/433849/EXPO- DEVE_ET(2014)433849_EN.pdf, accessed 8 February 2017.

24 UN (2015), Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), A/RES/69/313, Sec. 22

25 The Addis Tax Initiative was initiated by the governments of Germany, the Netherlands, the United Kingdom, and the United States of America. The initiative was launched in July the course of the 3rd Financing for Development Conference in Addis Ababa in 2015. It intends to generate substantially more resources for capacity building in the field of domestic revenue mobilisation / taxation as well as more ownership and commitment for the establishment of transparent, fair and efficient tax systems. More information can be found on the following link: https://www.addistaxinitiative.net/#slider-1

26 OECD, ITC (2015), Examples of Successful DRM Reforms and the Role of International Co-operation, Discussion Paper, p.4-5.

projects to build institutions and capacity.[27] Typical international organisations include the European Union (EU), OECD and the United Nations (UN). They provide development assistance or carry out co-operation programs with partner countries in developing countries.[28] Furthermore, regional tax organisations such as the African Tax Administration Forum (ATAF), the Inter-American Center of Tax Administrations (CIAT) and the Intra-European Organisation of Tax Administrations (IOTA). Such regional tax organisations play a prominent role in fostering reginal cooperation (such as south-south cooperations, peer learning and the sharing of experience). Additionally, many developed countries - including Switzerland, have tax and development programs on a bilateral basis, where the individual donor agency has a long-term relationship with a government of a developing country.[29]

C. Aid Modalities

There is a range of modalities, through which aid can be delivered. Since developing countries differ starkly - e.g. in their willingness to reform and their technical capacity - there is no single best approach. Generally, the aid for tax reform is delivered through the following modalities:

- **General Budget Support** (GBS): Vehicle for providing untied (i.e. not bound to a specific purpose) funding to finance ministries to support the government's budget programmes;
- **Sectoral Budget Support** (SBS): very similar to GBS, only it is applied to sector strategies;
- **Basket financing**: multi-donor pooled funding that is disbursed, not to the host government's general budget, but to a segregated account for a designated purpose, such as a tax programme;
- **Multi-donor trust funds**: an instrument through which tax systems are supported through a coordinated platform, the basic feature is that one agency – often the World Bank, the UNDP, or the IMF – receives and administers funds on behalf of a group of donors;
- **Bilateral projects or programmes**: aid flows to developing countries consisting of stand-alone bilateral arrangements;
- **In-kind support:** Next to the above-mentioned funding instruments, some aid agencies deliver technical services and investments directly through in-kind support, such as twinning arrangements or the secondment of tax officials. Tax authorities in

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27 Ibid.
28 Ibid.
29 Ibid.

low-income countries are especially interested in the engagement of experienced tax officials from other countries.[30] A well-known and highly effective in-kind support constitutes the tax inspectors without borders (TIWB) programme. It is a joint initiative by the OECD and UNDP, in which expert tax auditors (either recently retired or currently serving experts) are send to assistance-requesting host administrations to support the building of audit capacity around the world. It is mainly financed through governments and private foundations funds channeled through the UNDC and the OECD (for more information see Chapter IV.B.1.b).

However, if a donor country at the same time has domestic policies in place which are contrary to the development goals, the use of either of these modalities are of limited use. The enhancement of policy coherence for sustainable development is a focal point for a holistic and effective development policy - as stipulated in the Addis Ababa Action Agenda.[31] Hence, donor countries should need a mechanism in place which cross-references and links other policy areas to the SDGs to ensure no conflicting policy agendas. At the same, the recipient country also needs to be willing to reform and facilitate required legislative changes. If the political or economic elite of a country is de facto uninterested in effective change, neither mode of international support will in the end achieve its envisaged impact.

D. Stronger Focus on AEOI and BEPS

Providing development assistance in tax reform includes various different topics to be addressed. Different donors have different conceptual and local emphases, expertise, priorities and hence focus areas of work. Generally, one can fork the development activities into two focus areas. Firstly, domestic taxation, which refers to issues arising in the national context such as tax fraud, taxation of the informal sector and tax payer compliance. The second area focuses on international taxation, which addresses topics related to the taxation of transnational economic activities and covers taxation of multinationals, double taxation/non-taxation and profit shifting attempts e.g. using transfer prices, and information exchange.[32] The topic of AEOI and BEPS fall within the latter category.

Albeit both domestic and international taxation are important aspects, a comprehensive mapping project, conducted in 2010, by the International Tax Compact found out that traditionally donors focused more on domestic taxation. This focus on domestic taxation

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30 ITC and OECD (2013), Aid Modalities for Strengthening Tax Systems, p. 14-15 and p. 43-65, more information on aid modalities and the pro´s and con´s can be found in chapter 3, available under http://www.taxcompact.net/documents/ITC_2013-07_Aid-Modalities.pdf, accessed on 2 March 2017

31 Ibid, Target 17.13 and 17.14.

32 International Tax Compact (2010), Mapping Survey: Taxation and Development, Deutsche Gesellschaft für Technische Zusammenarbeit, p. VII, available under https://www.taxcompact.net/documents/ITC_2010-05_Mapping-Survey_Taxation-and-Development.pdf, accessed 4 March 2017.

has especially been the case with bilateral aid agencies. They have displayed the strongest focus on domestic taxation (87% of their work) in their partner countries.[33] According to the mapping analysis, Switzerland even devoted 100% of its tax revenue mobilization assistance to domestic taxation issues.[34] Multilateral financial institutions have followed the same bias and devoted 70% of their work to issues related to domestic taxation.[35] However, international organizations (EU, OECD and UN) and NGOs have showed a clear emphasis on international taxation creating a traditional division of work, meaning bilateral donors focus on domestic taxation whereas international organizations are more active in international taxation.[36] Thus it is important to bear in mind that a clear cut distinction between domestic and international taxation cannot be made. The implementation of international tax standards often presupposes strong domestic institutions. However, the work to reorganize the structure of tax administrations, train stuff and improve the IT systems are classified into the domestic tax category while partly being a precondition for working on international tax issues. Accordingly, this distinction cannot be seen in a strict manner.

Nevertheless, there seems to be a change in priorities and division of the work. Issues related to international taxation have received increased worldwide attention, mainly initiated by the financial and economic crises and with a climax at the birth of the BEPS project and the agreement on the automatic exchange of information as the new global standard. [37]
At the St Petersburg Summit G20 leaders emphasized the importance of the Standard on AEOI and the benefits it will generate for developing countries, committing to the following:

> "Developing countries should be able to reap the benefits of a more transparent international tax system, and to enhance their revenue capacity, as mobilizing domestic resources is critical to financing development. We recognize the importance of all countries benefitting from greater tax information exchange. We are committed to make automatic exchange of information attainable by all countries, including LICs, and will seek to provide capacity building support to them."[38]

With regards to BEPS a strong statement was issued by the G20 in 2014, stipulating that

> "for many developing countries, addressing BEPS is not a luxury item – one that

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33 Ibid.

34 International Tax Compact (2010), Mapping Survey: Taxation and Development, Deutsche Gesellschaft für Technische Zusammenarbeit, p. 39

35 International Tax Compact (2010), Mapping Survey: Taxation and Development, Deutsche Gesellschaft für Technische Zusammenarbeit, p. VII

36 Ibid.

37 The G20 Leaders' Summit was held from 5–6 September 2013 in St Petersburg, Russia. See in particular paras 50–52 of the G-20 Leaders' Declaration with regard to AEOI and BEPS. Available at www.g20.org/sites/default/ les/g20_resources/library/Saint_Petersburg_Declaration_ENG_0.pdf.

38 Ibid. para 52.

can be delayed to when more advanced levels of development are reached. Reliance on corporation tax means addressing BEPS is an urgent domestic resource mobilisation matter – a bridge that must be crossed in lower and middle-income countries, in combination with other pressing problems – and a strengthened capacity to address BEPS issues in turn strengthens effectiveness in other areas, including domestic tax avoidance."[39]

Correspondingly to these commitments/statements, in an analysis conducted in 2014 by the G20, G20 members were increasingly undertaking a number of activities with components related to BEPS or AEOI.[40] Next to the support and/or work with international organisations on these activities, G20 donor countries also increased their development activities related to BEPS or EOI on a bilateral level.[41] [42]

E. Awareness of Spillover Effects

An interesting new development is the increased political awareness of developed countries regarding the negative impact of their own domestic corporate tax law policies on the tax base of developing countries (called "spillover effects") and the aim to align the impact more coherently with their development objectives. The issue was refined in the comprehensive work undertaken by the IMF as a complementary project to the G20-OECD BEPS project.[43]According to the IMF a spillover effect is defined as "the impact one jurisdiction's tax rules or practices has on others".[44] In other words, spillovers are "fiscal externalities" which arise through a countries policy regarding its taxation at the corporate level. One aims to measure the resulting cross-border effects on cross-country allocation of corporate tax payments.

Different national tax policies can give rise to spillovers which were enumerated in the IMF report.[45] Most obviously it includes differences in headline statutory rates of corporate taxation, as they can create an incentive to shift taxable profits between countries.

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39 G20 (2014), Two-Part Report to G20 Developing Working Group on the impact of BEPS in Low Income Countries, p. 43, available under http://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf.

40 G20 (2014), G20 Response to 2014 Reports on Base Erosion and Profit Shifting and Automatic Exchange of Information for developing Countries, Development Working Group on Domestic Resource Mobilisation, available at http://www.g20.utoronto.ca/2014/16%20G20%20response%20to%202014%20reports%20on%20BEPS% 20and%20AEOI%20for%20developing%20economies.pdf, accessed 11 February 2017.

41 Ibid., p. 19.

42 For instance, the G20 analysis portrayed that Asia had the highest number of partner countries in which G20 members reported undertaking BEPS- and EOI-related development activities. Following Asia, BEPS-related development activities were most prevalent in Africa, Europe, the Middle East, and the Pacific, while EOI-related development activities were most prevalent in Latin America and the Caribbean.

43 IMF (2014), Spillovers in International Corporate Taxation, International Monetary Fund Washington D.C., available under http://www.imf.org/external/np/pp/eng/2014/050914.pdf

44 Ibid, p. 12.

45 Ibid. p.13-14.

However, also preferential regimes that offer special treatment for particular types of income offer an incentive to shift profits. Additionally, spillovers can be enhanced due to the system of double tax treaties a country concludes, if they include low or zero withholding tax rates, have restrictive PE definitions, lack anti-abuse rules or have limited exchange of information clauses.[46]

The result of the IMF analysis affirmed that spillovers are especially affecting the tax base of developing countries. It emphasized that inhibiting base erosion out of developing countries requires not just - albeit being very important - capacity building but also addressing weaknesses in one owns domestic law and international arrangements.[47] Simultaneously, the G20 Development Working Group (DWG) called on its G20 member recommending to routinely analyse the spillover effects of revisions made to their own tax systems on those of developing countries.[48]

Accordingly, a status update on the implementation of spillover analyses was conducted by the IMF, OECD, UN and WBG in the July 2016 Report "Enhancing the Effectiveness of External Support in Building Tax Capacity in Developing Countries" .[49] Therein it was buttressed that there is amble room for improvement, in integrating the assessment of spillover effects on developing countries as a routine part of evaluating major tax reforms in advanced countries.[50] However, as an important milestone, the Report highlighted the progress made by the Netherlands[51] and Ireland[52], since both countries have conducted comprehensive spillover analyses on their domestic corporate taxation and tax treaty policies and their respective impact on developing countries.

In the case of the Netherlands, the results of their analysis triggered inter alia the renegotiation of 23 tax treaties with developing countries. The Dutch Ministry of Finance issued a policy note on tax treaties stipulating that in Dutch treaties with countries on the DAC List of ODA recipients, the Netherlands will be willing to accept a broader PE-concept and higher withholding tax rates at source. Additionally, in negotiating its tax

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46 Ibid, p. 25-28.

47 IMF (2014), Spillovers in International Corporate Taxation, International Monetary Fund Washington D.C., Executive Summary, p. 1

48 G20 (2014), Two-Part Report to G20 Developing Working Group on the impact of BEPS in Low Income Countries, p. 50

49 IMF, OECD, UN and World Bank Group (2016), Enhancing the Effectiveness of External Support in Building Tax Capacity in Developing Countries, available underhttp://www.oecd.org/tax/enhancing-the-effectiveness-of-external-support-in-building-tax-capacity-in-developing-countries.pdf, accessed 16 Feb ruary 2017.

50 IMF, OECD, UN and World Bank Group (2016), Enhancing the Effectiveness of External Support in Building Tax Capacity in Developing Countries, p. 10 and Appendix 1. Additionally, it was recom mended to review the common practice of requiring tax exemptions for donor-financed projects.

51 F. Weyzig (2013), Evaluation issues in financing for development - Analysing effects of Dutch corporate tax policy on developing countries, no. 386, Commissioned by the Policy and Operations Evaluation Department (IOB) of the Ministry of Foreign Affairs of the Netherlands.

52 IBFD (2015), Spillover Analysis - Possible Effects on the Irish Tax System on Developing Countries, available under http://www.budget.gov.ie/Budgets/2016/Documents/IBFD_Irish_Spillover_Analysis_Report_pub.pdf

treaties with developing countries the Netherlands is willing to accept parts of the UN Model which gives more taxing rights to source countries. Furthermore, the Netherlands emphasised its commitment to include anti-abuse measures in all its tax treaties with developing countries in order to inhibit so called treaty shopping.[53]

Albeit not being confined to developing countries, next to the developments on spillover effects mentioned above, also Action 11 of the BEPS Action Plan, has a similar endeavour. It has as its scope in its mandate the development of an economic analysis of the scale and impact of BEPS, explicitly including spillover effects across countries to be analysed.[54] Hence, one can expect an increase of the occurrence of these analyses in the near future.

F. Switzerland's policies and commitment to date: State-of-play of the debate and the government's position

In numbers, according to the official statistics of the OECD/DAC, Switzerland constitutes the fifth biggest contributor on a global level with regard to ODA on DRM.[55] Hence, Switzerland aligns well with the global trend of tax as a priority area in development assistance.[56] In this regard, Switzerland uses different modalities for its ODA and focuses its support on various tax areas. For instance, the Swiss State Secretariat for Economic Affairs (SECO) is engaged in bilateral programs with partner countries and provides technical support, advisory services and training to multiple countries such as Peru, Colombia, Ghana, Mozambique and Burkina Faso. SECO is also involved in a number of global and regional initiatives. Currently, Switzerland chairs the Steering Committee of the Revenue-Mobilization Trust Fund managed by the International Monetary Fund (IMF), whose budget has now doubled to demonstrate the strong engagement in DRM. Switzerland is also among the largest contributors to the African Tax Administration Forum and the largest contributor to the Inter-American Center of Tax Administrations. Switzerland also provides funds to the Extractive Industries Transparency Initiative and to the World Bank's multi-donor trust fund Global Tax Program to which Switzerland is currently one of the largest financial contributors.[57] Since during the last

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53 English Summery available from Dutch Ministry of Finance (2016), EU Platform for Tax and Good Governance - Adopting anti-abuse provisions in Tax Treaties with Developing Countries, available un derhttp://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/good_governance_matters/platform/meeting_2016/nl__spillover_pres_160614.pdf

54 OECD (2015), Measuring and Monitoring BEPS, Action 11 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p.122, sec. 175, available under http://dx.doi.org/10.1787/9789264241343-en.

55 The official statistics can be found on the following link http://stats.oecd.org/qwids/#?x=1&y=6,5&f=2:262,4:1,7:1,9:85,3:312,8:85&q=2:262+4:1+7:1+9:85+3:51,312+8:85+1:3,4,5,6,58,7,8,9,10,11,60,12,13,14,61,15,16,17,18,62,19,63,75,20,21,22,23,24,36,59+6:2015+5:3,4&lock=CRS1.

56 For a comprehensive overview on Switzerland's DRM work, please see Annex I

57 More information can be found on SECOs projects can be found on https://www.seco-

years, the focus on international tax issues, such as transparency of the extractive industry and taxation of multinationals grew constantly, Switzerland addressed these latter topics through providing funds to International financial institutions or initiatives.[58]

Generally, addressing these topics through international platforms which already bring about extensive experience in the areas of BEPS and transparency constitute a sound basis for coordinated capacity development efforts. Especially since large scale reforms on these topics are highly resource extensive, multi-donor pooled funding and skills are essential for well-targeted, holistic projects. However, such topics can also be addressed by Switzerland in a bilateral relationship. A bulk of Switzerland's bilateral assistance goes already into the reorganization of a strong tax administration with functioning IT systems. Additionally, as a positive development, recently, there has been an agreement between the Swiss Federal Tax Administration and Ghana and Burkina Faso for technical assistance. This also shows that Switzerland is increasingly also addressing international tax issues in their bilateral donor relationships. All in all, Switzerland has achieved to play an important and acknowledged role in the international donor community addressing the improvement of DRM in developing countries.

This undoubtedly constitutes a positive achievement, however with room to improvement. Complementary, Switzerland should ideally make sure that its tax policy is not *de facto* at the same time antagonizing its global effort to improve the tax base of developing countries. Giving with one hand but then taking with the other, would be an inefficient setting. Accordingly, mechanisms need to be in place to ensure policy coherence in the field of tax law – that the Swiss tax law contributes to Switzerland's global effort rather than frustrating it. Accordingly, in Switzerland's committed to AEOI and the implementation of the BEPS minimum standards, it should heed the idiosyncratic position of developing countries and the global effort to help them generate more revenues. Negative spillover effects of Swiss tax policies on developing countries should be identified and if present rectified.

Due to Switzerland's special role as the biggest global wealth management hub and the host of multiple multinational corporation, it is especially important to have no policy in place with could potentially facilitate IFFs and BEPS from developing countries. Accordingly, Switzerland should have a clear strategy in place for AEOI, BEPS and domestic tax reforms with cross-border impacts (presently the Swiss Tax Proposal 17), which is aligned with its global effort to help developing countries raise more taxes to make sure that its tax policy is not inhibiting its development efforts. The below will try to present measures for improving Switzerland's policy coherence in the field of AEOI and BEPS, to be better aligned with Switzerland's positive contribution in the global DRM effort.

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cooperation.admin.ch/secocoop/en/home/themes/public-institutions-services/strengthening-finances.html

58 Ncroys (2015), SECO Independent Evaluation on Tax and Development - Final Report, p. viii.

III. AEOI and Developing Countries

As a measure to counter international tax avoidance and evasion, the OECD at the invitation of the G20 countries, has recently developed what it refers to as the new single global standard for the automatic exchange of information (AEOI) between tax authorities globally. The OECD defines AEOI as the systematic and periodic transmission of "bulk" taxpayer information by the source country to the residence country in a common reporting format or standard.[59] Participating countries would require local banks and financial institutions to obtain information on financial accounts, which they would make available to the local tax authorities; they, in turn, would provide that information on an automatic basis to other countries in a standardized format (that is to say, without the need for a specific request). As of August 2017, 49 jurisdictions have committed to undertaking their first exchange by 2017, with another 53 indicating they would start their exchange by 2018.[60]

Generally, the principal purpose of exchanging information is to provide countries with information to detect tax evasion. This allows them to protect their tax base and limit their exposure to revenue loss. Especially for developing countries the detection of tax evasion is considered as critical, due to the estimation of the OECD that approximately US$ 8.5 trillion of household assets are held abroad in developing countries.[61] For instance in 2012, more than 25% of all Latin American and almost 33% of all Middle Eastern and African household wealth was held abroad compared to the worldwide average of 6%.[62] Albeit, it would be wrong to conclude that assets being held abroad do per se constitute undeclared money, the likelihood of this being the case is much higher. Successful implementation of the AEOI can alert tax administrations of tax evasion that was previously unknown and hence limit the tax revenue and illicit financial flows lost by developing countries.

Theoretically, the adoption of the AEOI standard on the envisaged global scale would equip all countries - developed and developing - with the means to address illicit flows of money to locations for tax avoidance purposes. However, the practical success of the AEOI requires a number of implementation steps, which countries first need to overcome (see box below).

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59 OECD (2014), Illicit Financial Flows from Developing Countries - Measuring OECD Responses, OECD Publishing, Paris, p. 76.

60 See http://www.oecd.org/tax/automatic-exchange/commitment-and-monitoring-process/AEOI- com mitments.pdf (accessed 20 September 2017).

61 G20 (2014), OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic exchange of information: a roadmap for developing country participation, p. 9.

62 Boston Consulting Group (BCG) 2013, Global Wealth 2013, Maintaining Momentum in a Complex World http://www.bcg.de/documents/file135355.pdf

Foundational Steps for AEOI Implementation

a) **Translating the reporting and due diligence requirements into domestic law**: Jurisdictions need to put rules in place that require financial institutions to report information and follow due diligence procedures that are consistent with the Standard;

b) **Selecting a legal basis for the exchange of information**: Bilateral tax treaties or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Additionally, at the administrative level, automatic exchanges typically require separate agreements between competent authorities of participating jurisdictions to activate and "operationalise" the automatic exchange. These agreements specify the information to be exchanged and deal with practical issues such as the time and format of the exchange. Bilateral or multilateral Model Competent Authority Agreements can be used for exchanges;

c) **Effective administrative and information technology infrastructure to collect and exchange information**: Jurisdictions will also need to agree on effective transmission methods and encryption standards for the secure exchange of information. The international agreed AEOI Standard only constitutes a minimum standard for the secure transmission of information, but does not mandate a single solution;

d) **Protecting confidentiality and data safeguards:** The Standard contains detailed rules on confidentiality and data safeguards which need to be in place both on a legal and operational level.

Source: G20 (2014), OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, *Automatic exchange of information: a roadmap for developing country participation, p. 7-8.*

Accordingly, the implementation of a successful and effective AEOI presupposes an onerous administrative burden on countries and this burden is arguably bigger on developing countries. Developing countries usually - albeit on different degrees - do not have the same level of administrative resources and intellectual capital as developed countries. Additionally, developing countries are also not at the same level regarding the system already in place for the exchange of information as developed countries are.[63] The special needs and position of developing countries in their AEOI implementation was acknowledged by the OECD and G20, in particular, at the St Petersburg Summit in 2013.[64] G20 leaders called on the Development Working Group (DWG) in conjunction with the Finance Track, to work with the OECD, the Global Forum and other international organisations to develop a roadmap to assist developing countries.[65]The first task was to identify the obstacles that developing countries would need to overcome to successfully participate in the AEOI using the common reporting standard. The second task

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63 K. Sadiq, A. Sawyer, Developing Countries and the Automatic Exchange of Information Standard - A "one-size-fits-all" solution? 31 Australian Tax Forum 90, p. 102

64 G-20 Leaders' Declaration with regard to AEOI and BEPS. Available at www.g20.org/sites/default/les/g20_resources/library/Saint_Petersburg_Declaration_ENG_0.pdf.

65 Ibid., para. 52.

was to identify steps that would need to be taken to assist these countries to meet the standard as established by the OECD.[66]

A. The Priority Areas

As part of finding the key challenges faced by developing countries in implementing AEOI, the World Bank Group recognised the following five key challenges:

> "[T]he urgency of other basic domestic reforms; high costs of information technology infrastructure; human resources needs for analysing and using received data efficiently; difficulty of making legislative changes; and limited awareness of exchange of information practices."[67]

Albeit supporting the introduction of AEOI, studies revealed that developing countries themselves have expressed concerns about the common reporting standard.[68] According to a survey conducted by Knobel and Meinzer, the biggest concerns of developing countries in the implementation and usage of AEOI is the need to establish local collection systems to allow for reciprocal exchange of information, the ability to analyse the information received and the information technology requirements.[69]

Additionally, the confidentiality requirements constitute a particular hurdle for developing countries and there is the perception that developed countries are likely putting pressure on developing countries to provide assurance as to confidentiality.[70] Correspondingly, the OECD confirmed this perception stating that "countries need a high degree of comfort that the information is kept confidential both in law and in practice and is only used for the purposes allowed under the applicable exchange instrument".[71]

Moreover, the financial cost associated with information technology as well as the human resources constitute a major concern of developing countries.[72]It is well known that developing countries lack behind in their level of sophistication in their information technology system for the purpose of tax administration, and with regard to trained human resources. These administrative concerns and compliance cost do not only fall upon revenue authorities but will also extend to financial institutions affected by the reporting

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66 Ibid.

67 G20 (2014), OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic exchange of information: a roadmap for developing country participation, p. 12

68 K. Sadiq, A. Sawyer, Developing Countries and the Automatic Exchange of Information Standard - A "one-size-fits-all" solution? 31 Australian Tax Forum 90, p. 108

69 A Knobel and M Meinzer, Automatic exchange of information: an opportunity for developing countries to tackle tax evasion and corruption, Tax Justice Network (2014).

70 K. Sadiq, A. Sawyer, Developing Countries and the Automatic Exchange of Information Standard - A "one-size-fits-all" solution? 31 Australian Tax Forum 90, p. 109

71 OECD (2012), Automatic exchange of information: what it is, how it works, benefits, what remains to be done, p. 10

72 G20 (2014), OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic exchange of information: a roadmap for developing country participation, p. 10.

requirements.[73]

B. How to Address these Priority Areas

In the words of the OECD, successful implementation of the AEOI standard requires

> "knowledge, political will, information technology, human resources, legal frameworks, rigorous confidentiality and data protection safeguards and resources dedicated to ensuring the information received is put to effective use."[74]

Various approaches have been offered to developing countries to support them in the implementation of the common reporting standard for AEOI.

1. Current International Initiatives

a) The Roadmap

The mentioned roadmap for developing countries to participate in the AEOI was delivered by the Global Forum to the G20 DWG on 5 August 2015.[75] It is described as a high level implementation policy by the OECD to broadly address the concern of developing countries.[76] The roadmap focuses on general themes and challenges and is to be used only as a baseline for further work.[77] The roadmap proposes a stepped approach for enabling developing country to adopt the above mentioned foundational steps for participation in the Standard.[78]

Next to steps, the roadmap also stipulates four key principles to assist in the implementation of the common reporting standard for AEOI. First, based on the recognition that each jurisdiction will be starting from a different base, a tailor-made approach for each jurisdiction shall be applied. Second, domestic synergies should be achieved with domestic resource mobilisation and capacity building. Third, sufficient time should be allowed, taking into account the capacity building required. Fourth, a priority should be to focus on developing countries which are also financial centres to ensure that there is advancement towards a truly global system.[79]

However, next to the identification of high level hurdles and the drafting of principles and steps, the roadmap does not provide concrete solutions or tangible assistance suggestions. Thus, it does recommend to all developing countries to volunteer to participate

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73 K. Sadiq, A. Sawyer, Developing Countries and the Automatic Exchange of Information Standard - A "one-size-fits-all" solution? 31 Australian Tax Forum 90, p. 109

74 G20 (2014), OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic exchange of information: a roadmap for developing country participation, p. 3

75 Ibid.

76 K. Sadiq, A. Sawyer, Developing Countries and the Automatic Exchange of Information Standard - A "one-size-fits-all" solution? 31 Australian Tax Forum 90, p. 114

77 G20 (2014), OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic exchange of information: a roadmap for developing country participation, p. 24

78 Ibid., p. 14

79 Ibid., p. 13

in a pilot project, which should assist with effective implementation.

b) Pilot Projets

The Global Forum, in conjunction with the World Bank Group and other Global Forum members, is conducting pilot projects for developing countries to support their implementation of AEOI. Pilot projects are undertaken as a collaborative effort between the Pilot country (the developing country participant) and a developed country that has agreed to partner with the Pilot country, the Global Forum Secretariat, the World Bank Group and other organisations where relevant.[80] According to the Global Forum, six pilot projects are already underway: Albania was supported by Italy; Colombia supported by Spain; Ghana by the United Kingdom; Morocco by France; the Philippines by Australia; and Pakistan by the United Kingdom. The pilot projects will employ a step-by-step approach to implementation. The intention is that over time, each developing country participant (the "Pilot country") would reach full implementation in accordance with the Standard.

Spain's AEOI pilot with Colombia

Spain is supporting Colombia's implementation of the CRS for AEOI. The project makes use of peer-to-peer knowledge transfer while employing a step-by-step approach to implementation. The pilot project considers three main components. With support from the Global Forum and the World Bank Group, Spain and Columbia have worked on these components, which encompass the need for:

- an adequate legal framework (i.e. the legislation needed to develop to implement CRS, including that which imposes a reporting obligation on financial institutions),
- Administrative capacity (i.e. human resources and IT infrastructure)
- confidentiality and data safeguards (i.e. adequate rules and procedures)

Source: OECD (2016), Tax Administrations and Capacity Building: A Collective Challenge, OECD Publishing, Paris, p. 28
DOI: http://dx.doi.org/10.1787/9789264256637-en

Next to the pilot projects, dedicated further technical assistance is being offered by the Global Forum on Transparency and Exchange of Information for Tax Purposes, including training seminars (with more than 400 government officials attending training in 2015 alone) and one-to-one advisory services, particularly focusing on legislation and other areas highlighted through an ongoing monitoring process.[81]

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80 More information on the outline of a pilot project can be found in Global Forum on Transparency and Exchange of Information for Tax Purposes (2015), Automatic Exchange of Information: Pilot Project Outline, available under http://www.oecd.org/tax/transparency/technical-assistance/aeoi/AEOI-pilot-project-briefing.pdf.

81 More information on the technical assistance provided can be found under the following link http://www.oecd.org/tax/transparency/technical-assistance/aeoi/#d.en.352223

2. *Possible Bilateral Measures*

Various suggestions have been offered by developed countries to support the implementation of AEOI of developing countries. These include the volunteering to participate as a partner in the pilot project, volunteer to provide support - including financial support - with regard to training and technology. Further measures, which might be considered by developed countries are elaborated on below.

a) Publication of aggregated data

To date, many countries have spontaneously shared aggregate data - i.e. de-identified information - with their treaty partners on various types of income, such as the existence and amount of foreign owned accounts in their jurisdiction. The roadmap stated that G20 and other developed countries may consider spontaneously sharing aggregate data with a specific developing country. The purpose of this would be

> "to build awareness of AEOI, to demonstrate possible revenue benefits and increase the prioritisation of AEOI, and to obtain political commitment to AEOI." [82]

One step further to the spontaneous sharing of aggregated data with treaty partners is what Australia has decided to do. It amended its bill on AEOI with the requirement that de-identified aggregated information about accounts held in Australia need to be published each year by the Australian Tax Office.[83] Given that only totals by country of origin would be published, no confidentiality rules would be breached. Additionally, this measure would allow both countries not constituting treaty partners as well as civil society to find out basic information about their residents' holdings abroad. With this bill, Australia constitutes the first country in the world to have passed this clause to publicly publish information from the AEOI system.[84]Such a measure helps developing countries to allocate their scarce resources more effectively as such an overview provides also results on focus countries. It can also increase political pressure on government in developing countries to more effectively fight against tax evasion, as it provides more transparency on the scale of offshore assets. The increased pressure on politicians can be especially beneficial in developing countries, in which the political or economic elite opposes the introduction of AEOI, due to their own exposure to undeclared offshore money. Transparency in general also helps the population of a developing country to estimate whether the tax rules and administration in their country are functional or need revision.

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82 G20 (2014), OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic exchange of information: a roadmap for developing country participation, p. 22

83 For more information on Australia's amended bill see Tax Justice Network (2016), Australia passes new information sharing provision, available under http://www.taxjustice.net/2016/02/24/15031/.

84 Ibid.

b) Non-reciprocity

The current Standard of AEOI is structured on the basis of reciprocity—i.e. both jurisdictions must be able to obtain and exchange the required information. However, developing countries may lack the legal and administrative capacity to obtain information from their local financial institutions and it will still take time until they have the sufficient structure in place to collect information. However, developing countries might be very interested in receiving information from an exchange partner (for example, from a financial centre) in some form of a "phased in" implementation so that developing countries could benefit from obtaining information from other countries while developing their own capacity to provide information.[85]

Australia constitutes an example of a non-reciprocal AEOI phase in period. When asked by the Tax Justice Network in a survey regarding its pilot project with the Philippines, Australia provided the following insights[86]:

- The pilot started in 2015 and is expected to finish by 2018, when the Philippines is able to exchange CRS data with Australia.
- While Australia indicated that the pilot project will entail full reciprocity, "Australia has provided 2013/2014 AEOI data to the Philippines as a trial for the Philippines to learn the process of using AEOI data for compliance purposes"
- Australia has financed the pilot project and provided various forms of support and assistance to the Philippines since April 2015 through correspondence, teleconferences, training/workshops, on-site visits and a high-level engagement meeting. This assistance related to the AEOI framework and process, domestic legislation for the CRS, information infrastructure and technology for data collection, storage, processing, and exchange; confidentiality and data safeguards including information management and security; and using AEOI data for compliance purposes.

Accordingly, Australia volunteered and tested the actual exchange mechanism on a temporary non-reciprocal basis, as a leaning facilitator.

c) Interim withholding tax regime

The AEOI Standard presupposes rigorous confidentiality and data protection safeguards. Additionally, if the sending jurisdiction applies stricter data protection rules, it may require the receiving country to guarantee a similar high level of protection to the

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85 UN (2015), United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries, A. Trepelkov, H. Tonino, D. Halka (ed.), p. 26

86 A. Knobel (2017), Findings of the 2nd TJN Survey on Automatic Exchange of Information (AEOI) Sanctions against financial centres, AEOI statistics and the use of information beyond tax purposes, Tax Justice Network, p. 30 - 31.

information received.[87] Without touching upon the topic of the necessity of high level of protection, it is undisputed that this additional level constitutes a high compliance burden on developing countries. They not only have to comply with their domestic law but also with additional safeguards that may be required to ensure data protection under the domestic law of the supplying competent authority.

As a practical interim solution, before developing countries are compliant with these safeguards, a withholding tax regime[88] - as provided by the Swiss government to the United Kingdom and Austria, might be offered to these countries.[89]

Under the Swiss proposal known as "Rubik Agreements"[90], financial institutions are required to withhold a tax on investment income accruing on customers' (bank) accounts. The resulting revenue from the deducted withholding tax is then anonymously delivered to the foreign government. Hence, under the Swiss proposal, instead of reporting information about account holders, the banks directly deliver the tax revenue deducted and withheld from the taxpayer. The tax rate that is deducted by the financial institution corresponds with the tax rate in the country of the taxpayer's tax domicile.[91]

The withholding tax regime would - as AEOI - get rid of formal requests and lengthy procedures, as it will be automated and the banks deduct and withhold a tax on investment income and the revenue is automatically passed to the taxpayer's domicile. However, as a downside compared to AEOI, withholding tax regimes do no bring tax evaders to trial. Hence, opponents often argue on the basis of morale and justice against the introduction.[92] A withholding tax regime also reduces policy flexibility and sovereign authority of a country over its taxpayers.[93]

Thus, in certain circumstances the hindrance of a trial and the *de facto* limitation on sovereign authority over ones' taxpayer might be legitimate. When confronted with a country in which the information might be used or disclosed in proceedings that could result in the imposition and execution of the death penalty or torture or other severe violations of human rights (such as for example when tax investigations are motivated by political, racial, or religious persecution), this brings about order public question on the site of the supplying jurisdiction. In these rare cases, the withholding tax regime

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87 G20 (2014), OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic exchange of information: a roadmap for developing country participation, p. 3

88 See on this topic, Elisabeth Bürgi Bonanomi, Sathi Meyer-Nandi (2014), Schweizer Doppelbesteuerungsabkommen: Aktuelle Politik und Entwicklungsrelevanz, Jusletter, 30 June 2014.

89 For more information on the Swiss Withholding Tax regime for the UK and Austria see Withholding tax agreements off to a good start: Switzerland transfers first tranche to Austria and the United Kingdom available under https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-49751.html.

90 For more information on the Rubik Agreements, Xavier Oberson (2015), International Exchange of Information in Tax Matters: Towards Global Transparency, Edward Elgar Publishing, p. 143ff.

91 L. U. Cavelti, Automatic Information Exchange versus the Withholding Tax Regime Globalization and Increasing Sovereignty Conflicts in International Taxation, World Tax Journal June 2013, p. 198

92 Ibid., p.201

93 I. Grinberg, The Battle Over Taxing Offshore Accounts, 60 UCLA L. Rev. 304 (2012), p.347

could - next to the grounds of lack of confidentiality and data protection safeguards - be a viable method to collect the tax itself without contravening the public policy of the supplying jurisdiction.

However, a further downside of the withholding tax regime is its efficiency, since it does not capture changes in the principal amount. The withholding tax regime is only effective when dividends and other investment income accrue on a bank account, but it does not apply to changes in principal.[94] In this regard the AEOI has clear superiority over the withholding tax regime.

Additionally, the administrability should also not be underestimated. Although arguments can be found that anonymous withholding regimes are less costly and more administrable than automatic exchange of information, this claim might be wrong when looking at it holistically. A multilateral withholding tax regime similar to the Rubik Agreements would require 1) the determination on how to identify taxpayers' countries of residence, 2) the collection of information about amounts of interest, dividends, capital gains, and other income in order to levy the right withholding tax rates, 3) identify which financial institutions should be included in the withholding tax regime, 4) ensure that the financial institutions comply with the requirements to identify taxpayers with the respective country of residence and withhold the appropriate amounts on the different types of income, and 5) determine how to encourage widespread multilateral participation from other financial centers.[95] Moreover, the financial institutions need to keep track of the different tax rates and rate changes in different categories of income for each and every country with which a withholding tax regime is established.[96] Accordingly, the more withholding tax treaties a country signs, the more different foreign tax rates and laws must be applied and tracked and there might naturally be a limit as to the possible number of countries. Some argue that this problem would disappear if a flat tax applies to all countries and if the deduction of the withholding tax would not be a substitute for the declaration in the tax domicile.[97]

In summary, the AEOI is clearly superior to a withholding tax regime. A multilateral withholding tax regime is not a viable solution. However, for a selected number of developing countries only, a withholding tax regime might be considered, as an interim solution for the period in which confidentiality and data protection safeguards are not to the satisfaction of the supplying jurisdiction, or in the case where the supplying jurisdiction is confronted with order public questions.[98] However, if such an interim solution is considered, the administrative burden falls upon the source country withholding the

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94 Ibid., p. 201 - 203.

95 I. Grinberg, The Battle Over Taxing Offshore Accounts, 60 UCLA L. Rev. 304 (2012), p.351 – 352.

96 Ibid., p. 352.

97 L. U. Cavelti, Automatic Information Exchange versus the Withholding Tax Regime Globalization and Increasing Sovereignty Conflicts in International Taxation, World Tax Journal June 2013, p. 210.

98 See also R.A. Pfister, Das Abgeltungssteuerabkommen als Alternative zum automatischen Informationsaustausch, IFF Forum für Steuerrecht 2016, p. 255.

tax and its financial institutions. Hence, possible measures to compensate for this additional administrative burden and extra effort should be deliberated on and be part of the negotiation when drafting such agreement with a developing country.[99] Moreover, mechanism should be included to limit the outflows of assets from the source country, whose financial institutions withhold the tax. As can be found in the Rubik Agreement between Switzerland and United Kingdom, part of the agreement could be the issuance of a list of 10 countries into which the largest amounts of assets were transferred before the agreement came into force.[100] Such a list could enable the developing country to have a more focused approach in targeting potential countries into which taxpayers transferred their assets. It would also constitute a disincentive to simply transfer the assets to a different country to avoid taxation.

Another part of the withholding tax regime is the regularization of the past of untaxed assets. In the Swiss Agreement with the United Kingdom, the Swiss banks needed to deduct and withhold a flat tax on already existing assets from the UK clients. Such regularization would not be applicable if the client opted for a voluntary disclosure. The amount of the flat tax will be subject to negotiations between the countries. In the case of the UK it was calculated based on a formula, which took into account the initial value of the respective account at the time it was opened, as well as the current value together with the duration of the client relationship with the bank.[101] The mechanism of the regularization of the past could enable developing countries to receive an one-off lump sum payment compensating avoided taxes, while also offering the taxpayer the possibility to discretely come clear from past tax avoidance practices without criminal prosecution. The latter part of the withholding tax regime covering the past, could also be offered to developing countries, already in the process of implementing the AEOI as a means to target the past.

C. Swiss Status Quo

Switzerland's implementation of the AEOI and the OECD's Common Reporting Standard (CRS) entered into force on 1 January 2017. As of then, Switzerland has started collecting data to be exchanged the first time in 2018 with 38 States and territories including all EU member states.[102] On 16 June 2017 the Swiss Federal Council also adopted the dispatch on the introduction of AEOI with 41 further states and territories. The dispatch was further modified and refined by the Swiss National Council on 27 September 2017.[103] Generally, the dispatch would mean that data will be collected in 2018 with the first set of data to be exchanged in 2019. The additional countries for the 2018/2019 exchange are divided into the following categories:

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99 Ibid., p. 252 – 253.

100 See for instance Art. 17 of the Agreement Between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on Cooperation in the Area of Taxation.

101 See Annex I of the Agreement Between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on Cooperation in the Area of Taxation.

102 Australia, Canada, EU, Guernsey, Isle of Man, Iceland, Japan, Jersey, Norway, South Korea.

103 17.040 Botschaft über die Einführung des automatischen Informationsaustauschs über Finanzkonten mit 41 Partnerstaaten ab 2018/2019 vom 27 September 2017, Beschluss des Nationalrates.

- G20 countries (Argentina, Brazil, China, India, Indonesia, Mexico, Russia, South Africa) and OECD Member States (Chile, Israel);
- Important economic and trade partners in Switzerland (Principality of Liechtenstein, Colombia, Malaysia, United Arab Emirates);
- States and territories within Europe with references to the European Union (Andorra, Faroe Islands, Greenland, Monaco, San Marino);
- States and territories with sectionally or regionally important financial centers (Antigua and Barbuda, Aruba, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Costa Rica, Curacao, Grenada, Marshall Islands, Mauritius, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Seychelles, Turks and Caicos, Uruguay).[104]

Accordingly, the list of potential exchange partners includes a number of developing countries, such as India, Brazil, South Africa, Mexico and Colombia. However, already the dispatch of the Swiss Federal Council from June 2017 allowed the refusal to exchange the information on financial accounts with certain countries on safety grounds. The dispatch stipulated that the Swiss Federal Council will prepare a situation report before the first exchange of data takes place. This review is planned for autumn 2019. In this review process, each and every jurisdiction will be checked whether it effectively meets the requirements under the standard, especially those concerning confidentiality and data security. Accordingly, automatic exchange will thus only be "activated" if the other jurisdiction's data protection standards are considered adequate. The Swiss Bankers Association which lobbied successfully for this inclusion stated in a press briefing that South America was specifically mentioned as a region where some jurisdictions will be scrutinized especially carefully. The amended dispatch by the Swiss National Council from September 2017 specifies the review criteria further which will be decisive for the activation of the AEOI.[105]

Most of the new criteria focus on whether the partner country has the necessary legislation in place for AEOI implementation, especially safeguards for the adherence to the specialty requirement so that the data exchanged will only be used for tax purposes. A review criteria also looks at adequate measure against corruption. Other points examine if the level of protections on confidentiality, data security and data privacy in the partner country are in line with the standards of the AIA Agreement or whether there has already been notified breaches. Additionally, and importantly, one review criteria checks whether persons, whose information is to be exchanged to a partner country, will be subject to proceedings as a result of the exchanged information, which violate their human rights. All these review criteria are legitimate and are important to be addressed

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[104] 17.040 Botschaft über die Einführung des automatischen Informationsaustauschs über Finanzkonten mit 41 Partnerstaaten ab 2018/2019 vom 16. Juni 2017, BBI 2017, p. 16 However, Saudi-Arabia and New Zealand are not included in the amended dispatch of the Swiss National Council dated 27 September 2017.

[105] Ibid., Art. 1bis.

before an exchange of information takes place. However, there is on odd additional criteria, which has an economic policy objective. Art. 1 bis (c) of the dispatch from the Swiss National Council stipulates as a condition for AEOI the following when translated into English:

> "the partner country has an appropriate network of AEOI partner countries in place, including the coverage of the relevant competitive financial centers"

This criteria has the potential of creating a "catch-22" situation for some developing countries, not having an extensive AEOI network in place. Should other financial centers opt for a similar restriction, this could result in a dilemma for developing countries. They will be left out of the exchange, since the dependent condition of having a sufficient AEOI network in place, presupposes first the acceptance of partner countries to become their AEOI partners. Hence, from a development policy perspective, such restriction is very problematic.

All in all, it is still unclear with which developing countries Switzerland will ultimately activate the AEOI and how the review criteria will be applied prior to activation.

Additionally, Switzerland has so far not participated in one of the official Global Forum's pilot programs to help developing countries in their participation in the AEOI. However, Switzerland has offered assistance in AEOI to various counties under different other modalities. The future might also bring closer collaboration between the Swiss Federal Tax Administration and developing focus countries. The Swiss Federal Tax Administration concluded with the Swiss State Secretariat for Economic Affairs a Framework Agreement on 4th October 2017 for technical assistance. Albeit currently not explicitly including the topic of exchange of information, there are consideration that expertise on this subject will be provided in the near future.

D. Recommendations for Switzerland in line with the Federal Constitution

Switzerland constitutes the biggest global private wealth management centre.[106] Accordingly, there is high demand in receiving taxpayer information from Swiss banks. Disclosure of such information would undoubtedly benefit developing countries enormously and would play a positive role in their DRM efforts.

Switzerland already provides general financial supports to various international programs with regard to training and technology for AEOI. Apart from these contributions, Switzerland could consider providing technical assistance through volunteering as a partner in the pilot project of Global Forum. However, it might also do that outside of

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[106] According to Deloitte Wealth Management Centre Ranking 2015, available under https://www2.deloitte.com/content/dam/Deloitte/ch/Documents/financial-services/ch-en-financial-services-the-deloitte-wealth-management-centre-ranking-2015.pdf

the context of the Global Forum independently. The Framework Agreement between the Swiss Federal Tax Administration and the Swiss State Secretariat for Economic Affairs on technical assistance constitutes a milestone into the right direction and could be the foundation for Swiss pilot projects with its focus countries on AEOI. Currently this subject matter is not included, but there are already considerations, which from a development policy perspective are much appreciated.
Additionally, we recommend the following measures:

- Switzerland should refrain from the introduction of overly restrictive review criteria, which go beyond human rights and data protection. Especially, the suggested criteria in Art. 1 bis (c) of the dispatch from the Swiss National Council on AEOI -requiring the existence of an appropriate network of AEOI partner countries, including the relevant competitive financial centers - as a precondition before Switzerland activates the AEOI relationship has potential to creating incoherencies with Switzerland development policy and should hence be omitted.
- Switzerland's introduction of the publication of de-identified aggregated information about accounts held in Switzerland, which should be published each year by the Swiss Tax Authority. Given that only totals by country of origin would be published, no confidentiality rules would be breached with this measure, while providing developing countries with reference points on tax avoidance committed by their residents. Additionally, it depicts information on possible revenue benefits if AEOI is introduced. Such information might increase political commitment to AEOI in developing countries. However, Switzerland should also try to promote the publishing of the aggregated information on the international level to help it become a common international standard, followed by all major financial centres in order to improve its effectiveness.
- Loosening the full reciprocity requirement with developing countries on the official ODA list. Developing countries, which are compliant with Switzerland's confidentiality and data safeguard standards, should be offered some form of a "phased in" period in which they can benefit from obtaining information while developing their own capacity to provide information. Such compromise should be offered to developing countries, which require more time to implement a reciprocal system to collect data. It could be combined with a capacity building programme to speed up the process of implementing the full infrastructure for AEOI.
- Switzerland could consider a policy, in which it provides a workable number of developing countries (maybe chosen on the basis of biggest amount of assets under management from these countries) the option of a withholding tax regime as an interim solution. This regime could be offered in case these countries fail to be compliant with Switzerland's confidentiality and data safeguards or the sending of information to this country brings about public policy concerns for Switzerland. However, since such a measure brings about high administrative burden for the Swiss administration and financial institutions, compensatory measures should be included in such instrument, which compensate the extra costs incurred.

- The lump sum payment for the regularization of the past could also be offered to developing countries, either together with the withholding tax regime for the future or as a single measure only for the regularization of the past. However, again if each and every formula for calculating the on-off payment is different from developing country to developing country, a multilateral option covering a vast amount of developing countries, might not be administrable. Hence, again Switzerland could choose a workable number of countries maybe on the basis of biggest amount of assets under management from these countries.

IV. BEPS and Developing Countries

At the 2013 St. Petersburg Summit, Group of Twenty (G20) leaders recognised that "developing countries should be able to reap the benefits of a more transparent international tax system, and to enhance their revenue capacity, as mobilising domestic resources is critical to financing development". The G20 leaders mandated the G20 Development Working Group (DWG) to "review relevant work on base erosion and profit shifting (BEPS) during 2014 in order to identify issues relevant to low income countries (LICs) and consider actions to address them".[107] The G20 acknowledged that the implementation of the global BEPS solutions can be problematic due to a limited capacity and also differences in the nature and scale of BEPS problems facing developing countries as opposed to G20 members.[108] Hence, in order to implement more specific measures apt to address BEPS in developing countries a study "Impact of BEPS in Low Income Countries"[109] (hereafter DWR Report) was conducted on the understanding of the main sources of BEPS in Developing Countries, their idiosyncratic challenges, which differ both in nature and scale to those faced by developed countries.

A. The Priority Areas according to the DWG Report

In the DWG Report the OECD worked closely with the International Monetary Fund and findings were derived from dialogues and consultations with developing countries[110] including experiences drawn from meetings of the Task Force on Tax and Development and the OECD Global Forum on Transfer Pricing, and other international organisations such as the World Bank Group (WBG) working with developing countries. The key results of the DWG Report can be summarized as follows:

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107 G20 (2014), Two-Part Report to G20 Developing Working Group on the impact of BEPS in Low Income Countries, p. 10, available under http://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf

108 G20 (2014), G20 Response to 2014 Reports on Base Erosion and Profit Shifting and Automatic Exchange of Information for developing Countries, Development Working Group on Domestic Resource Mobilisation, available at http://www.g20.utoronto.ca/2014/16%20G20%20response%20to%202014%20reports%20on%20BEPS% 20and%20AEOI%20for%20developing%20economies.pdf, accessed 11 February 2017.

109 G20 (2014), Two-Part Report to G20 Developing Working Group on the impact of BEPS in Low Income Countries.

110 Direct consultations with developing countries were held in February and March 2014 at events organised by the OECD (in Asia and Latin America), the African Tax Administration Forum (in South Africa) and the Centre de rencontres et d'études des dirigeants des administrations fiscales (in Paris).

Mayor inhibiting policies/conditions to address BEPS

a) Some developing countries lack the necessary legislative measures needed to address base erosion and profit shifting.

b) Developing country measures to challenge BEPS is often hindered by lack of information.

c) Developing countries face difficulties in building the capacity needed to implement highly complex rules and to challenge well-advised and experienced MNEs.

d) The lack of effective legislation and gaps in capacity may leave the door open to simpler, but potentially more aggressive, tax avoidance than is typically encountered in developed economies.

Key BEPS issues for developing countries

e) Base erosion caused by excessive payments to foreign affiliated companies in respect of interest, service charges, management and technical fees and royalties.

f) Profit shifting through supply chain restructuring that contractually reallocates risks, and associated profit, to affiliated companies in low tax jurisdictions.

g) Significant difficulties in obtaining the information needed to assess and address BEPS issues, and to apply their transfer pricing rules.

h) The use of techniques to obtain treaty benefits in situations where such benefits were not intended.

i) Tax loss caused by the techniques used to avoid tax paid when assets situated in developing countries are sold.

j) In addition, developing countries often face acute pressure to attract investment through offering tax incentives, which may erode the country's tax base with little demonstrable benefit (included in this report, not as an integral part of BEPS, but of first order concern to developing countries that impacts on the tax base).

B. How to Address these Priority Areas

1. Current International Initiatives

Coordination among donors is currently extensive with regard to support on BEPS related challenges of developing countries. There is broad consensus on the comparative advantages regarding skill, experience and expertise of addressing these issues through international banks and organisations involved. Hence, donor countries mainly address the BEPS related issues in their DRM ODA through supporting and participating in the

conjoint projects. This not only pre-empts risk of duplications, gaps and misalignment of support but also ensures maximum effectiveness, in the current scaling-up of support to DRM programs. The two main programmes constitute the inauguration of the Platform and the Tax Inspectors without Borders Programme.

a) The Platform

The key BEPS issues for developing countries, identified in the DWG Report, are and will be addressed in a coordinated and efficient manner, as the G20 called in February 2016 upon the IMF, OECD, UN and World Bank Group to

"recommend mechanisms to help ensure effective implementation of technical assistance programmes, and recommend how countries can contribute funding for tax projects and direct technical assistance, and report back with recommendations".[111]

One milestone of this request was the inauguration of the Platform for Collaboration on Tax in April 2016 by the IMF, the OECD, the UN and the WBG.[112] An important output of this collaboration constitutes the development of practical toolkits with solutions to the above-mentioned BEPS-related challenges that developing countries face. It resulted already in two toolkits, namely a toolkit on "Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment"[113] and a toolkit for "Addressing Difficulties in Accessing Comparables Data for Transfer Pricing Analyses"[114]. The development of further toolkits on the remaining priority topics is scheduled in 2016 and

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111 IMF, OECD, UN and World Bank Group (2016), Enhancing the Effectiveness of External Support in Building Tax Capacity in Developing Countries, available under http://www.oecd.org/tax/enhancing-the-effectiveness-of-external-support-in-building-tax-capacity-in-developing-countries.pdf, accessed 16 Feb ruary 2017.

112 More information on the Platform can be accessed on the following link: http://www.oecd.org/tax/beps/platform-for-collaboration-on-tax.htm

113 The comprehensive toolkit on options for low-income countries' effective and efficient use of tax incentives for investment develops principles for the design and governance of tax incentives and provides guidance on good practices in these areas. Since much of the pressure to offer incentives stems from an awareness of those offered by other countries, the paper also discusses options for international coordination to address the risk of mutually damaging spillovers from such tax competition. Finally, a separate back ground document develops practical tools and models that can help assess the costs and benefits of tax incentives, which is essential for informed decision making. The aim is to assist low-income countries in reviewing and reforming their tax incentives, so as to better align them with their developmental objectives. The toolkit can be accessed on the following linkhttp://www.oecd.org/tax/tax-global/options-for-low-income-countries-effective-and-efficient-use-of-tax-incentives-for-investment.pdf, accessed 16 February 2017.

114 The toolkit examines how tax administrations can evaluate the correctness of the transfer prices set by multinationals when there is insufficient information available to governments on market-based transacttions that are comparable to those reported by the multinational corporation ("comparables"). It offers advice on making the best use of data that exists and options for monitoring the behaviour of multination nal corporations in situations in which no data is available. In addition, since the pricing of transactions in the extractive industries is an issue of particular relevance to many low-income countries, the draft toolkit also addresses the information gaps on prices of minerals sold in an intermediate form. Additional supplementary material on minerals pricing is provided for a systematic process that could be used by tax

2017.[115] Accordingly, each and every priority area will be addressed with practical measures drafted by the international organisations most experienced in these topics.

b) Tax Inspectors Without Borders

As the lack of audit capacity was identified as one of the key inhibiting factors to challenge BEPS behaviour the OECD has pledged as a priority to support the tax revenue authorities of developing countries.[116] Accordingly, the OECD together with the United Nations Development Programme (UNDP) has launched in July 2015 the Tax Inspectors Without Borders (TIWB) Project, which attempts to address widespread tax avoidance by multinational enterprises in developing countries and constitutes a contribution towards financing the UN's Sustainable Development Goals. The TIWB main focuses on capacity building through a "learning by doing" approach. It organises the deployment of highly qualified tax experts (either retired or currently serving) to countries that request assistance with ongoing audits of multinational companies. The projects focus on revenue recovery and improving local audit capacity.

The duration of assistance always varies according to the special need of the requesting country. Thus, each placement is likely to be at least one week long but a placement can also comprise of 8 to 12 weeks audit assistance over a period of 6 to 12 months. The host administration would provide information regarding how and why an expert should engage with their audit cycle. In doing so the host country is asked to precisely consider audit planning, tax return cycles and peak work periods in the audit process in order to have maximum effect of the on-site presence of the tax expert. The mode of assistance also varies according to need and availability. Next to periodic on-site assistance, in some cases, it will be coupled with remote desk-based assistance when the expert is not present in the host country.

So far eight pilot projects have resulted in more than $260 million in additional tax revenues to date. Thirteen projects are underway worldwide, in Botswana, Costa Rica, Ethiopia, Georgia, Ghana, Jamaica, Lesotho, Liberia, Malawi, Nigeria, Uganda, Zambia and Zimbabwe. A range of new programmes are also planned to be launched in 2017, including new deployments of auditors to Republic of Congo, Egypt, Uganda, Cameroon

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administrations to map the transformation chain for a particular mineral, identify key traded products and establish common industry pricing practices. Detailed case studies demonstrating the process are then provided for copper, gold, thermal coal and iron ore.
The toolkit can be accessed on the following link: http://www.oecd.org/tax/toolkit-on-comparability-and-mineral-pricing.pdf

115 For a detailed overview of all active projects on tax capacity development of the international organisations, please see Appendix 3 of IMF, OECD, UN, WBG (2016), Enhancing the Effectiveness of External Support in Building Tax Capacity in Developing Countries.

116 OECD (2014), The BEPS Project and Developing Countries: from Consultation to Participation, available under http://www.oecd.org/ctp/strategy-deepening-developing-country-engagement.pdf, accessed 9 Feb ruary 2017

and Vietnam, with the goal of 100+ deployments by 2020.[117]

- **Swiss Status Quo and Recommendation**

Switzerland is actively engaged in and contributes to the Platform through the World Bank Global Tax Program. With regard to the TIWB programme, Switzerland so far has not send nor does it intend to send its tax administrators to developing countries to provide capacity building or to provide funds for these endeavours.[118] However, since one of the important reasons why Switzerland constitutes an attractive destination for foreign investment with many global or regional headquarters of MNE is the quality of its experienced tax administration, Switzerland has valuable experience to share.

Its tax administrations have a functioning transparent, efficient and stable working mode and in-depth knowledge how international business functions. Since some of the mayor BEPS facilitating factors of developing countries are their lack of information, the difficulties in building the capacity needed to implement highly complex rules and to challenge well-advised and experienced MNEs, Switzerland's expertise in these areas should be utilised. Accordingly, the "best-practices" of Swiss tax administration with their knowledge and experience, can be highly valuable for developing countries, still lacking sufficient amount of experience and exposure to business practices of MNE. Tax authorities in low-income countries are especially interested in the engagement with experienced tax officials. Since Swiss tax authorities have in-depth experience on the taxation of multinationals, in-kind support through twinning arrangements or secondments could bring valuable exchange and knowledge transfer to tax administrations of developing countries. Hence, it is important that Switzerland shares this knowledge, either through participating in international initiative such as the Tax Administrators Without Borders programs or through providing technical assistance in these areas independently to its focus developing countries. For instance, the scope of the Framework Agreement between the Swiss Federal Tax Administration and the Swiss State Secretariat for Economic Affairs could be extended to also cover the sending of Swiss tax administrators - current or retired - to developing countries. In doing so they could provide real-time technical assistance in audits and enforcement and targeted capacity-building with its partner countries on specific international tax topics, can contribute extensively to the skills present in the tax administrations of developing countries. Next to their increased ability to raise taxes, it will also help them to create a more attractive working mode for businesses in these countries. It will contribute to more predictable and coherent results when companies deal with tax administrations in developing countries.

2. Possible Bilateral Measures

Next to the involvement in international initiatives, there is still room for domestic

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117 OECD, Tax Inspectors Without Borders, available under http://www.oecd.org/tax/tax-inspectors-without-borders-making-significant-progress.htm, accessed 9 February 2017.

118 Swiss Federal Council (2016), Unlautere und unrechtmässige Finanzflüsse aus Entwicklungsländern, Report from 12 October 2016, p. 16.

measures on a bilateral basis, which reinforce the rational of the international initiatives, rather than running counter or constituting redundant duplications. The below will provide suggestions of possible measures, firstly with regard to the tax treaty design, when entering into negotiations with developing countries, and secondly with regard to Transfer Pricing.

a) Tax Treaty Design

The rationale of Double Tax Treaties (DTTs) is to relieve a taxpayer in either country of the liability to pay some or all of the tax due in both countries on the same income or capital. They create bigger certainty and set limits to the taxation of cross-border investments through allocating taxing rights between the foreign direct investment (FDI) recipient countries - generally in fiscal terms referred to as the source country - and the residence country of the investor. The allocation of taxing rights includes the specifying of maximum withholding tax rates on interest, dividends, royalties and other payments from source countries - generally below those rates otherwise applicable under domestic law. DTT are also responsible for mitigating double taxation by "harmonizing tax definitions, defining taxable bases, assigning taxing jurisdictions, and indicating the mechanisms to be used to remove double taxation when it arises"[119].

However, generally DTTs tent to shift taxing powers from the source state to the residence state - which might not be that problematic if two treaty partners are involved with largely symmetrical investment patterns.[120] Thus, when two countries have an asymmetrical investment position - as is generally the case between developing and industrialised country, this shift in taxing powers implies a significant loss of tax base by the source country.[121] Developing countries are mainly net capital importing countries, with the capital streaming predominantly from industrialised countries into their economy, and capital income flowing the other way around. Hence, the shift in taxing powers from the source country to the residence country induced by the DTT potentially brings about the disadvantage of revenue foregone from reduced withholding tax rates next to the cost of treaty negotiation and administration.[122]

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119 P. Baker (2012), An Analysis of Double Tax Treaties and their Effect on Foreign Direct Investment, available at http://www2.warwick.ac.uk/fac/soc/economics/news_events/conferences/peuk12/paul_l__baker_dtts_on_fdi_23_may_2012.pdf, p. 2 referring to UNCTAD (2011), World Investment Report. Non-Equity Modes of International Production and Development, United Nations, New York and Geneva.

120 J. Braun, M. Zahler (2017), The True Art of the Tax Deal: Evidence on Aid Flows and Bilateral Double Tax Agreements, Discussion Paper No. 17-011, Zentrum für Europäische Wirtschaftsforschung GmbH, available under http://ftp.zew.de/pub/zew-docs/dp/dp17011.pdf

121 T. Rixen and P. Schwarz (2009), Bargaining over the avoidance of double taxation: Evidence from german tax treaties, Finanzarchiv/Public Finance Analysis 65 (4):442–471, 2009, available under http://dx.doi.org/10.2139/ssrn.2502529.

122 See for instance M. Keen, P. Mullins (2017), International corporate taxation and the extractive industries: principles, practice, problems, in International Taxation and the Extractive Industries, ed. P. Daniel, M. Keen, A. Swistak, V. Thuronyi, Routledge (2017).

To neutralise these effects, the DTT must realise sufficient gains from increased FDI to offset any revenue losses. However, conclusive empirical evidence on the investment effects of treaties is missing, since identifying causality (between the conclusion of the treaty and the resulting increased FDI) is inherently problematic.[123] However what has become increasingly prevalent and perceived as problematic, is the issue of developing countries losing tax revenues due to the conclusion of tax treaties. Accordingly, next to the conducted spillover analyses referred to above, there is increased awareness that when entering into negotiations with a developing country, the asymmetric relationship should be heeded and the treaty should be aligned with the development aid programme of the industrialised country. A good example constitutes the recent progressive proposal of a UK bill (see text box)[124].

UK Draft Bill: Double Taxation Agreement and Developing Countries

The UK had a bill in its second reading, which would require the finance minister to align the outcome of tax treaties with developing countries with the goal of the UK's overseas development aid programme for reducing poverty. It would require the finance minister to explicitly report to the Parliament on the ability of the government of the developing country to collect tax revenues to promote development in the country. Specific items to be reported on include the expected ability and amount of collecting capital gains tax of the developing country, the rate of withholding tax, the amount of profit tax the developing country would be able to collect including the PE definition, and any other provisions in the double taxation treaty that could impact on tax revenue in the developing country. Additionally in case the treaty will result in tax losses of the developing country, the report should address how much additional foreign investment the developing country is likely to secure from the treaty.

Source: Draft Double Taxation Treaties (Developing Countries) Bill 2016-17 is available under https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0016/17016.pdf

Currently, Switzerland has approximately over 100 DTT in force out of which around 44 are with developing countries.[125] So far Switzerland does not have an explicit DBA policy developed for developing countries.[126] As a starting point of negotiations it uses the OECD Model Treaty which is then modified in the course of the negotiations.[127]

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123 Appendix V of the IMF (2014) paper provides a analysis of different studies undertaken on the correla tion of treaties and the increase of FDI.

124 See the website of the UK Parliament, available under http://services.parliament.uk/bills/2016-17/doubletaxationtreatiesdevelopingcountries.html However, this Bill was expected to resume its second reading debate on Friday 24 March 2017 but the order was not moved any further due to a voting state ment situation. However, we have contacted the responsible MP, who has assured us that he will not drop the cause.

125 See list of DTT of Switzerland dated 27 July 2017 https://www.sif.admin.ch/sif/de/home/themen/internationale-steuerpolitik/doppelbesteuerung-und-amtshilfe.html.

126 P. Baumgartner, Doppelbesteuerungsabkommen mit Entwicklungsländern, IFF Forum für Steuerrecht 2014, p. 267.

127 See for instance the "Botschaft" of the DTA between Switzerland and Peru of 21 September 2012, available under https://www.newsd.admin.ch/newsd/message/attachments/28728.pdf.

However, a limited amount of treaties between Switzerland and a developing countries explicitly mention in the dispatch of the Federal Council for the parliamentary approval, that some concessions have been made in the process of negotiations due to the economic position of the developing country.[128]Accordingly, some argue that such procedure implicitly entails a review policy for DTT with developing countries since the dispatch of the Federal Council is subject to consultation prior to the signing and must then be expressly approved by the Parliament.[129]However, albeit the DTT outcome needs to be rationalised in front of the Swiss parliament - which generally refers to the sentence that some divergence from the OECD model had to be made due to the special position of the country, there is no clear checks and balances review with regard to Swiss development policy and no coherent strategy in place.

Additionally, with regard to BEPS related treaty changes, Switzerland has only committed to implementing the resulting minimum standards (i.e. access to the mutual agreement procedure for resolving disputes and the inclusion of anti-abuse clauses in DTTs), not however, on the changes to the PE definition (see for more information IV.B.2.A.2). Accordingly, on 7 June 2017 Switzerland signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS. Hence in a first step, the Swiss DTTs with Argentina, Chile, India, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Austria, Poland, Portugal, South Africa, the Czech Republic and Turkey will be amended by the BEPS Convention. They will be modified with a description of purpose in the preamble, the inclusion of an anti-abuse clause and an adjusted provision governing dispute resolution. The remaining DTTs in force of Switzerland will either be amended by the Multilateral Instrument at a later point in time or by means of a bilateral DTT amendment.[130]

Although being in line with the BEPS minimum standards, Switzerland so far does not heed the idiosyncratic BEPS hurdles of developing countries and has no policy in place to address these specifically. Accordingly, the following will provide possible instruments to be included in tax treaties with developing countries, or to be used as a benchmark, which if not included in a DTT with a developing country, need a sensible justification.

(1) Greater use of Withholding Taxes as a simplified measure to discourage base eroding payments

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128 BBI 2006 7933, Botschaft über ein Doppelbesteuerungsabkommen mit der Islamischen Republik Pakistan vom 13 September 2006.

129 P. Baumgartner, Doppelbesteuerungsabkommen mit Entwicklungsländern, IFF Forum für Steuerrecht 2014, p. 267.

130 See Media release by Federal Council, Switzerland signs BEPS Convention, 7. June 2017. Available under https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-66981.html

One of the key factors identified in the DWG Report constitutes base erosion caused by excessive payments to foreign affiliated companies in respect of interest, service charges, management and technical fees and royalties. This is not only the case of developing countries in general, but has also been identified as one of the mayor causes of losing tax base for resource rich countries.[131] Although not being officially addressed in the BEPS Project, withholding taxes have often been considered the most suitable means for developing countries against base eroding tax avoidance techniques. Withholding taxes do not compensate entirely the loss of income stripping since generally the withholding tax rates are lower than the corporate income tax rate. However, they constitute a workable backstop and tax base protection mechanism, which should not be given up in tax treaty provision.[132]

For instance, in 2011, the IMF emphasised in its report "Revenue Mobilization in Developing Countries"[133] that withholding taxes are an important protection for developing countries with weak tax administrations since it minimises the incentive for profit transfer.[134] The IMF reiterated this assertion in this 2014 report on spillover effects, stating that withholding taxes constitute simple anti-avoidance measures apt for protecting the tax base of developing countries.[135] The report by the "UN Department of Economic and Social Affairs UNDESA", the "Financing for Development Office" and the "International Tax Compact" published in January 2013 also emphasised:

> A critical factor, when designing a treaty model is ability of tax administration to administer treaty provisions. Simple withholding tax might be the most appropriate anti-avoidance strategy for a developing country. Withholding taxes are easier to apply and collect than taxes that rely on information provided by the taxpayer, through filing of tax returns, and require determination of allowable deductions, etc.[136]

So, what exactly are withholding taxes? Most countries levy them in their domestic laws on certain kinds of payments. Hence, they are not levied on corporate profit - which is susceptible to BEPS activities, but rather on corporate payments to foreign entities. Generally, they are applied on dividend distributions, or on deductible payments, such as interest, royalties, management fees and in certain cases technical service fees. Thus,

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131 For more information specifically regarding tax base protecting measures for resource rich developing countries see A. Readhead (2016), Preventing Tax Base Erosion in Africa: a Regional Study of Transfer Pricing Challenges in the Mining Sectors, Natural Resource Government Institute.

132 S.E. Shay (2017), An overview of transfer pricing in extractive industries, in International Taxation and the Extractive Industries, ed. P. Daniel, M. Keen, A. Swistak, V. Thuronyi, Routledge (2017), p. 65-66.

133 International Monetary Fund, Revenue Mobilization in Developing Countries, Fiscal Affairs Department (2011).

134 *Ibid*, p. 36.

135 IMF (2014), Spillovers in International Corporate Taxation, International Monetary Fund Washington D.C., p. 33-34.

136 UN Report, Group Meetings on "Capacity Building on Tax Treaty Negotiation and Administration" Rome, Italy, 28–29 January 2013, S.11.

where there is a DTT in place, the withholding tax rates applicable under domestic law are usually reduced to 10% or sometimes even to zero.

Accordingly, there is the strong argument that withholding taxes, especially on interest, royalties, management fees and technical service fees, constitute a simple measure against profit shifting to low-tax affiliates by multinational firms. Additionally, dividend withholding tax can be very beneficial to developing countries, when granting tax incentives - a further key BEPS issue identified with regard to developing countries. Albeit dividends are usually paid out of profit that has already been taxed, levying withholding tax on dividends can secure minimum tax revenues in the case that the host country has exempted the multinational from paying corporate income tax for several years due to tax incentives, such as tax holidays.[137]

According to some commentators, other advantages include the following:

- Redistributive effect: Generally, withholding taxes allocate stronger taxing rights to foreign direct investment (FDI) recipient countries - i.e. the source country - on income generated in the source country but earned by foreign investors. Hence, they enable the source country to generate a larger share of tax revenues and since developing countries are mostly net FDI recipients, withholding taxes are particularly beneficial for them. Accordingly, withholding taxes have a redistributive effect at the international level by increasing the share of taxes paid by a multinational company in developing countries - an outcome much in line with the DRM efforts in development assistance.[138]
- Ease of application: The basis for calculation of the tax is straightforward and relatively easy to collect by the source country.[139]
- Incentive for re-investing profit in host country: Dividend withholding taxes make it less attractive to repatriate the profits to the foreign parent company. This disincentive has the potential to stimulate foreign direct investment through re-investing profits in the host country, rather than repatriating them back to the parent company.[140]

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137 F. Weyzig (2013), Evaluation issues in financing for development - Analysing effects of Dutch corporate tax policy on developing countries, no. 386, Commissioned by the Policy and Operations Evaluation Department (IOB) of the Ministry of Foreign Affairs of the Netherlands, p. 42

138 F. Weyzig (2013), Evaluation issues in financing for development - Analysing effects of Dutch corporate tax policy on developing countries, no. 386, Commissioned by the Policy and Operations Evaluation Department (IOB) of the Ministry of Foreign Affairs of the Netherlands, p. 41

139 A. G. A. Faria (1995), Relief from Double Taxation. In: P. Shome (Ed.), *Tax Policy Handbook* (pp. 217-221), Washington DC: IMF.

140 F. Weyzig (2013), Evaluation issues in financing for development - Analysing effects of Dutch corporate tax policy on developing countries, no. 386, Commissioned by the Policy and Operations Evaluation Department (IOB) of the Ministry of Foreign Affairs of the Netherlands, p. 42

- Increased equity finance: Interest withholding tax make excessive debt finance less attractive and partially offsets the tax cost of the local interest deduction.141 However, finding the "right" level of withholding tax on interest seems to be a delicate task. Considerations as to limit excessive interest deductions through setting the withholding tax rate at the same rate as the domestic corporate income tax were considered as hampering foreign investment.[142] Additionally, modern lending contract of financial institutions often minimise the impact of withholding taxes through including 'grossing up' clauses. Accordingly, the borrower de facto bears the cost of the withholding tax in the form of a higher interest charge, which will in effect increase the tax deductible interest charge and reduce the borrower´s home country tax base.[143] For developing countries in determining the appropriate level of withholding tax on cross-border interest payments it is generally recommended to adopt differential rates.[144] For lenders constituting financial institutions the treaty may impose lower withholding tax rates than when the loan facility constitutes an intercompany agreement within the group. This approach could potentially balance out the availability of needed investment and the desire to minimise tax costs from the tax deduction for interest.

Accordingly, when concluding DTTs with developing countries, the importance and various benefits of higher withholding tax rates for their ability to generate revenues should be heeded with a clear policy approach to accommodate higher withholding taxes in a DTT. However, some developing country prefer low or no withholding taxes, due to their assumption that it fosters FDI. Naturally, in such cases the demand of the developing country should be followed.

· Swiss Status Quo and Recommendation

Swiss DTT with developing counties are very diverse with no apparent coherent policy in place. If one looks at the withholding tax rates negotiated the following can be found:[145]

Dividends:

Swiss DTT with developing countries also usually differentiate between portfolio investments and direct investments - the latter having lower and hence more beneficial withholding tax rates for the investor. Looking at article 10(2) in the Swiss DTTs with Egypt, Ivory Coast, India, Kazakhstan and Uruguay, Kazakhstan has the threshold at a minimum of 10% participation in order to qualify as a direct investment (corresponding

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141 UN (2015), United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries, A. Trepelkov, H. Tonino, D. Halka (ed.), p. 179

142 UN (2015), United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries, A. Trepelkov, H. Tonino, D. Halka (ed.), p. 181

143 Ibid., p. 180

144 Ibid., p. 182.

145 For a more detailed analysis see E. Bürgi Bonanomi, S. Meyer-Nandi, Schweizer Doppelbesteuerungsabkommen. Aktuelle Politik und Entwicklungsrelevanz, Bern 2013

to the UN MA), Uruguay and Egypt follow OECD recommendations (i.e. the minimum participation must be 25% for a direct investment qualification), and for India and Ivory Coast, there is no differentiation at all between portfolio investment and direct investment.
The withholding tax rate in these DTTs is usually 5% as recommended by the OECD for direct investments. This rate varies as well, however. In the DTTs newly entered into or revised as of 2009, Switzerland applies the exclusive residence principle in the DTTs with Mexico and Georgia, and therefore does not permit any source-based taxation. In the DTTs with Peru and India, it deviates from the maximum withholding tax of the OECD model convention of 5% and limits the taxation right of the source state to 10%, which allocates greater taxing rights for Peru and India. In the category of portfolio investments, Switzerland follows the specifications of the OECD model convention with a few exceptions[146], granting a maximum withholding tax of 15%.

Interest:

Art. 11 para. 4 in Swiss DTT-practice with developing countries follows mainly the OECD model convention and grants the source state a limited taxation right of 10%. However, the DTT Switzerland-Georgia, for example, does not grant any taxation right for interest to the source state. Mexico and Turkey retain a taxation right of 7.5%. In comparison, Peru can apply a withholding tax rate of 12.5%, which is above the OECD recommendation.

Royalties:

The Swiss DTTs with developing countries mainly follows the OECD specifications, but partially includes more development-compatible modifications. Switzerland maintains the exclusive residence principle in the royalty's article in the DTTs with Georgia, South Africa, Mongolia, Moldavia, Macedonia and Argentina[147]. In contrast, it grants the countries Uruguay, Kazakhstan, India and Ivory Coast a limited taxation right of 10%, and Egypt even of 12.5%.

From a development perspective Switzerland should have a coherent policy in place to grant developing countries higher withholding taxes if they wish to have them. What is equally important to consider is that Switzerland has effective methods in place for the elimination of double taxation. The current method of the so called "pauschale Steueranrechnung" only leads to partial elimination of double taxation. Hence, a portion of the withholding tax remains an additional tax burden for the investor, which can have a negative influence on FDI. [148]Additionally, Switzerland only grants a limited tax credit in certain DTTs with high withholding tax rates (e.g. only 10% for interest albeit being 15% in the DTT with the Ivory Coast and for royalties albeit being 12.5% in the DTT

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146 The DTTs between Switzerland and Georgia, India, Venezuela, Tunesia and China with WHT for portfolio investments amounts to 10%., with Pakistan to 20%.

147 Nicht in Kraft bzw. beendet.

148 P. Baumgartner, Doppelbesteuerungsabkommen mit Entwicklungsländern, IFF Forum für Steuerrecht 2014, p. 266.

with Egypt), which might again be unfavourable for FDI into the developing countries. A full tax credit of the withholding taxes paid in the developing countries to the Swiss tax would provide the developing countries with more tax revenues without having negative repercussions on their attractiveness as a FDI location.

(2) Broader PE Definition beyond the BEPS Recommendation

The concept of a permanent establishment (PE) laid down in domestic law and DTTs is important to determine whether an enterprise conducting business abroad will be subject to tax on its business activities. It stipulates the threshold when a foreign company has enough business presence in the other country - i.e. the source country - to be liable to corporate income tax. Once a PE is created in the source state, the source country receives the right to tax the amount of profits of that business as are associated with the PE. Since developing countries generally constitute the source country, the concept of PE plays a significant role on their taxing jurisdiction and hence their tax base.

DTTs generally contain a definition of what constitutes a PE and provide for a number of different cases when a PE is triggered. This treaty PE definition can potentially narrow down the PE definition stipulated under domestic law. Hence, the broader the PE definition is drafted in the treaty, naturally the more beneficial it is for the source country.

However, the PE definition has already been subject to scrutiny in the recent BEPS project, which resulted in the widening of the definition in the OECD Model to be more source country friendly. Accordingly, the catalogue of specific activity exemptions has been narrowed down, and an anti-fragmentation rule was included to the catalogue to address the avoidance of a PE by fragmentation of activities.[149] Interestingly some changes - the amendment to the independent agent article in particular - bring the OECD Model closer to the UN Model.[150] However, since the changes to the PE article are not part of the minimum standard, their factual implementation into DTTs in place are at the discretion of individual countries.

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149 OECD (2015), Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report, OECD Publishing, Paris.
DOI: http://dx.doi.org/10.1787/9789264241220-en

150 Prior to BEPS under the independent agent article an agency PE was not triggered if an enterprise *carries on business through a broker, general commission agent or any other agent of an independent status, provided that the person acts in the ordinary course of his/her business (*Art. 5 (6) OECD Model and Art. 5 (7) UN Model). The UN Model included in addition to this wording that an agent is not regarded as independent if the agents' activities are devoted wholly or almost wholly to one enterprise and the conditions made or imposed between the agent and the enterprise differ from the conditions between independent parties. Now based on the BEPS Action 7 recommendations, an agent would not be considered as "independent" if he/she acts exclusively or almost exclusively for one or more enterprises to which it is closely related. This mirrors the additional sentence of the UN Model. See OECD (2015), *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 16.

When one looks at Switzerland's choice, it has only committed to implementing the resulting minimum standards, which does not include the changes to the PE article. Hence, the Swiss DTTs updated by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS do not include changes to the PE definition.[151] With regard to developing countries, this choice is regrettable given the more beneficial wording for source countries.

However, since much has been written about the changes to the PE concept under the BEPS project[152], this section will only provide possible PE broadening measures, not addressed under the BEPS project but beneficial to fighting BEPS activities and hence raising tax revenues in developing countries:

• *The time threshold for construction projects*

The most common form of a PE is the fixed place of business PE, which is generally defined as a fixed place of business through which the business of an enterprise is wholly or partially carried out.[153] The PE definition in treaties mostly enumerate (not exhaustively) common types of fixed place of business PEs, some of which contain a specific required time threshold. As such a building site, a construction, or installation project, are generally deemed a PE when the activities exceed a certain duration (for instance the OECD Mode requires a duration of more than 12 months, whereas the UN Model - as the more source country friendly Model only requires a duration of 6 month). Next to the shorter period of time, the UN Model is also broader in its scope of activities, since it includes assembly projects as well as supervisory activities in connection with a building site in its definition of a construction PE.

Accordingly, the shorter the required time threshold and the broader the activities are for these construction/installation projects are, the higher the possibility of a developing country to tax the profits of foreign construction companies being active in their territory.

• *Swiss Status Quo and Recommendation*

When one looks at the DTT between Switzerland and developing countries, the wording is very diverse. Some treaties follow the source country friendlier UN approach of requiring a duration of 6 month and also including supervisory activities inside the scope of the construction PE. Such wording can be found e.g. in the treaty between Switzer-

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151 See Media release by Federal Council, Switzerland signs BEPS Convention, 7. June 2017. Available under https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-66981.html

152 See for instance for a detailed overview of the Action 7 outcome in relation to developing countries A. W. Oguttu (2017), Tax Base Erosion and Profit Shifting in Africa - Part 2: A Critique of Some Priority OECD Actions from an African Perspective, Working Paper 65, International Centre for Tax and Development.

153 Article 5 (1) OECD and UN Model contain the same wording.

land and Algeria, Argentina, the Ivory Coast, India and in the DTT with Pakistan (however, the revised version of the treaty between Pakistan and Switzerland not in force yet, will prolong the required duration to 9 month). The treaties between Switzerland and Columbia require 6 months but does not include supervisory activities, Bangladesh requires 183days but also does not include supervisory activities. Other treaties require a duration of 9 month, while not including supervisory activities (the DTTs with Albania and Ghana). Then there are treaties requiring a period of 12 month while also including supervisory activities (e.g. Azerbaijan, China and South Africa). The treaties with Zambia[154], St. Vincent, Montserrat, Malawi, St. Lucia, Virgin Islands, Gambia and Antigua, Barbados, St. Christopher, Dominican Republic are all based on the old 1957 UK treaty, which includes old and outdated wording. The construction PE requires a 12month period without including supervisory activities.

Accordingly, there is no coherent policy with regard to the framing of the construction PE. In some treaties, the UN Model is followed, others have a hybrid between the UN and the OECD Model and there are examples under which the OECD Model is followed (or an old version of a UK treaty from 1957). When negotiating with developing countries, Switzerland should have a policy in place to follow the UN Model, i.e. requiring a 6 months' time period, while including supervisory activities.

• *Specific Activity Exemption*

The PE definition mostly includes a list of places of business, which do not trigger the PE threshold - known as the specific activity exemptions.[155]Generally speaking, even when there is a fixed place of business, certain activities will be considered as auxiliary or preparatory activities that do not lead to a PE and hence will not allow the source country to tax any business profit arising from these activities. The catalogue of exempted activities differs in DTTs. Only looking at the OECD and the UN Model Treaty, both correspond in their wording, with the UN Model however, having less exceptions available. Unlike the OECD Model the UN Model does not explicitly exclude facilities solely used for the purpose of delivery and stock maintained only for the purpose of delivery.

Accordingly, DTTs not including these activities in their specific activity exemption would enable the source country to tax the profit associated with a warehouse or maintenance of stock of goods or merchandise for delivery purposes, which could be more favourable for developing countries. Additionally, this broader PE definition would also respond to some of the issues raised by commissionaire arrangements, which were much under focus under Action 7 of the BEPS project. However, in practice the real effect

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154 Switzerland and Zambia have signed a new double taxation treaty on 29 August 2017. It still needs to be ratified before entering into force. For more details see https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-67903.html.

155 See Article 5 (4) OECD and UN Model.

may not be great, as there is then a need to determine the amount of income properly attributable to the PE. The income attributable to the delivery business or maintenance of stock may not yield much taxable income.[156]

• *Swiss Status Quo and Recommendation*

The DTTs between Switzerland and developing countries in their majority follow the OECD Model in their specific activity exemption. Accordingly, facilities solely used for the purpose of delivery and stock maintained only for the purpose of delivery are for instance excluded from constituting a fixed place of business PE in the treaties with Albania, Algeria, Azerbaijan, Bangladesh, China, Ivory Coast, Ghana and Columbia. The treaties with Argentina, India and Pakistan follow the UN Model. Since, in practice this difference in wording might not have a significant difference for developing countries, no urgent changes to the Swiss practice are necessary. However, the BEPS project resulted in the widening of the definition in the OECD Model to be more source country friendly through narrowing down the catalogue of specific activity exemptions, and the inclusion of an anti-fragmentation rule to address the avoidance of a PE by fragmentation of activities. Albeit so far Switzerland has decided as a general strategy not to include such changes through the multilateral instrument. However, from a development policy perspective it should contemplate their inclusion in the treaties with developing countries through the multilateral instrument or on the basis of bilateral negotiations.

• *Deemed insurance PE*

A common way to reallocate functions and risks within a multinational group is through insurance structures - known as captive insurance arrangements. Captive insurance means that a special affiliate - mostly located in a low tax jurisdiction - internally insures risks of various group companies.[157] This practice can have valid business reasons such as the pooling and management of risks from many subsidiaries or allowing subsidiaries to insure themselves against risks for which they cannot easily attain market coverage themselves.[158] However, multinationals can also shift profits through tax deductible insurance premiums to captive insurance companies - a profit shifting practice also addressed in the BEPS project.[159]

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156 UN (2015), United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries, A. Trepelkov, H. Tonino, D. Halka (ed.), p. 374

157 More details on captive insurance structures can be found in Palan, R., Murphy, R., & Chavagneux, C. (2010). How globalization really works. Ithaca, NY: Cornell University Press, p. 95-97.
Cross, M. L., Davidson III, W. N., & Thornton, J. H. (1988). Taxes, Stock Returns and Captive Insurance Subsidiaries. The Journal of Risk and Insurance, 55(2), 331-338;

158 F. Weyzig (2013), Evaluation issues in financing for development - Analysing effects of Dutch corporate tax policy on developing countries, no. 386, Commissioned by the Policy and Operations Evaluation Department (IOB) of the Ministry of Foreign Affairs of the Netherlands, p. 47-48.

159 See for instance as a summary of measures against captives under the BEPS project, EY Global Tax Alert, Publication of final OECD BEPS reports - Implications for captive insurers from 12 October 2015.

Profit shifting through contractually reallocating risks and associated profit to affiliated companies in low tax jurisdictions has also been identified as a key BEPS issue for developing countries (see Chapter IV. Sec. A). Also, the African Tax Administration Forum (ATAF) has indicated that African countries have concerns about significant insurance premiums being paid by multinational to affiliate captive insurance companies in tax haven-jurisdictions.[160]

A simple measure to attribute the deductible insurance premiums back to the tax base of the payor country, is to include a specific clause on PEs of insurance undertakings, as stipulated in Art. 5 (6) UN Model. A PE is deemed to exist where a non-resident enterprise collects insurance premiums or insures risk in the source country, unless such activities are conducted by an independent agent. Article 5 (6) UN Model does not require the activities to occur through a fixed place of business in the source country or for any minimum period of time. It is sufficient that the collection of premiums take place in the source country or if the risks that are insured are located therein.[161]

Hence, including such provision into the DTTs with developing countries could enable them to limit their profit shifting exposure and increase their domestic revenues. However, since the treaty provision cannot impose tax where the income is not subject to tax under domestic legislation, there needs to be a corresponding domestic legal provision establishing the right to tax the relevant income derived from insurance premiums before this measure will be effective.

• *Swiss Status Quo and Recommendation*

The prevalence of an insurance PE article is not very common in Swiss DTTs with developing countries. However, in very few treaties such provision can be found. The Swiss treaties with India, the Ivory Coast and Pakistan (also in the revised version not in force yet) include such provision. The treaty with Argentina has a modified and more restricted version not in its PE article but under Article 7 - Business profits. Under this rule the State in which insured property or persons are located has the right to tax the insurance premiums, but the tax shall not exceed 2.5% of the gross amount of the premium (Art. 7 (7) Swiss - Argentina DTT).

Generally, from a development policy perspective Switzerland should include the insurance PE provision from the UN Model into its treaties with developing countries.

• *Limited force of attraction rule*

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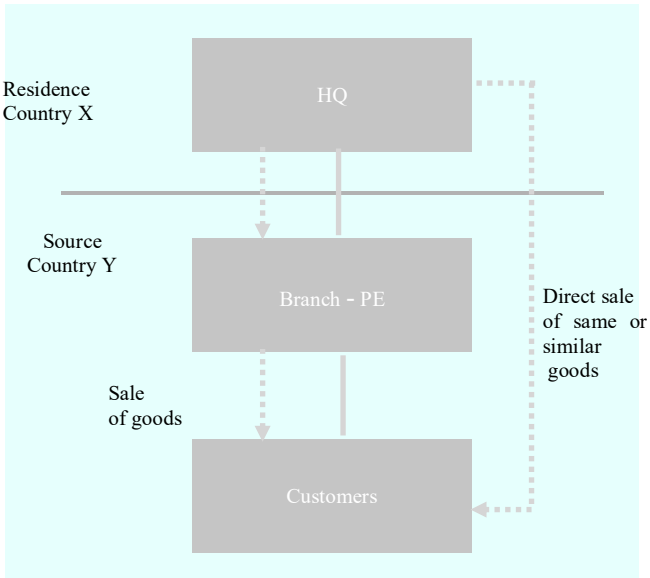
160 A. W. Oguttu (2017), Tax Base Erosion and Profit Shifting in Africa - Part 2: A Critique of Some Priority OECD Actions from an African Perspective, Working Paper 65, International Centre for Tax and Development, p. 35-36

161 UN (2015), United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries, A. Trepelkov, H. Tonino, D. Halka (ed.), p. 66-67.

Generally speaking, once a PE is created only business profit attributable to the PE may be taxed in the source country. However, there is one significant addition to this general rule, contained in the UN Model Convention. As opposed to the OECD Model, the UN Model includes a so called limited force of attraction rule in its Art. 7 (1), stipulating the following:

> If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment; (b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.

The rule allows taxation of certain business profits not actually attributable under normal rules to the PE. It allows the additional attribution of business profits, which relate to the sales of similar goods or merchandise in the source country, as well as other business activities of the same or similar kind carried on by the enterprise in the source country. The below example shows how the rule should work. Under this example the HQ, resident in Country X, has a Branch in Country Y. The Branch sells goods to customers in Country Y. HQ also sells the same and similar goods directly to the customers in Country Y. Under these circumstances the force of attraction rule bites, since profits are derived from sale of same or similar goods akin to that of the PE. Hence, the profits derived by HQ through the sale of same or similar goods in Country Y could be taxed in that Country.



At present, this limited force of attraction rule can scarily be found in concluded DTT - only in about 10 per cent of all DTTs.[162] The opponents to this rule argue the inappropriateness of taxing, as taxing income from an activity unrelated to an establishment that is in itself not extensive enough to constitute a PE seems inappropriate for some. They sometimes point to the

[162] UN (2015), United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries, A. Trepelkov, H. Tonino, D. Halka (ed.), p. 64.

uncertainty that such an approach creates for taxpayers, and the disincentive to investment such rule could create.[163]

However, the major arguments for this rule are various potential administrative benefits. Since the source country would not need to absolutely determine whether particular activities are related to the PE or the income involved is attributable to it, this simplifies complex attribution procedures. Accordingly, those favouring such a rule often prefer it not because they seek particularly broad taxing rights in this area, but because they merely want to ensure that difficulties of attribution do not prevent them from in practice exercising what may be well accepted and relatively conservative taxing rights.[164]

• *Swiss Status Quo and Recommendation*

Switzerland does not include a limited force of attraction rule in its treaties in general. From a development policy perspective, such rule might be beneficial for developing countries. For instance, India is a strong proponent of such rule and it can also be found in some treaties of the US, France and Germany.[165]

(3) Inclusion of Services - Service PE v. Service Fee

Payments for managerial, technical or consultancy services - usually referred to as technical services, constitute deductible expenditure by the payers. Where the service provider constitutes a non-resident, fees for technical services can present a serious problem of base erosion for developing countries (see key BEPS issues for developing countries under IV.A).

The reason for this problem is that the income from technical services is generally only taxable if the non-resident service provider has a PE or a fixed base in the source country. Since these requirements require a high threshold for establishing taxing rights for the source country this often brings about the result that it is relatively easy for non-resident service providers to service customers in a source country without becoming subject to tax there. Hence, the non-inclusion of the service income into the tax base of the developing country combined with the tax deductibility of the service payment at the level of the resident of the developing country (either a resident company or a PE), can have a serious impact on the tax base.

Some developing countries have already special rules in their domestic law dealing with this issue. There are generally two different ways how the issue is addressed, either

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163 M. Lennard (2009), The UN Model Tax Convention as Compared with the OECD Model Tax Convention – Current Points of Difference and Recent Developments, Asia-Pacific Tax Bulletin, p.7.

164 Ibid.

165 See A. Mehta, the Limited Force of Attraction Rule, Asia-Parcific Tax Bulletin, 2015 (Volume 21), No 2, published 26 March 2015.

through an extended PE definition, including a service PEs, or through a final gross-based withholding tax at a flat rate, which the resident payer for the service is required to withhold from the payments to the non-resident service provider. The DTTs with developing countries should include a corresponding provision in order not to nullify the effect of the domestic law provision.

Accordingly, the DTT could either include a service PE definition, similar to Art. 5 (3) (b) UN Model, stipulating that the provision of services, including consultancy services, by a company through its staff or other staff employed for this purpose, if the activities lasts for more than 183 days in a 12-month period triggers a PE. However, the effectiveness of such provision depends on whether the tax authorities are able to detect the presence of the service provider for the required period of time in their country. Furthermore, the 183-day time limit can for instance be avoided through artificially splitting of the connected projects in order not to meet the time threshold.[166] Furthermore, a multinational enterprise may use its subsidiary in a low-tax country to provide various services to the company in the developing country such as legal, accounting, management and technical services, which do not require employees of the non-resident service provider to be present in the developing country for a long period of time, if at all. In these cases, it is difficult for developing countries to counteract this type of tax planning.[167]

In these cases the second option of allowing source countries to tax fees for technical services on a basis similar to the taxation of royalties in the DTT on a gross basis at a limited rate without any threshold requirement and even if the services are provided outside the source country, could be a highly effective anti-avoidance measure.[168] It is also easier to apply then the service PE inclusion and hence constitutes the superior instrument for developing countries to protect their domestic tax base from erosion through to non-resident service providers.

• *Swiss Status Quo and Recommendation*

The Swiss practise with regard to technical services is very diverse. Looking at the different Swiss DTTs with developing countries, ranging from treaties which neither include a service PE nor a service fee. Such absence can be found for instance in the treaty with South Africa, Albania, Bangladesh, the Ivory Coast, and the treaties based on the old 1957 UK treaty, which include inter alia Gambia, Zambia and Malawi. Other Swiss DTTs only include the service PE definition, requiring however different periods of presence. Some require a time threshold of 6 month, as can be found in the Swiss DTTs with Algeria, Azerbaijan, China (in this case stating 183 days), and the Philippines. Others stipulate a period of 9 months such as the DTT with Peru to a period of 12 month, as required under the DTT with Kazakhstan. One can also find Swiss DTTs which include both provision, the service PE together with the service fee, such as the DTT with

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166 UN (2015), United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries, A. Trepelkov, H. Tonino, D. Halka (ed.), p. 375.

167 Ibid. p. 40 - 41

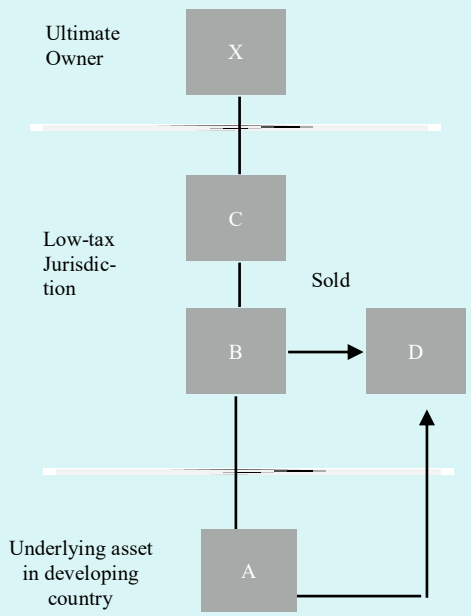
168 Ibid. p. 42

Argentina, India, and Peru. The revised DTT with Pakistan, which is not in force yet also includes both a service PE and a service fee. The DTTs with Columbia and Ghana only include a service fee in their royalties' article.

From a development policy perspective, it is positive to note that the inclusion of service does occur in Swiss DTTs with developing countries. However, there are still multiple treaties lacking either provision and if a DTT includes service, it is mostly done through a service PE definition. However, the service fee might be more workable for developing countries and hence should be the preferred option in a DTT with a developing country.

(4) Capital gains provision capturing indirect transfer of interest

Tax loss caused by so called indirect transfers used to avoid tax paid when assets situated in developing countries are sold is a controversial topic and was identified as one of the key BEPS issues faced by developing countries (see Chapter IV. Sec. A). Also in the context of resource discoveries, this issue has emerged as a macro-relevant concern in serval low-income countries, over the recent years.[169]The IMF (2014) analysis for instance cites a case in Mauritania, in which a potential capital gain of $4 billions on a large gold mining project in Mauritania escaped tax there since it was transacted in the Bahamas. Another example involves a Mozambique mining project with a transaction value of around $4 billions being sold on the Australian stock market and hence escaping taxation in Mozambique. However, Mozambique changed its tax code in 2014, hence when subsequently a sale of shares in the exploration concession occurred, Mozambiques authorities collected $1.1 billion in capital gains taxes.[170]



Company A holds an asset (e.g. immovable property or a mining right) located in a developing country that increase in value. The ultimate parent company of A, X Company, realises the gains by tax efficiently, by selling the intermediate holding Company B located in a low-tax country. This will result in that no tax is payable on the capital gain in the developing country.

The issue at stake is that generally the transfer of an asset is taxable but the transfer of ownership interest in an entity that holds the asset is not. This enables an owner of certain assets out of which a capital gain arises to avoid tax in the country in which the assets (such as a telecom or

169 IMF (2014), Spillovers in International Corporate Taxation, International Monetary Fund Washington D.C., p. 28-29.

170 Ibid., p.70

mineral license) are located by holding the assets through a chain of companies and then selling the claim in a low-tax country (see illustration on the left).

Aware of this lacuna, in the past few years a number of developing countries adopted the policy of taxing foreigners on the sale of interest in foreign entities that hold, directly or indirectly, the shares of resident companies.[171] Domestic tax laws firstly need to have clear rules providing that direct and indirect disposal of immovable property - which should be widely defined to for instance include mining and telecommunication rights) are taxable under the capital gains tax regime.[172] DTTs need to support these domestic laws by ensuring that the country in which the underlying assets are located retain their taxing rights for these transactions. Enabling treaty provisions are both included in the UN and the OECD Model, whereas the UN version is much broader.

Art. 13 (4) of OECD Model allows taxation of capital gain from alienation of shares, which derive 50% or more of their value from immovable property located in a Contracting State by that State. Art. 13 (4) of UN Model has a wider material scope, covering also capital gains from alienation of an interest in a partnership, trust or estate, narrowed down by personal scope: it applies only to those enterprises, which (a) are engaged in management of immovable property and (b) own predominantly immovable property (or, as UN Model puts it, immovable property should constitute 50% of total assets or more). However, the recently approved changes to the OECD Model will even expand the scope of Art. 13 (4) further. The modification will look as follows:

> 4. Gains derived by a resident of a Contracting State from the alienation of shares ***or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived*** ~~deriving~~ more than 50 per cent of their value directly or indirectly from immovable property ***, as defined in Article 6,*** situated in ***that*** ~~the~~ other State ~~may be taxed in that other State.~~[173]

Accordingly, the amended OECD Article has a broader material scope similar to the UN Model. It goes further and includes an anti-avoidance provision, requiring that the 50% threshold needs to be passed at any time during the 365 days preceding the alienation of the shares. This longer period safeguards that no circumvention is made, through diluting the 50% value shortly before the transaction takes place.

Additionally, the UN Model has a unique paragraph 5, allowing the source State to tax

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171 UN (2015), United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries, A. Trepelkov, H. Tonino, D. Halka (ed.), p. 145.

172 For more information on how the domestic law could be designed see IMF (2014), Spillovers in International Corporate Taxation, International Monetary Fund Washington D.C., p. 71. Furthermore specific and general anti-avoidance rules in taxing indirect transfers are addressed in UN (2015), United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries, A. Trepelkov, H. Tonino, D. Halka (ed.), p. 145 - 148.

173 Art. 13(4) 2017 Update to the OECD Model Tax Convention, 21 November 2017, OECD, available under http://www.oecd.org/ctp/treaties/2017-update-model-tax-convention.pdf

the capital gains on shares, if the alienator residing in other Contracting State held directly or indirectly a certain percentage of the capital of company, shares of which have been sold. The actual percentage is subject to negotiation of the contracting parties. The rationale behind this provision is to allow the source State to tax the capital gains from substantial participation irrespective of the place of transaction.

Next to the importance of inserting a clause ensuring that developing countries retain their taxing rights for indirect transfers in DTTs, a further measure is to provide their tax administration with information on indirect transfers, if the other revenue authority becomes aware of such a transfer taking place. The exchange of information provision under DTTs, Tax Information Exchange Agreements (TIEAs) or the Mutual Administrative Assistance Convention can enable such an information exchange. Since developing countries often find it very challenging to discover such offshore transactions[174], briefing tax administrations in countries in which the transfer is transacted to provide information on conspicuous transactions to the developing country can be a very beneficial measure as well.

• *Swiss Status Quo and Recommendation*

A vast amount of Swiss DTTs with developing countries already include a provision capturing indirect transfers of property rich companies. Such DTTs include countries like Bangladesh, Algeria, Azerbaijan, China, Ghana, India, Columbia, Peru. It can also be found in the revised treaty with Pakistan currently not in force. However, the wording mainly reflects the OECD Model provision, as it only mentions companies and does not refer to partnerships, trusts or estates. Additionally, some Swiss clauses have a restrictive modification, stating that such provision should not apply to gains "*from the alienation of shares in a company the value of which consist of more than 50 per cent of immovable property, in which the company carries on its business (emphasis added)*". Such modification can be found for instance in the DTT with Argentina and in the revised DTT with Pakistan. In the DTT with Peru the amount of tax is conditional upon certain rules, narrowing it down to 2.5% - 15% depending on certain circumstances. However, there are also still a number of Swiss DTTs, which do not include such provision, including DTTs with the Ivory Coast, Albania, and the former UK overseas territories such as Gambia, Zambia and Malawi.

Given that indirect transfers of immovable property in one of the key BEPS concerns for developing countries, from a development policy perspective, Switzerland should include a broad provision capturing indirect transfers of property rich companies. It should also have a policy in place to brief its tax administrators to provide information on conspicuous transactions to developing countries through the spontaneous exchange of information mechanism.

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174 IMF (2014), Spillovers in International Corporate Taxation, International Monetary Fund Washington D.C., p. 71

b) Transfer Pricing

Abusive transfer pricing practices is considered to pose a major risk on the tax base of developing countries. The limited capacity and the lack of information in order to apply adequate transfer pricing rules has also been identified as a key BEPS issue for developing countries (see IV.A). Many resources are allocated to strengthening transfer pricing capacity, for instance the Platform and Tax Administrators without Borders all have programmes to improve the transfer pricing regimes in developing countries and to commensurate administrative capacity for transfer pricing. However, the World Bank pointed out that building transfer pricing expertise is not a short-term endeavour and that country experience suggests that institution building for effective transfer pricing audit skills takes a minimum of 3-5 years.[175] Hence, this section will provide two supportive measures, which might be adopted to help developing countries in their current struggle in obtaining the adequate information needed to develop their capacity and apply their transfer pricing rules.

(1) In kind support on identifying functions performed in developing countries

Multinational corporations having a business nexus in developing countries are very often organized as low risk, routine ventures, accordingly rewarded with low profit rates. Routine manufacturing, distribution or other functions that do not involve control over intangible assets are usually performed in developing countries.[176] Some transfer pricing methods directly determine the profit associated with these routine (and hence easier to value) activities performed, with the residual profit by default being allocated to the other party - the one with the more complex functions, generally located outside the developing country. This technique allows to determine the appropriate return to the party controlling unique or difficult-to-value intangible assets indirectly.[177]

The usage of these simplified schemes is very attractive for tax administrations due to their ease of application. However, they bring about the risk that they may not accurately respond to changing commercial circumstances and can perpetuate inappropriately low fixed profit margins to the routine (the easier to value) activities in developing countries. Without sufficient guidance and information available, the risks of missing functions in developing countries that contribute value beyond the limited routine activity is imminent.[178]

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175 J. Cooper, R. Fox, J. Loeprick, K. Mohindra (2016), Transfer Pricing and Developing Economies - A Handbook for Policy Makers and Practitioners, World Bank Group. Washington D.C.

176 IMF (2014), Spillovers in International Corporate Taxation, International Monetary Fund Washington D.C., p. 34

177 UN (2017), Practical Manual on Transfer Pricing for Developing Countries, UN, New York, Sec. B.3.3.12.1.

178 IMF (2014), Spillovers in International Corporate Taxation, International Monetary Fund Washington D.C., p. 34

Justice Robert Hogan (2009) once stated, *transfer pricing is largely a question of facts and circumstances coupled with a high dose of common sense*.[179] Since knowledge on facts and circumstances is dependent on the accessibility of information, the access to information is key for adequate transfer pricing result. However, developing countries will at the initial stages of their design and implementation of their transfer pricing regimes face difficult conditions, in particular to the ability to access information on transfer pricing methods and there may also be limited information available to the local entity while the related party may have more extensive access to more and better data.[180]

To improve this information asymmetry effective exchange of information between the competent tax authorities can be a powerful way for improvement. For instance, Japan initially was disadvantaged in its transfer pricing regimes. However, after developing effective partnerships with many treaty partners, this enabled Japan to have access to large amount of information, intensive and practical discussion on transfer pricing methods or comparability analysis. This interaction between tax authorities stabilised the capacity of Japan´s Competent Authority, which now makes similar contributions for the benefit of new negotiating partners.[181]

Tax authorities can utilise the exchange of information provision in an applicable tax treaty, a TIEA or the Mutual Administrative Assistance Convention. Most current tax treaties - if they include the new international standard of exchange of information, TIEAs and the Mutual Administrative Assistance Convention contain articles that provide the legal basis for the competent authorities of the contracting parties' countries to exchange information, as necessary, to carry out the provision of the tax treaty and enforce domestic tax laws. Hence, such framework enables a contracting state's competent authority to request information from the other contracting state to assess the proper allocation of profit in accordance with the application of the arm's length principle. Due to the highly factual nature of transfer pricing cases with a growing importance of international exchange of information, the role and importance of exchange of information in transfer pricing enforcement is steadily increasing.[182] However, in order to not only constitute a theoretically applicable legal basis contained in tax treaties and to enhance its application, countries could consider to conclude a special working agreement or memorandum of understanding (MoU) with the tax administration in a developing country treaty partner, setting forth the details about the procedure of requesting information and receiving support to access and interpret information. So far, the OECD has developed a template MoU for competent authorities in

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179 See General Electric Capital Canada Inc. v. The Queen, 2009 TCC 563 (Tax Court of Canada), and The Queen v. General Capital Canada Inc. (2010) F.C.A. 344 (Federal Court of Appeal), paragraph 273.

180 UN (2017), Practical Manual on Transfer Pricing for Developing Countries, UN, New York, Sec. B.8.11.4.

181 UN (2017), Practical Manual on Transfer Pricing for Developing Countries, UN, New York, Sec. B.8.11.5. A similar example is also described on India in Sec. B.8.11.6.

182 J. Cooper, R. Fox, J. Loeprick, K. Mohindra (2016), Transfer Pricing and Developing Economies - A Handbook for Policy Makers and Practitioners, World Bank Group. Washington D.C., p. 41-42.

the context of bilateral safe harbour rules for low risk research & development, distribution and manufacturing services and all encourage exchange of information between the competent authorities where it is necessary to carry out the agreed safe harbours. A safe harbour can be described as a TP regime which offers a simplification if the provision on a prescribed treatment applies to a defined category of taxpayers or transactions, without the need to find data on comparables and to perform a benchmarking study. The MoU templates can be found in Annex I to Chapter IV of the OECD Transfer Pricing Guidelines (2017).[183] For developing countries, with limited resources available, bilateral MoU including agreed safe harbours concluded with some treaty partners could provide a means of protecting the local tax base in common transfer pricing fact patterns without a burdensome enforcement effort.[184] They can be very effective. However, while providing the advantage in terms of a reduction in the compliance cost of the tax administration (also for the taxpayer), they also raise the risk of misuse and manipulation. Hence, they need to be combined with robust exchange of information to ensure that no other functions performed are overlooked.

• *Swiss Status Quo and Recommendation*

Switzerland's network with exchange of information partner countries is extensive. Bilaterally, Switzerland's network is rather restricted, e.g. approximately 10 DTT with developing countries containing the full OECD standard for exchange of information, as well as TIEAs with the Seychelles, Grenada and Brazil (the latter not in force yet). However, being party to the Mutual Administrative Assistance Convention extensively expands the number of developing countries having a legal basis for exchange of information with Switzerland. Currently, 112 countries, including BRICS and developing countries are party to the Mutual Administrative Assistance Convention.[185]Accordingly, with regard to the enabling legal framework in place Switzerland network is far reaching. However, whether this framework is already used for assisting developing countries with transfer pricing information and for practical discussions between Swiss and developing countries tax administrators so far is questionable.

In order to boost such dialogue, Switzerland could consider concluding a special working agreement or so-called MoU with the tax administration of a list of developing country treaty partners. It could be based on the OECD templates for safe harbours. However, it should be broader and also set forth the details about the procedure of requesting information and receiving support to access and interpret information. Practical clauses should ease the modes of application of exchange of information, to improve the access to information developing countries receive. While including practical safe harbours, the MoU should also intensify and facilitate practical discussion on transfer pricing methods or comparability analysis between the Swiss tax authority and the tax authority

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183 OECD (2017), OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, OECD Publishing, Paris, available under http://dx.doi.org/10.1787/tpg-2017-en.

184 Ibid, p. 451.

185 The list of participants is available under http://www.oecd.org/tax/exchange-of-tax- information/Status_of_convention.pdf.

of a partner jurisdiction, in case a safe harbour is inapplicable, with the goal to stabilise the capacity of the tax administration to practical exposure.

(2) Bilateral APAs

For a country that focuses on transfer pricing for the first time, uncertainty will likely be exacerbated by the tax administration's limited experience. To provide the highest level of certainty for both the tax administration and taxpayers regarding the treatment of particular transactions or a group of transactions, the development of an advance pricing agreement (APA) program may be considered.[186] APAs confirm in advance the arm´s length result by agreement between taxpayers and tax authorities on certain sets of criteria such as transfer pricing methods, comparables and appropriate adjustment thereto, critical assumptions as to future events. They enable a reduced risk of transfer pricing adjustments for multinationals especially under bilateral APAs, which involve a taxpayer seeking an agreement with and between two tax authorities, which is then implemented domestically in each country.[187] Typically, APAs involving the tax authorities of treaty partners are considered to fall within the scope of the mutual agreement procedure provision in the tax treaty.[188]

Generally, the key advantage of adopting an APA system is that uncertainty can be eliminated through agreeing on predictable result in taxation of international transactions. This predictability is much appreciated by business, especially when due to limited experience by tax administrations tax outcomes are highly unpredictable in certain countries. Furthermore, for developing countries especially bilateral APA negotiations bring about a good opportunity to consult and cooperate not only with the taxpayer but also with the foreign tax authority, which might have more transfer pricing experience and business knowledge. Additionally, the APA negotiation may assist tax administrations to gain insight knowledge into complex international transactions undertaken by MNEs, which might speed up the capacity building of the tax administration.

However, the initialisation of an APA programme typically presupposes a well-functioning transfer pricing audit team.[189] Hence, some developing countries are hesitant to introduce such APA programs, due to the potential different information and knowledge level between taxpayer and the tax administration with the risk to agree on suboptimal results. Thus, some argue that experience will be gained in concluding APA and this learning by doing approach constitutes an important part of capacity building on transfer pricing issues.[190]

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186 J. Cooper, R. Fox, J. Loeprick, K. Mohindra (2016), Transfer Pricing and Developing Economies - A Handbook for Policy Makers and Practitioners, World Bank Group. Washington D.C., p. 28

187 UN (2017), Practical Manual on Transfer Pricing for Developing Countries, UN, New York, Sec. B.8.11.5. A similar example is also described on India in Sec. B.8.10.1.

188 Paragraph 4.139 of the OECD Transfer Pricing Guidelines

189 J. Cooper, R. Fox, J. Loeprick, K. Mohindra (2016), Transfer Pricing and Developing Economies - A Handbook for Policy Makers and Practitioners, World Bank Group. Washington D.C., p. 319.

190 UN (2017), Practical Manual on Transfer Pricing for Developing Countries, UN, New York, Sec. B.8.11.5. A similar example is also described on India in Sec. B.8.10.3.

Bilateral APA Programmes between developed and developing countries could be a practical solution to the capacity / knowledge asymmetry potentially present in unilateral APA negotiations only between MNE and a developing country tax administration while still having the benefit of speeding up capacity building. Having a second tax administration present would provide more checks and balances during the negotiations. These bilateral negotiations, interactions and cooperation between two tax administrations to alleviate double taxation regarding the multinational taxpayer's income can provide an avenue for countries to quickly get up to speed on international practices while also defending their tax base and increasing bilateral cooperation.[191]

Albeit, the two tax administrations obviously have an incentive to opt each for a point of view that maximises their revenue collection, in bilateral APAs with developing countries, a policy could be adopted by the developed country to be more beneficial to developing countries. Tax administrations from developed countries could for instance heed so called "location specific advantages" in the allocation of profit to attribute a bigger share of profit to the developing country.

Location specific advantages (LSAs), are defined as a type of benefit related to geographical location. Usually they involve location savings, in which developing countries want to be compensated for the economic benefit arising from moving operations to the low-cost jurisdiction and hence enabling cost savings (e.g. through cheap labour, lower material costs etc.), i.e. the "location savings".[192] The appropriate allocation of location savings can be of particular concern in developing countries, especially when the country has attracted foreign investment as a result of lower labor and materials costs.[193]

Additionally, the relocation of a business may in addition to location savings give rise to some other LSAs, present in developing countries. Potential LSA could include:

- Highly specialised skilled manpower and knowledge;
- Proximity to growing local/regional market;
- Large customer base with an increased spending capacity;
- Advanced infrastructure (e.g. information/communication net- works, distribution system); or

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191 More information on the advantages of bilateral APAs in comparison to unilateral ones can be found in J. Cooper, R. Fox, J. Loeprick, K. Mohindra (2016), Transfer Pricing and Developing Economies - A Handbook for Policy Makers and Practitioners, World Bank Group. Washington D.C., p. 321

192 UN (2017), Practical Manual on Transfer Pricing for Developing Countries, UN, New York, Sec. B.8.11.5. A similar example is also described on India in Sec. B.8.1.14.

193 J. Cooper, R. Fox, J. Loeprick, K. Mohindra (2016), Transfer Pricing and Developing Economies - A Handbook for Policy Makers and Practitioners, World Bank Group. Washington D.C., p. 218

- Market premium for relatively uncompetitive markets.[194]

Albeit the OECD Transfer Pricing Guidelines are more hesitant and cautious when it comes to location specific advantages, the Guidelines do acknowledge that location savings and other local market features can affects comparability and the arm's length price and hence should be taken account of. However, it restricts the application only to circumstances under which no reliable local market comparables are available to identify the arm's length price.[195] While India and China are big proponents of LSA, stating their positions in the UN Transfer Pricing Manual issued in 2012, developed countries tend to use the concept of LSA with hesitation.

• *Swiss Status Quo and Recommendation*

Switzerland offers multinationals the possibility to conclude APAs, be it bilateral or multilateral. Accordingly, if a multinational wishes to conclude a multilateral APA, e.g. to determine the pricing of a transaction between group companies located in Switzerland and a developing country, this is already possible. However, to the best of our knowledge there is so far, no explicit policy in place to establish multilateral APA programmes with interested developing countries with a development policy aim. From a development policy perspective, a programme should be set up with the aim of speeding up the capacity building of the tax administrations involved. Since at the same time such APA programme would offer predictability to the respective MNE, it would be business friendly while helping developing countries to increase their technical knowledge in transfer pricing.

(3) Transfer Pricing Documentation and Country-by-Country Reporting (CbCR)

Transfer pricing documentation equips tax administrations with information to identify transfer pricing risks and assess taxpayer compliance with a country's transfer pricing legislation. In doing so it can help prevent unnecessary transfer pricing disputes, create more certainty and resolve disputes once they arise. The BEPS Project - Action 13 in particular -, resulted in the revise of Chapter 5 of the OECD Transfer Pricing Guidelines.[196] The refined transfer pricing documentation obligations under Action 13 inter alia addressed the diverse documentation rules across countries and the increasing compliance burden for taxpayer in meeting each jurisdiction's diverse requirements. It also tackled the concerns of tax administrations regarding insufficient information on the tax

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194 Ibid., Sec. B.2.3.2.53.

195 OECD (2017), OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, OECD Publishing, Paris, available under http://dx.doi.org/10.1787/tpg-2017-en, sec. D.6.

196 OECD (2015), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241480-en (hereafter Action 13 Final Report).

footprint of the global operations of MNEs. The result led to the introduction of a standardised three-tiered transparency and disclosure system, including: (a) the master file, (b) the local file, and (c) the country-by-country report template. The last element - the country-by-country report template - the most controversial one - constitutes a mandatory minimum standard. All three elements are aimed to ensure more consistency among countries and more transparency on global operations. The elements of three-tiered approach require the following:

(a) **The master file:** The master file provides a "high- level overview ... [of] the MNE group's transfer pricing practices in their global economic, legal, financial and tax context."[197] The file covers five major topics: organizational structure, description of businesses, intangibles, intercompany financial activities, and tax and financial situation.[198] Thereby, it should constitute a "blueprint" assuring that an appropriate overview of the MNE group's global business is provided. Annex I to the Action 13 Final Report provides further details regarding the content of the master file, but essentially reiterates the same information provided in the report. Furthermore, with regard to filling, the Action 13 Final Report envisions that the master file would be "filed directly with the tax administrations in each relevant jurisdiction as required by those administrations."[199] Such method of filing is called local filing.

(b) **The local file:** The local file provides a much more detailed picture relating to specific intercompany transactions. The rationale is to supplement the master file and thereby assist the local tax authority in assessing whether the taxpayer has complied with the arm's length principle in the specific jurisdiction.[200] The local file focuses on material data to the transfer pricing analysis related to transactions taking place between a local country affiliate and associated enterprises in different countries (including financial information, a comparability analysis, and the selection of the most appropriate transfer pricing method).[201] Similar to the master file, annex II sets out more details on the content of the report. With regard to delivery of the local file, Action 13 Final Report stipulates that the local file should be "filed directly with the tax administrations in each relevant jurisdiction as required by those administrations."[202]

(c) **Country-by-Country Report**: The country-by-country template requires comparative data across countries for a detailed and global snapshot of the business regarding the global allocation of the income, taxes paid, and certain indicators of the location

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197 Ibid., p. 14-15.
198 Ibid., p.15.
199 Ibid., p. 20.
200 Ibid., p. 15.
201 Ibid., p. 15.
202 Ibid., p. 20.

of economic activity.[203] More specifically the CbC reporting would require multinationals to report the following data (the Final Report includes a template in the Annex III to Chapter V of the Transfer Pricing Guidelines): (1) revenue, (2) earnings before taxes, (3) cash tax, (4) current year tax accruals, (5) stated capital, (6) accumulated earnings, (7) number of employees, and (8) tangible assets.[204] The reporting would be on a country-by-country, not entity, basis.[205] The Action 13 Final Report buttresses that the CbC report should be used by tax authorities to assess high-level transfer pricing risk or in evaluating other BEPS related risks. However, it "should not be used as a substitute for a detailed transfer pricing analysis of individual transactions and prices based on a full functional analysis and a full comparability analysis."[206] Unlike the master and local file, the filing of the CbC report requires a more formal implementation regime.[207]

CbCR Filing

Whereas the master and local file documentation standards are recommended to be implemented via local country legislation or administrative procedure to be filed directly with the tax administration in each relevant country[208], the CbC report would require firstly that the jurisdiction of the ultimate parent entity of the multinational group has enacted legislation which would require the parent to file the CbC report in its jurisdiction.[209] Thereafter, the parent company would distribute the CbC report to its jurisdiction, which will pursuant to an automatic exchange mechanism disseminate the CbC report to all of the jurisdictions in which the MNEs operates.[210] Ideally it would do so on the basis of the Multilateral Competent Authority Agreement (MCAA) included under the Convention on Mutual Administrative Assistance in Tax Matters. This would enable a jurisdiction to either provide a list of jurisdictions (also party to the MCAA) with whom it will do the exchange of the CbC report - as Switzerland decided to do[211], or to exchange the CbC report with all parties to the MCAA.[212] However, the exchange presupposes the respect of confidentiality and the restricted use of the CbC report only to assess transfer pricing risk.[213] Further options are to accomplish the exchange of CbC reports under the framework of a bilateral tax treaty or tax information exchange treaty and the corresponding CAA.[214] Model CAAs (on the basis of the Mutual Administrative

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203 Ibid., p. 16.
204 Ibid., p. 29-30.
205 Ibid., p. 29.
206 Ibid., p. 16.
207 Ibid., p. 37.
208 Ibid., p. 20.
209 Ibid., p. 23.
210 Ibid., p. 23
211 See Botschaft zur Genehmigung der Multilateralen Vereinbarung der zuständigen Behörden über den Austausch länderbezogener Berichte und zu ihrer Umsetzung (23 November 2016), p. 48-49 available under https://www.admin.ch/opc/de/federal-gazette/2017/33.pdf.
212 Action 13 Final Report, p. 50.
213 Ibid., p. 20-21 and p. 16.
214 Ibid., p. 23.

Assistance Convention, the BTT, or TIEA) are included in the Annex IV of Action 13 Final Report. However, in the event that the jurisdiction of an ultimate parent company fails to provide the CbC report to another jurisdiction, secondary mechanisms are accepted under certain circumstances, such as local filing or filing by a designated member of the MNE group.[215] However, it appears that local filing obligations could be potentially penalized by the OECD through their peer review process.[216] The recently published document on the methodology of the peer review process could be interpreted in the following way: In case there is no international agreement (e.g. the Mutual Administrative Assistance Convention, DTT, or TIEAs) in place between the developing country and the country of the ultimate parent entity or the designated member of the MNE group (in case the ultimate parent entity will not be the entity responsible for the filing), local filing should not be permissible.[217] However, since from approx. 195 countries in the world today, 113 countries are already party to the Mutual Administrative Assistance Convention, this limitation might have a limited impact. The future will show the consequences of local filing obligations, broader than those stipulated under Action 13.

Special benefits for developing countries

Generally, all countries, developed and developing countries, benefit from the new documentation and disclosure regime as it extends the information available to tax administrators and enhances their ability for a comprehensive risk assessment.[218]The introduction of the CbC report is aimed to further improve tax administrator's information for risk assessment purposes, by adding information on global group performance. It offers tax administrators comprehensive insights into the location of earnings and tax payments of an MNE, and an understanding of inconsistent allocation of the jurisdictions of value creation and revenue recognition.[219]
Despite these general advantages, the new international transparency and disclosure regimes bring about advantages especially for developing countries. If they manage to participate through implementing the confidentiality and safety standards, and are successfully implementing domestic law changes, it will potentially improve their restrained capacity to access, verify and process information, that was historically difficult for developing countries to secure because of their limited capacity. It also incentivises developing countries to invest in their capacity constraints, since valuable information will be within reach.[220] Further advantages include

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215 Ibid.

216 OECD (2017), BEPS Action 13 on Country-by-Country Reporting – Peer Review Documents, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris, available under http://www.oecd.org/tax/beps/beps-action-13-on-country-by-country-reporting-peer-review-documents.pdf

217 Ibid., p. 13.

218 J. Cooper, R. Fox, J. Loeprick, K. Mohindra (2016), Transfer Pricing and Developing Economies - A Handbook for Policy Makers and Practitioners, World Bank Group. Washington D.C., p. 247.

219 Ibid., p. 247. Thus, CbC reporting has drawn significant public attention and also some criticism due to its high exemption threshold for entities with consolidated group revenue below €750 million. However, the threshold and delivery procedure will be reconsidered in a review schedules for 2020.

220 D. Ring (2016), Developing Countries in an Age of Transparency and Disclosure, 2016 BYU L. Rev. 1767 2016, p. 1828.

- The creation of global attention to transparency and disclosure raises the profile of MNEs reporting requirement and the available administrative and substantive law options. This might help the currently limited domestic support for effective substantive rules for addressing MNEs reporting requirements and tax planning;
- The new documentation regimes explicitly state what should be provided in disclosure by business. These predetermined regimes bridge the gap of the currently limited disclosure requirements for business under domestic law of many developing countries and align their standards to an international harmonised standard;
- The automatic disclosure often to multiple states increases the likelihood that the disclosure will be made and that it will be reasonably accurate. This is beneficial in situation in which developing countries have limited leverage to demand disclosure;
- Preparation and delivery of information is ensured, since it will also be delivered to other countries with more leverage and enforcement resources. Accordingly, less pressure on taxpayers is needed, which is especially relevant for developing countries lacking resources to obtain documents from taxpayers or via information exchange on request under bilateral tax treaties;
- The standardised format for documentation facilitates better and more targeted training of the tax administrators, which is especially beneficial for developing countries having limited training, support and resources available.[221]

Potential support for Developing Countries

In order to enhance the ability of developing countries to use the information received, targeted capacity-building might be a helpful and sustainable option. Targeted training for developing country tax auditors could focus on the information included in these files and how to use that information to make overall risk assessments and in appropriate circumstances pursue taxpayer-level audits.[222] In this regard the use of "case studies" of hypothetical taxpayers with corresponding master and local files and CbC reports could help developing countries to process the new information more effectively to tackle BEPS.[223] For instance the Tax Inspectors Without Borders programme provides real-time technical assistance (audits and enforcement support) and capacity-building in its pilot programmes with developing countries.[224]

Next to capacity-building support, capital exporting countries that constitute parent jurisdictions of multinational groups should avoid being excessively restrictive and onerous in their selection of CbC report exchange partners. An overly restrictive approach

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221 D. Ring (2016), Developing Countries in an Age of Transparency and Disclosure, 2016 BYU L. Rev. 1767 2016, p. 1828-1829

222 UN (2015), United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries, A. Trepelkov, H. Tonino, D. Halka (ed.), p. 537.

223 Ibid.

224 Ibid.

towards developing countries will likely result in them drafting their legislation in a way to broaden the local filing obligations beyond the Action 13 Final Report recommendations. Many countries have already done so through drafting their legislation to trigger direct filing obligations by the local subsidiary if the CbC report is not obtained automatically from another country.[225]

A Step further to Public CbC Reporting

To further boost transparency and public scrutiny on corporate income taxation, the European Commission adopted a proposal for amending the Directive 2013/34/E.U., known as the "Accounting Directive, on 12 April 2016.[226]Originally, the Accounting Directive already included CbCR elements for some sectorial industries such as the extractives and logging. However, the amendment aims to broaden the reporting obligations through inserting an additional chapter relating to "Report on Income tax information".[227]The responsible committees of the European Parliament made further modifications to the proposal, broadening the scope. Whereas the Commission's proposal, set the threshold of the reporting obligations – aligned with the Action 13 recommendations – at €750 million turnover, the amended proposal by the Parliament suggests that one should consider, within a period of 4 years, whether all large undertakings as defined in the original Accounting Directive[228] should be subject to the public reporting obligation.[229] The amended proposal also stipulates that the information presented should be for each tax jurisdiction also outside the EU[230], whereas the previous version of the Commission only required the information to be reported on an aggregated basis for tax jurisdiction outside the EU, which do not qualify as tax havens. The scope of information to be reported was also increased[231] together with the publication of the report on the website of the company as well as on a public registry managed by the EU Commission.[232] However, the amended proposal also includes the option to leave out infor-

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225 Information on the drafting of country legislation with a broad direct filing obligation can be found in A. Knobel, A. Cobham (2016), Country-by-Country Reporting: How restricted access exacerbates global inequalities in taxing rights, Tax Justice Network, p. 7-8. available under https://www.taxjustice.net/wp-content/uploads/2016/12/Access-to-CbCR-Dec16-1.pdf.

226 Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/E.U. as regards disclosure of income tax information by certain undertakings and branches, available under http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0198

227 Ibid., Chapter 10a.

228 A large undertaking is defined as exceeding at least two out of three of the following criteria: balance sheet total of €20 million, net turnover of €40 million and 250 employees.

229 See Amendment 55 Amendments adopted by the European Parliament on 4 July 2017 on the Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (COM(2016)0198 – C8-0146/2016 – 2016/0107(COD)) , available under http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0284+0+DOC+XML+V0//EN.

230 Ibid., Amendment 43.

231 Ibid., Amendment 35 – 41 and 65.

232 Ibid., Amendment 27.

mation in case commercial sensitive information needs to be protected. A detailed explanation is needed in case a company wants to make use of such omission.[233] The amended proposal will be subject to further revision and hence the content of the final legislation is difficult to anticipate.

Although the topic of public CbCR is not specifically an issue only for developing countries, developing countries will likely be beneficiaries of such measure. Firstly, public CbCR would provide access to the report to all developing countries irrespective of their network of exchange of information agreements.[234]Secondly, public CbCR helps to create a well-informed population that can judge the effectiveness of the national tax administration and tax rules. In the context of developing countries, with corruption constituting a non-negligible risk, public disclosure provides the possibility to compare the revenues collected with the countries budget expenditure and hence would make possible sources of corruption more visible.[235] It would also help developing countries to alleviate the pressure on providing excessive tax incentives, since the terms will be subject to public review. Lastly, a further argument for public disclosure is that in the context of developing countries with limited resources and capacities to assess and evaluate the CbCR data, public discloser would enable international organisations, NGOs and other third parties to review the data and offer their analysis and views to the broader public and the under-resourced tax administration of the developing country.[236]Accordingly, from a development policy perspective public CbCR is very much welcomed.

• *Swiss Status Quo and Recommendation*

Based on initial estimates approx. 200 MNE resident in Switzerland will be effected by the Swiss implementation of the CbC reporting. So far Switzerland is party to the Mutual Administrative Assistance Convention which entered into force on 1 January 2017 and will be applicable for Switzerland as of 1 January 2018. Switzerland has also signed the Multilateral Competent Authority Agreement on 27 January 2016, which was recently approved by the Parliament.[237] The Federal Act on the International Automatic Exchange of Country-by-Country Reports of Multinationals was also recently approved by the Parliament.[238] The latter two pieces of legislation are not in force yet. If the Swiss citizens collect 50'000 signatures before 5 October 2017, a binding referendum could still theoretically materialize to judge on the approval of both legislation. Otherwise both

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233 Ibid., Amendment 83, 69, 47

234 D. Ring (2016), Developing Countries in an Age of Transparency and Disclosure, 2016 BYU L. Rev. 1767 2016, p. 1820 - 1821

235 Ibid., p. 1820.

236 Ibid.

237 Multilaterale Vereinbarung der zuständigen Behörden über den Austausch länderbezogener Bericht (draft), available under https://www.newsd.admin.ch/newsd/message/attachments/46268.pdf.

238 Bundesgesetz über den internationalen automatischen Austausch länderbezogener Berichte multinati onaler Konzerne (draft), available under https://www.newsd.admin.ch/newsd/message/attach ments/46271.pdf.

pieces will enter into force as of 5 October 2017. Switzerland draft legislation is based on the model legislation recommended in the Action 13 BEPS report. However, it made some modifications. Switzerland did not introduce the proposed Master File and Local File with the argument that the cost of introducing such requirements would be disproportional.[239]However, from a development policy perspective, this decision to omit the Master and Local File, has no negative effect, since it only concerns the Swiss tax administrations. If the tax administrations of a developing country want to have access to these documents, they need to require their presence in their own national legislation anyways. However, as stated above, Switzerland decided to bilaterally active the CbCR exchange relationship with partner countries and will hence provide a list of jurisdictions (also party to the MCAA) with whom it will do the exchange[240], and not to exchange the CbC report with all parties to the MCAA.[241]The list of countries will be published after the deadline of the possible referendum.[242]From a development perspective having a broad and inclusive list, including developing countries is recommended. A restrictive approach would only result in the encouragement to increase local filing obligations.

Additionally, since the Swiss tax administration has extensive knowledge in processing and reading transfer pricing documentation, Switzerland should no longer refrain from participating in the Tax Inspectors Without Borders Programme. Moreover, looking at the progressive development with regard to public CbCR in the EU, which will likely also effect Swiss headquartered companies with an EU presence, Switzerland should consider contemplating similar requirements. This would elevate Switzerland to being a progressive first adopter. From a development policy perspective, such move would be highly appreciated.

V. Summary of Recommendations for possible ways forward for Switzerland

Clear strategy to heed the Swiss development policy efforts in its BEPS and AEOI implementation. Switzerland needs to make sure that its tax policy is not *de facto* at the same time antagonizing its global effort to improve the tax base of developing countries. Giving with one hand but then taking with the other, would be an inefficient setting. Accordingly, mechanisms need to be in place to ensure policy coherence in the field of tax law – that the Swiss tax law contributes to Switzerland's global effort rather than frustrating it. In Switzerland's committed to AEOI and the implementation of the BEPS

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239 Botschaft zur Genehmigung der Multilateralen Vereinbarung der zuständigen Behörden über den Aus tausch länderbezogener Berichte und zu ihrer Umsetzung (23 November 2016), para. 1.4., available under https://www.admin.ch/opc/de/federal-gazette/2017/33.pdf.

240 Botschaft zur Genehmigung der Multilateralen Vereinbarung der zuständigen Behörden über den Austausch länderbezogener Berichte und zu ihrer Umsetzung (23 November 2016), p. 48-49 available under https://www.admin.ch/opc/de/federal-gazette/2017/33.pdf.

241 Action 13 Final Report, p. 50.

242 Botschaft zur Genehmigung der Multilateralen Vereinbarung der zuständigen Behörden über den Austausch länderbezogener Berichte und zu ihrer Umsetzung (23 November 2016), p. 48-49

minimum standards, it should heed the idiosyncratic position of developing countries and the global effort to help them generate more revenues.

Conducting a spillover analysis. As conducted by the Netherlands and Ireland – a spillover analysis should be conducted on the Swiss corporate tax law and practices is recommendable to ascertain tax base pull factors, which lead to a loss of tax revenues from developing countries. Creating adequate counter-measures based on such analysis would guarantee a more holistic and coherent approach.

A procedure to review tax reforms for their coherence with Swiss development policies. Such procedure might be a good instrument for a routine review of tax law from a development policy perspective and can potentially increase greater coherence. Due to Switzerland's special role as the biggest global wealth management hub and the host of multiple multinational corporation, it is especially important to have no policy in place with could potentially facilitate IFFs and BEPS from developing countries. Accordingly, Switzerland should have a clear strategy in place for AEOI, BEPS and domestic tax reforms with cross-border impacts (presently the Swiss Tax Proposal 17), which is aligned with its global effort to help developing countries raise more taxes rather than inhibiting it.

Switzerland should share its technical knowledge on BEPS and AEOI with developing countries. Swiss tax administrations are known for their functioning, transparent, efficient and stable working mode together with their in-depth knowledge how international business functions. Accordingly, the "best-practices" of Swiss tax administration with their knowledge and experience, can be highly valuable for developing countries, still lacking sufficient amount of experience and exposure to business practices of MNE and AEOI. Tax authorities in low-income countries are especially interested in the engagement with experienced tax officials. Since Swiss tax authorities have in-depth experience on the taxation of multinationals and EOI, in-kind support through twinning arrangements or secondments could bring valuable exchange and knowledge transfer to tax administrations of developing countries. Switzerland has so much knowledge and expertise to share which go well beyond financial contributions. Accordingly. it is important that Switzerland shares its practical knowledge through either participating in the Tax Administrators Without Borders Pilot programmes. Or it can create its own pilot programs for its focus countries. Sending Swiss tax administrators - current or retired - to developing countries, providing real-time technical assistance in audits and enforcement and targeted capacity-building on specific international tax topics, can contribute extensively to the skills present in the tax administrations of developing countries. Next to their increased ability to raise taxes, it will also help them to create a more attractive working mode for businesses in these countries. It will contribute to more predictable and coherent results when companies deal with tax administrations in developing countries. The Framewoerk Agreement between the Swiss Federal Tax Administration and the Swiss Secretariat of Economic Affairs is an important step in the right direction. However, the current scope should be broadened to also include technical assistance in i.a. AEOI and audit capacity.

Switzerland should refrain from the introduction of overly restrictive review criteria, which go beyond human rights and data protection for activating its AEOI relationships. Especially, the suggested criteria in Art. 1 bis (c) of the dispatch from the Swiss National Council on AEOI -requiring the existence of an appropriate network of AEOI partner countries, including the relevant competitive financial centers - as a precondition before Switzerland activates the AEOI relationship is could create incoherencies with Switzerland development policy and should be omitted.

Switzerland's introduction of the publication of de-identified aggregated information about financial accounts held in Switzerland. Such information should be published each year by the Swiss Tax Authority with totals by country of origin. However, Switzerland should also try to promote the publishing of such information on the international level to help it become a common international standard, followed by all major financial centres in order to improve its effectiveness and an equal playing field.

Switzerland should loosen the full reciprocity requirement in AEOI with developing countries on the official ODA list. Developing countries, which are compliant with Switzerlands confidentiality and data safeguard standards, should be offered some form of a "phased in" period in which they can benefit from obtaining information while developing their own capacity to provide information. Such compromise should be offered to developing countries, which require more time to implement a reciprocal system to collect data. It could be combined with a capacity building programme to speed up the process of implementing the full infrastructure for AEOI.

Introduction of withholding tax regime as an interim solution for a selected number of developing countries before AEOI is in place. Switzerland could consider a policy, in which it provides a workable number of developing countries (maybe chosen on the basis of biggest amount of assets under management from these countries) the option of a withholding tax regime as an interim solution. This regime could be offered in case these countries fail to be compliant with Switzerland's confidentiality and data safeguards or the sending of information to this country brings about public policy concerns for Switzerland. However, since such a measure brings about high administrative burden for the Swiss administration and financial institutions, compensatory measures should be included in such instrument, which compensate the extra costs incurred.

The lump sum payment for the regularization of the past. Such measure could be offered to developing countries, either together with the withholding tax regime for the future or as a single measure only for the regularization of the past. However, again if each and every formula for calculating the on-off payment is different from developing country to developing country, a multilateral option covering a vast amount of developing countries, might not be administrable. Hence, again Switzerland could choose a workable number of countries maybe on the basis of biggest amount of assets under management from these countries.

Higher withholding taxes in DTTs with developing countries and the granting of a full tax credit. There is currently no specific policy in place with regard to the amount of withholding taxes offered to developing countries. The treaty landscape looks very diverse. Hence, Switzerland should create a refined policy for its DTT with developing countries, which heeds the asymmetric relationship in investment flows and aligns the

treaty outcome with Switzerland's development aid programmes. From a development perspective Switzerland should have a coherent policy in place to grant developing countries higher withholding taxes if they wish to have them. What is however equally important to consider is that Switzerland should then have effective methods in place for the elimination of double taxation. The current method of the so called "*pauschale Steueranrechnung*" only leads to partial elimination of double taxation. Hence a portion of the withholding tax remains an additional tax burden for the investor, which can have a negative influence on FDI. Switzerland should also refrain from granting only limited tax credits as can be found in the DTTs with the Ivory Coast and with Egypt. Such clause might be unfavourable for FDI into the developing countries. A full tax credit of the withholding taxes paid in the developing countries to the Swiss tax would provide the developing countries with more tax revenues without having negative repercussions on their attractiveness as a FDI location.

Broader PE Definition beyond the BEPS recommendation. There is currently no coherent policy in place with regard to the framing of the construction PE, the specific activity exemption, and the deemed insurance PE. In some treaties, the UN Model is followed, others have a hybrid between the UN and the OECD Model and there are examples under which the OECD Model is followed (or an old version of a UK treaty from 1957). However, when negotiating with developing countries, Switzerland should have a policy in place to generally follow the UN Model, if the developing country so wishes.

Inclusion of Services in DTTs preferably through a Service Fee. The Swiss practice with regard to technical services is very diverse. Looking at the different Swiss DTTs with developing countries, it ranges from treaties neither include a service PE nor a service fee. to only including the service PE definition, requiring however different periods of presence (ranging from 6 – 12 months). One can also find Swiss DTTs which include both provision, the service PE together with the service fee others which only include the service fee. From a development policy perspective, it is positive to note that the inclusion of service does occur in Swiss DTTs with developing countries. However, there are still multiple treaties lacking either provision and if a DTT includes service, it is mostly done through a service PE definition. However, the service fee might be more workable for developing countries and hence should be the preferred option in a DTT with a developing country.

Inclusion of a broad capital gains provision capturing indirect transfers of interest in the DTTs with developing countries. A vast amount of Swiss DTTs with developing countries already include a provision capturing indirect transfers of property rich companies. However, such clauses mainly reflect the more restrictive OECD wording. Some Swiss treaties even include restrictive modifications narrowing down the OECD wording even further. Additionally, there are still a number of treaties which do not include such provision. Given that indirect transfers of immovable property in one of the key BEPS concerns for developing countries, from a development policy perspective, Switzerland should include a broad provision capturing indirect transfers of property rich companies and should refrain from restrictive drafting of such clause. It should also have a policy in place to brief its tax administrators to provide information on conspicuous transactions to developing countries through the spontaneous exchange of information

mechanism.

In kind support on identifying functions performed in developing countries through special working agreements or MoUs. Switzerland already has an extensive network of exchange of information partners in place. However, whether this framework is already used for assisting developing countries with transfer pricing information and for practical discussions between Swiss and developing countries tax administrators so far is questionable. In order to boost such dialogue, Switzerland could consider concluding a special working agreement or so-called MoU with the tax administration of a list of developing country treaty partners. It could be based on the OECD templates for safe harbours. However, it should be broader and also set forth the details about the procedure of requesting information and receiving support to access and interpret information. Practical clauses should ease the modes of application of exchange of information, to improve the access to information developing countries receive. While including practical safe harbours, the MoU should also intensify and facilitate practical discussion on transfer pricing methods or comparability analysis between the Swiss tax authority and the tax authority of a partner jurisdiction, in case a safe harbour is inapplicable, with the goal to stabilise the capacity of the tax administration with practical exposure.

Establishing a bilateral APA programme with interested developing countries. Switzerland offers multinationals the possibility to conclude APAs, be it bilateral or multilateral. Accordingly, if a multinational wishes to conclude a multilateral APA, e.g. to determine the pricing of a transaction between group companies located in Switzerland and a developing country, this is already possible. However, to the best of our knowledge there is so far no explicit policy in place to establish multilateral/bilateral APA programmes with interested developing countries with a development policy aim. From a development policy perspective, a programme should be set up with the aim of speeding up the capacity building of the tax administrations involved. Since at the same time such APA programme would offer predictability to the MNE, it would be business friendly while helping developing countries to increase their technical knowledge in transfer pricing.

TP documentation and CbCR. From a development perspective having a broad and inclusive list of CbCR exchange partners, including developing countries is recommended. A restrictive approach would only result in the encouragement to increase local filing obligations. Additionally, since the Swiss tax administration has extensive knowledge in processing and reading transfer pricing documentation, Switzerland should no longer refrain from participating in the Tax Inspectors Without Borders Programme. Moreover, looking at the progressive development with regard to public CbCR in the EU, which will likely also effect Swiss headquartered companies with an EU presence, Switzerland should consider contemplating similar requirements. This would elevate Switzerland to being a progressive first adopter. From a development policy perspective, such move would constitute a helpful measure.

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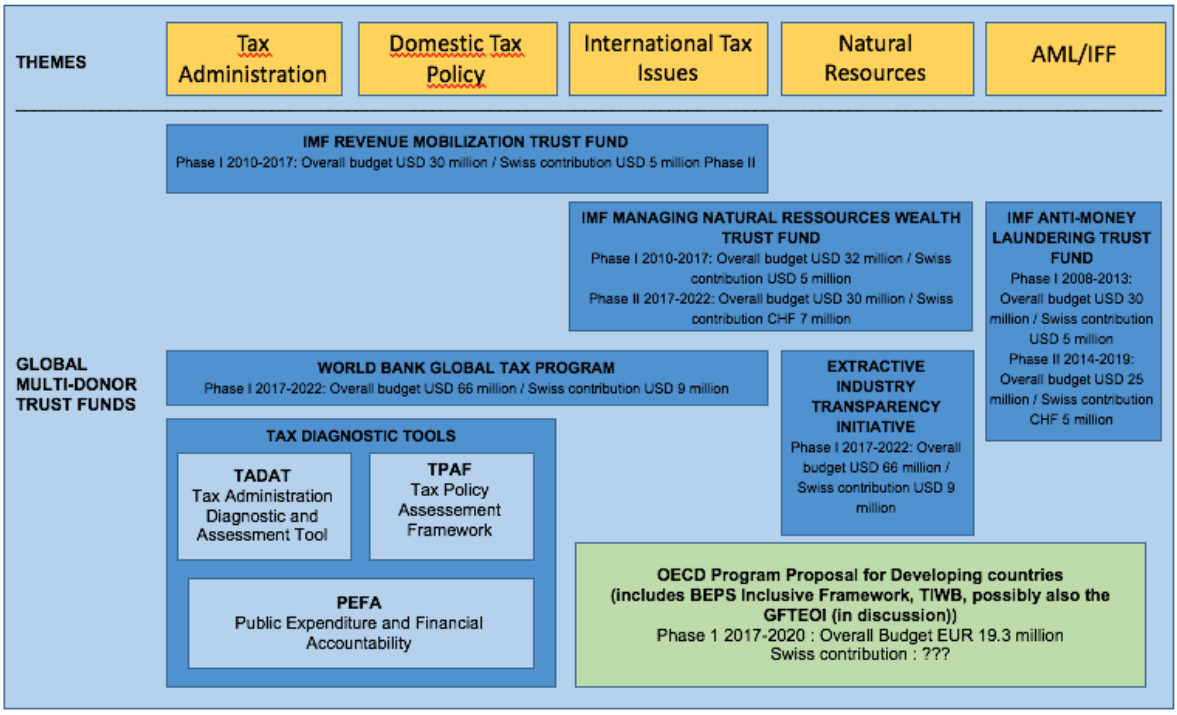
Annex I

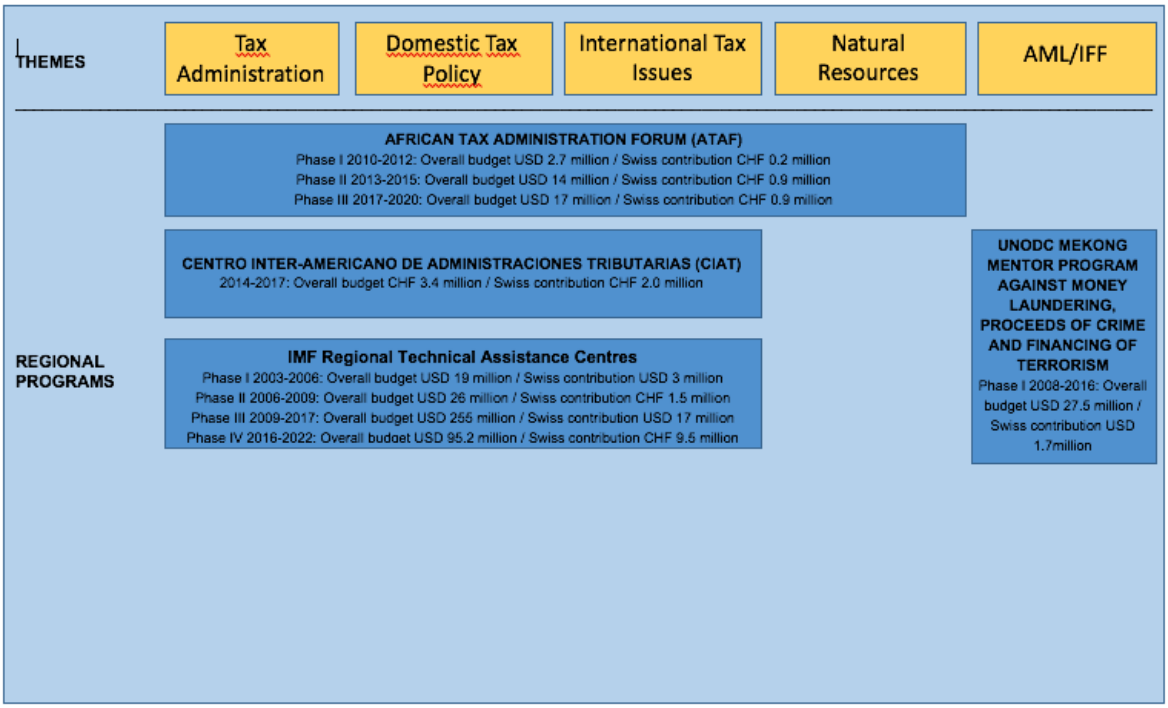
SECO Support to the Tax and Development Agenda

Global Multi-donor Programs providing technical assistance and capacity development



SECO Support to the Tax and Development Agenda

Regional Multi-donor Programs providing technical assistance and capacity development



SECO Support to the Tax and Development Agenda

Bilateral Programs providing Technical assistance and capacity development