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COSTS AND BENEFITS OF TAX INCENTIVES BY DEVELOPING COUNTRIES TO MNEs (Case Study: Petroleum Agreement between Guyana and ExxonMobil)

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Introduction

Policymakers worldwide are interested in using tax policy to promote their country's economic interests. They do so by engaging multinational enterprises (MNEs) through the use of tax incentives. Developed countries, with a sophisticated legal and institutional framework, use investment tax credits, accelerated capital cost allowance, research and development grants and favouring export activities, among other traditional measures, to entice MNEs. Developing countries, lacking the legal and institutional framework, offer low or zero corporate income tax rates and preferential tax regimes. These rates and preferences are contractually bargained but arrived at in light of the asymmetry of information and bargaining power in favour of the MNEs. Developing countries expectation is that MNE's operations will result in jobs for locals, transfer of technology and other local content benefits.

MNEs are adept at structuring their legal framework so that the low tax or tax-free income from these countries are then channeled to their resident country that charge no or low corporate income tax. Thus, not only the host country's tax base is eroded but the negative spillover to other countries continue.

Low or no tax jurisdictions (tax havens) effective tax rate on geographically mobile income is recognized as the gateway for other harmful tax practices. It hosts countries lose revenues and is seen as unfair between preferred MNEs and other taxpayers, plus it can result in political risks for governments.

In recognition of this problem, individual countries, regional and international organizations are taking actions to tackle it head-on. Leading the charge is the Organization for Economic Co-operation and Development (OECD). It proposes 15 Actions under the Base Erosion and Profit Shifting (BEPS) Project. The general thrust is to shift towards source-based taxation to ensure that profits are taxed where economic activities generating the profits are performed and where value is created. This is recognized as the substantive or nexus approach under BEPS Action 5. It is universally acknowledged that while this approach can be incorporated into the domestic law of the taxing jurisdiction, it alone is not sufficient to guarantee the tax base of a country. The United Nations Handbook states:

> Without adequate transparency and disclosure of tax information to the taxing authorities, even the most carefully designed substantive tax rules will fail to protect the base. Thus, an important part of BEPS work targets the more administrative issues of transparency and disclosure. Ultimately, the goal is to ensure that tax authorities have adequate and appropriate access to the information necessary for the effective administration of the tax law[1]

This Paper will explore BEPS Actions in connection with source-based taxation and the substantive approach aimed at more effectively addressing the base erosion and profit shifting

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[1] Page 571, United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries Second Edition. https://www.un.org/esa/ffd/wp-content/uploads/2017/08/handbook-tax-base-second-edition.pdf

problems through improved knowledge and understanding derived from structured transparency and disclosure by MNEs.

In the final section, I will examine the usefulness and limitations of BEPS' Actions to a developing country, namely, the Petroleum Agreement between the Government of Guyana and ExxonMobil[2]. Guyana is a small country with a population of 750,000, constrained by non-existent or inadequate physical, financial, legal, technical and institutional infrastructure, and a Government accused of secrecy and lack of transparency. The oil revenues over a ten year period are expected at US$600b[3] and Guyana's annual budget is a mere US$1.5b.

Harmful Tax Practices and Revenue Base Erosion

It is generally acknowledged that certain no or only nominal tax jurisdictions (referred to as tax havens) and harmful preferential tax regimes (which levy different taxes on distinguishable tax bases, such as banking, insurance, intellectual property holding and other "relevant sectors") "affect the location of financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems."[4]

The OECD's 1998 Report, "Harmful Tax Competition: An Emerging Global Issue"[5] sets out the framework to identify harmful tax practices. In subsequent refinements, culminating with OECD's 2018 Report, the Forum on Harmful Tax Practices (FHTP)[6] focussed the framework on the twin atypical corporate income tax systems of (a) whether a jurisdiction imposes no or only nominal taxes (tax havens) and (b) the absence of a requirement that the activity is substantial (referred to as the nexus approach) for relevant sectors or regimes (preferential tax regimes).

Tax havens are usually small countries with strong financial and support services and are restrictive with tax and other information exchange to other taxation authorities. They are attractive to MNEs because of the "advantages" of minimal taxes and financial confidentiality. The OECD Report highlighted four features of tax havens:

1) no or low effective tax rate;
2) lack of transparency in the operation of legislative, legal and administrative provisions;
3) lack of effective exchange of information by having in place laws and policies from which MNEs benefit from strict secrecy rules, preventing scrutiny from tax authorities; and

[2] A copy of the Agreement is available at: available at https://dpi.gov.gy/download/petroleum-agreement-between-the-government-of-the-cooperative-republic-of-guyana-and-esso-exploration-and-production-guyana-limited-cnooc-nexen-petroleum-guyana-limited-hess-guyana-exploration-limit

[3] World Oil Magazine reported that ExxonMobil's 13th discovery offshore Guyana brings estimates recoverable oil resources offshore Guyana to 5.5 billion barrels with potential to double that amount: https://www.worldoil.com/news/2019/4/23/exxonmobil-makes-13th-discovery-offshore-guyana.

[4] Para. 4 OECD (1998), Harmful Tax Competition: An Emerging Global Issue, OECD Publishing, Paris, https://doi.org/10.1787/9789264162945-en.

[5] Ibid, note 4

[6] OECD (2018), Resumption of application of substantial activities for no or nominal jurisdictions – BEPS Action 5, OECD, Paris. http://www.oecd.org/tax/beps/resumption-of-application-of-substantial-activities-factor.pdf

4) no requirement of substantial activities in the host jurisdiction thus attracting investments and transactions that are purely tax driven.

Preferential tax regimes exist where the host country has typical standard tax system but the MNEs' are given preferential tax treatment on distinguishable tax bases by way of reduced tax rates and/or reduced tax base. In addition to the tax haven features, the OECD Report added "ring fencing" as a feature of preferential regimes. This occurs where the MNEs' investment or transactions are insulated from the domestic market of the country.

The practical application of this framework sees no or only nominal taxes as the gateway to harmful tax practices but that harm will be reduced or avoided where this is accompanied by substantial activities requirements for preferential regimes. In other words, no or only nominal tax rates would be permitted where there is substantial activities or a nexus to the preferential tax regime.

Countries looking to enforce the substantial activities requirement for preferential regimes would first need to pass legislation with provisions as to which companies will be affected, how the substance requirements will be applied and the penalties for failure to comply. The regime can be analyzed in three stages as follows:

a) Identify the companies with income from one or more of the following "relevant sectors": Interest box regimes; Headquartering activities; Banking; Insurance; Fund management; Finance and leasing; Pure equity holding company; Shipping; Headquartering; Intellectual property holding (IP box regimes); Distribution and service center business;

b) Determine whether the company in the relevant sector has adequate substance in the country. Factors that will show that the company has adequate substance include:
   - the company is directed and managed in the country;
   - the company has an adequate number of qualified employees with physical presence and expenditure proportionate to the level of activity carried out in the country and
   - the company conducts core income-generating activity in the country; and

c) Have a transparent mechanism to ensure compliance and provide effective enforcement of substantial requirements to be meaningful. A hierarchy of sanctions or penalties should be instituted for non-compliant companies with the sanctions becoming more severe for persistent non-compliance, culminating with the company being struck off. Also, the non-compliant information of the company may be exchanged with other competent tax authorities.

To summarize, the OECD's reports and other agencies focus on two types of harmful tax practices: low or no tax jurisdictions (tax havens) and harmful preferential tax regimes. Substantial activity "is now an essential requirement, and without meeting this criterion a

preferential regime that meets the gateway criterion and is within the scope will be found to be potentially harmful"[7].

Impact of OECD's Framework on Harmful Tax Practices on Developing Countries

There is general consensus applauding OECD's BEPS framework for coordinating and harmonizing countries' international tax rules to curtail MNEs' cross-border tax planning and limit their ability to engage in international tax avoidance.

However, there is less agreement and much criticism on the stated goal of BEPS to align the taxation of profits with value creation[8]. There is no definitive position as to the location of value creation. "Achieving consensus is challenging because the different roles that countries play in the world economy mandate that they advocate for competing for international tax policies"[9] . This problem is compounded by BEPS proposition for the arm's length principles governing transfer pricing rules. For example, the U.S. economy thrives on innovation which dictates that intellectual property developed by its resident MNEs is a major driving force of value creation. France emphasizes employment in its jurisdiction by charging higher prices for its products produced and sold within the country. China, on the other hand, emphasizes its ability to promote low-cost manufacturing through its large population that works for low wages. Also, China is advocating that a company's profits should not be attributed only to the traditional arm's length factors of assets, functions, and risks. China's IFA Comments[10] argue for a "fair-share-principle" that accommodates exterior contributions, such as from the market and the government. This demonstrates a more radical formulation of international tax rules that give scope for accommodating other factors aligned to the country. This concept is referred to as value realization rather than value creation.

Many other developing countries rely on the export value of their natural resources, including the extractive industries like oil, precious metals, and minerals. In most cases, they lack the externalities of legal, economic, technological and other infrastructure. Also, they are a net importer of intellectual property and capital. Unlike countries like China, they do not possess market realization through a large consumer population, nor do their Governments have the capacity to be active investing parties. These shortcomings leave developing countries vulnerable with little scope to attribute more profits to themselves. To compound this asymmetrical relationship with the investing MNE, invariably the host governments do not have the management capacity to monitor the profits of the MNE. They are left with little option but to accept the traditional model. Under this model, taxation of profits is aligned with value creation but the location of the value is external and outside the control of the host country's tax

[7] Para 15 ibid 4

[8] Forward of: Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports DOI: https:o//dx.di.org/10.1787/9789264241244-en

[9] At page 30: Herzfeld, Mindy, The Case against BEPS – Lessons for Coordination (August 2, 2017). University of Florida Levin College of Law Research Paper No. 18-3. Available at SSRN: https://ssrn.com/abstract=2985752 or http://dx.doi.org/10.2139/ssrn.2985752

[10] China International Tax Center / IFA China Branch, Comments on DISCUSSION DRAFT ON THE USE OF PROFIT SPLITS IN THE CONTEXT OF GLOBAL VALUE CHAINS and other related transfer pricing issues (Feb 6, 2015), in OECD, Comments Received on Public Discussion Draft: BEPS Action 10, at pages 100-102

authorities. The issue of what constitutes value creation or value realization or "fair-share-principle" needs to be agreed upon first.

In summary, developing countries resources, be it, consumers, labor force or natural resources, need to be properly incorporated into the "value" or profit.

Transparency, Disclosure, and Exchange of Information

The other two key harmful tax practices identified above, lack of transparency (factor 2) and no effective exchange of information (factor 3) will be discussed in this section.

The substantive law of the country focuses on negotiated tax incentives to the MNE by way of no or low effective tax rates and preferential tax regimes. Here, attention is given to the rules and practices that erode the tax base and shifts profits out of the country. However, as pointed out earlier by the UN[11], administrative issues relating to transparency and disclosure are important to ensure tax authorities have adequate and appropriate access to information that is necessary for the effective administration of the substantive tax laws.

At the outset, it is important to understand the contextual meaning of the terms, transparency, and disclosure, and to distinguish them from the exchange of information. The United Nations Handbook[12] provides the following definitions:

> The term "transparency" reflects the idea that a country needs to understand how a taxpayer is conducting its business, structuring its operations and making investments in the country. To achieve this level of understanding, it may be necessary for the country to have a solid grasp of the activities, transactions and business structure of the taxpayer beyond the borders of its jurisdiction.
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> The term "disclosure" captures the idea that a country will need access to information necessary to provide transparency regarding the activities of a taxpayer.
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> The phrase "exchange of information" refers to the process (and mechanism) by which a country can obtain information regarding a taxpayer or the transactions of the taxpayer, typically from another country. The most well-known mechanism for exchange of information is bilateral tax treaty provisions based on Article 26 of both the United Nations and the OECD Model Conventions.

The rapid and expansive growth of cross-border investments and transactions by MNEs with a large volume of mobile capital spread in multiple tax jurisdictions give these companies a wide array of tax planning techniques and arbitrage opportunities which can lead to base erosion and profit shifting. Thus, tax authorities need adequate disclosure and transparency of the MNE's activities to design substantive tax laws and enforcement mechanisms to deal with these aggressive tax planning and arbitrage opportunities.

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[11] Supra note 1

[12] Page 574, ibid

OECD BEPS Actions

The OECD BEPS project deals with the transparency and disclosure issue directly through Actions 12 and 13 and additionally through Actions 11[13] and 5. Action 12 requires taxpayers to disclose their aggressive tax planning arrangements while Action 13 examines transfer pricing documentation. BEPS Action 13[14] recommends a standardized reporting system with three components. These are:

a. Master File that gives an overview of the MNE's group business. It includes five main categories – the group organizational structure, description of each business, intangibles (IPs) held by the group, intercompany financial activities and the financial and tax position of the MNE.
b. Country-by-country (CbC) reporting template that itemizes the following: revenue from related and unrelated party, profit (loss) before income, cash tax, current year tax accruals, and tangible assets. A list identifying all group entities by country of location, permanent establishments (PEs) and major activities should accompany the CbC.
c. Local File consisting of jurisdiction-specific information to help the country determine whether the MNE complies with the arm's length principle embedded in the transfer pricing rules in its major transactions connected to the country.

It is hoped that the above information will offer useful indicators, especially from the Master File and the CbC for risk assessment and help tax authorities to better focus their limited resources on critical audit areas.

Automatic exchange of information

OECD's BEPS Action 12[15] targets aggressive tax planning arrangements and calls for taxpayer's disclosure regarding these structures. Action 12 focuses on international tax schemes and defines tax benefits widely to capture relevant transactions. It also recommends a modular design of mandatory disclosure rules to allow maximum consistency among countries "while being sensitive to country-specific needs and risks and the costs for tax administrations and businesses"[16].

Neither the United Nations Model Convention at Article 26[17] nor Article 26[18] of the OECD Model Convention requires the automatic exchange of information. But the OECD considers the

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[13] OECD, Measuring and Monitoring BEPS, Action 11—2015 Final Report.
[14] OECD, Transfer Pricing Documentation and Country-by-Country Reporting, Action 13—2015 Final Report (Paris: OECD, 2015), available at http:// www.oecd-ilibrary.org/taxation/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report_9789264241480-en.
[15] OECD, Mandatory Disclosure Rules, Action 12—2015 Final Report (Paris: OECD, 2015), at 14, available at http://www.oecd-ilibrary.org/taxation/ mandatory-disclosure-rules-action-12-2015-final-report_9789264241442-en.
[16] Page 620, United Nations Handbook on Selected Issues in Protecting the Tax Base of Developing Countries Second Edition. https://www.un.org/esa/ffd/wp-content/uploads/2017/08/handbook-tax-base-second-edition.pdf
[17] Article 26: Exchange of information ... 435, United Nations Model Double Taxation Convention between Developed and Developing Countries. https://www.un.org/esa/ffd/wp content/uploads/2014/09/UN_Model_2011_Update.pdf

automatic exchange of information by way of model competent authority agreements (CAA) among States to facilitate the exchange of country-by-country reports. Ideally, the exchange mechanism would be a CAA under a multilateral agreement to capture a wider pool of Reports from different countries. Other models CAAs could be used, including, Convention on Mutual Administrative Assistance in Tax Matters; bilateral tax conventions; and tax information exchange agreements (TIEAs). OECD's latest Automatic Exchange Portal reported that there are over 2000 bilateral exchange relationships activated with respect to jurisdictions committed to exchanging CbC reports[19]. However, a review of treaty members shows that many developing countries have not signed up to any CAA and have very limited treaty network.

Developing countries impediments regarding BEPS Actions

Although developing countries have concerns about the impact of MNEs' aggressive tax planning, their more immediate focus is on profit shifting. Thus, they may find Action 13 more relevant and absorbs most of their tax administration resources. The UN Report recommends "In terms of both overall mission of Action 13 and the implementation-specific decisions, developing countries should evaluate the BEPS project against their own circumstances"[20].

Developing countries face a number of challenges in securing information, transparency, and disclosure from MNEs and other tax jurisdictions. These challenges are discussed under the following categories below:

a. Domestic law impediments

Developing countries may not have domestic laws requiring MNEs to provide certain information necessary to help them determine whether to initiate audits and what areas to prioritize for such examination.

Countries that lack such domestic laws may benefit from using BEPS Actions 12 and 13 modular reports as a guide, laying out their reporting requirements. For example, Action 13 provides for certain relevant information to be included in the Master File Report and the Country-by-Country Report, while Action 12 refers to the Automatic Exchange of Information through CAAs.

Another source of guidance is the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum)[21]. It identifies fundamental domestic laws characteristics that may either inhibit or facilitate transparency. It examines the key features

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[18] OECD, Model Tax Information Exchange Agreement (Paris: OECD, 2002), available at http://www.oecd.org/tax/exchange-of-tax-information/ 2082215.pdf.

[19] The OECD portal is located at http://www.oecd.org/tax/automatic-exchange/country-by-country-exchange-relationships.htm

[20] Page 609, ibid 14.

[21] OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, Tax Transparency 2014: Report on Progress (Paris: OECD, 2014), available at http://www.oecd.org/tax/transparency/ GFannualreport2014.pdf;

through a peer review system. These include ownership and structures of entities; accounting records; banking information for account holders; and rules and procedures governing access to this information.

The purpose of the domestic law is to ensure that the country's tax authority can mandatorily obtain the specified relevant information from MNEs and be able to share it with other competent tax authorities while, at the same time, respecting the MNE taxpayer's rights. The sharing of MNEs information with other tax authorities have reciprocal benefits by way of comparative analysis and filling gaps of missing information.

b. Domestic enforcement impediments

Having set up laws and engage international agreements to obtain the MNE's information, the next hurdle is to effectuate an administrative system to effectively use the available information. Developing countries face special challenges in this regard, including, a limited number of audit and other technical personnel with the requisite training and experience in complex areas such as transfer pricing and other countries tax and accounting laws. Other administrative barriers identified in the UN Report[22] include regular attrition of highly trained staff; technological limitations to the ability to receive, manage, store and work with different types of data; inadequate systems for identifying and matching taxpayers; and existing culture of limited tax compliance.

Recognizing the enforcement limitations faced by developing countries, recommendations by OCED BEPS Actions 11, 12 and 13 must of necessity be considered in light of these limitations. In recognition of the need for developing countries to build up their tax administration capacity, the International Monetary Fund (IMF), the OECD, the United Nations, and the World Bank have collaborated in setting up a "Platform for Collaboration on Tax" (Platform) to offer support and assistance[23]. A "draft toolkit" to assist developing countries in transfer pricing analysis was developed by the Platform[24]. Also, the United Nations Development Program (UNDP) and the OECD jointly set up the "Tax Inspectors without Borders" (TIWB)[25] project to assist in building tax capacity. In this project, both developed and developing countries tax experts work side-by-side on local tax audit matters.

In summary, developing countries not only suffer from domestic constraints in accessing and using MNEs' information but they also lack the channels of treaty network to obtain information

[22] Page 578, ibid

[23] International Monetary Fund-OECD-United Nations-World Bank, "The Platform for Collaboration on Tax: Concept Note", at 5 (19 April 2016), available at https://www.imf.org/external/np/sec/pr/2016/pdf/pr16176.pdf.

[24] World Bank, "The Platform for Collaboration on Tax Invites Comments on a Draft Toolkit Designed to Help Developing Countries Address the Lack of Comparables for Transfer Pricing Analyses," (24 January 2017), available at http://www.worldbank.org/en/news/press-release/2017/01/24/ the-platform-for-collaboration-on-tax-invites-comments-on-a-drafttoolkit-designed-to-help-developing-countries-address-the-lack-of-comparables-for-transfer-pricing-analyses.

[25] OECD-UNDP, Tax Inspectors Without Borders, "Progress Report and 2016 Work Plan for Discussion and Approval," at 1 (16 April 2016), available at http://www.tiwb.org/About/governing-board/governing-board-progressreport-and-2016-work-plan.pdf.

on MNEs from other tax jurisdictions. Therefore, it is imperative that these countries implement the requisite tax laws and build up their domestic tax administration capacity, along with fostering treaty network with other countries. This endeavour does not come without significant financial costs to developing countries but the major international organizations are willing to offer support and assistance.

The Guyana-ExxonMobil Petroleum Agreement

The final section of this Paper examines the Guyana-Exxon Mobil Petroleum Agreement. It gives an opportunity to relate the OECD BEPS Project framework to a project between an MNE and a developing country. We will be able to see to what extent BEPS Actions can be useful to understand and assess the structure and operations of the Agreement in so far as the purpose is to prevent the erosion of the tax base of Guyana and shifting its profits out of the country.

In June 2016, Guyana and Exxon Mobil executed this Agreement in great secrecy. The contents of the Agreement were disclosed nineteen months later after the persistent clamor for information from the Parliamentary Opposition, the Press and social activists and the existence of a signing bonus which the Government had denied existed.

It is important to note at the outset that Guyana has very limited tax treaty agreements, namely with Canada, UK, and CARICOM. It is not a party to any of the OECD BEPS Actions, such as the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (Convention)[26]. The Convention has 128 participating jurisdictions. It is the most comprehensive multilateral instrument available that deals with all forms of tax co-operation to tackle tax evasion and avoidance. Had Guyana been a member it could have benefitted from the Convention's peer review arrangement. The peer review would have ensured that the Petroleum Agreement was evaluated and implemented to a standard consistent with an agreed set of criteria and methodology. The terms of reference of the Convention requires participating jurisdictions to be transparent with the information and frowns upon secret tax rulings.

OECD BEPS Action 5 categorize harmful tax practices into two main areas, tax havens and preferential tax regimes. Guyana is not a tax haven as it does not satisfy the factor having a tax system that of charging no or nominal taxes. It charges corporate income tax at 40 percent for commercial companies and 27.5 percent for non-commercial companies. It also charges fourteen percent value-added tax[27].

However, it has offered a number of MNEs preferential tax regimes in the mineral extractive and forestry industries. The Petroleum Agreement is a preferential tax regime. It is set up as a profit-sharing agreement, whereby Guyana receives two percent royalty per annum for the sale price of crude extracted from its territory and split the costs and net profit equally with ExxonMobil.

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[26] Convention on Mutual Administrative Assistance in Tax Matters; available at http://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm

[27] Information on Guyana's tax system and rates found at: https://gra.gov.gy/

I will briefly examine the five factors, outlined earlier, to demonstrate why the Petroleum Agreement is a preferential tax regime that may be classified as a harmful tax regime.

1. no or low effective tax

Under the Agreement, ExxonMobil shares 50% of the cost and profits with Guyana. ExxonMobil pays no tax[28]. To demonstrate this point, I will analyze the projected financial results over a 10 year period. At Revenues of US$600b (10 billion barrels at $60) less royalties $12b (2%) and costs at $450b (75% pre-production, production, and other costs), the project should yield a net profit of $138b with $69b to ExxonMobil. The Company pays zero tax on this amount.

2. lack of transparency and 3. lack of effective exchange of information

The Agreement mentions that "Guyana Geology and Mines Commission, a body corporate established under the Guyana Geology and Mines Commission Act (No. 9 of 1979), has been seised with the responsibility, inter alia, of planning and securing the development, exploitation and management of Petroleum, as defined by the Act, in Guyana so as to ensure for the people of Guyana the maximum benefits therefrom and for doing such things in relation thereto."[29] However, the petroleum portfolio was removed completely from the Guyana Geology and Mines Commission fully planted in the Office of the President. All appointments and management is ultimately at the sole discretion of the President. Besides the Petroleum (Production) Act[30] and the Agreement, there is little or no other formal legislative, legal or administrative provisions to provide transparency of this project.

As mentioned earlier, Guyana is not a party to tax exchange mechanisms that would allow scrutiny from tax authorities. Even it was part of an exchange mechanism, the taxing authority of Guyana (Guyana Revenue Authority) has been effectively removed from the examination process.

Curiously, the Income Tax provisions have not been amended to allow ExxonMobil to pay zero income tax. Instead, the Agreement makes provision for the Minister of the Government of Guyana to pay the tax on behalf of ExxonMobil and for the Commissioner General of Guyana Revenue Authority to issue tax certificates to ExxonMobil evidencing the payment[31]. The effect

[28] Atricle 15 – Taxation and Royalty states "Subject to ……, no tax, value-added tax, duty, fee, charge or other impost shall be levied at the date thereof or from time to time thereafter on the Contractor or Affiliated Companies in respect of income derived from the Petroleum Operations or in respect of any property held, transactions undertaken or activities performed for any purpose authorized or contemplated hereunder…"

[29] Page 1, Guyana Petroleum Agreement: available at https://dpi.gov.gy/download/petroleum-agreement-between-the-government-of-the-cooperative-republic-of-guyana-and-esso-exploration-and-production-guyana-limited-cnooc-nexen-petroleum-guyana-limited-hess-guyana-exploration-limit/?wpdmdl=29939&refresh=5cd5a8c0bfada1557506240

[30] Petroleum (Exploration and Production) Act: Laws of Guyana Cap 65:10: available at http://goinvest.gov.gy/wp-content/uploads/Petroleum-Exploration-and-Production-cap6510-.pdf

[31] The Agreement states at Article 15.4 "The Minister hereby agrees: (a) that the a sum equivalent to the tax assessed pursuant to Article 15.2 and 15.3 will be paid by the Minister to the Commissioner General, Guyana Revenue Authority on behalf of the Contractor…..". Article 15.5 states "…. The Minister shall note that he is paying the income taxes on behalf of the Contractor, so that the Commissioner General, Guyana Revenue Authority can properly prepare the receipts required under this Article 15.5".

of this arrangement is to not only to erode the revenue base of Guyana but also to spillover to ExxonMobil’s countries of permanent establishment. This Agreement is seen as the most aggressive form of tax planning by MNEs where taxes are completely avoided. Had Guyana used the OECD BEPS Action framework this agreement would not have passed muster.

Preferential tax regimes enjoy two other preferences which are lack of substantial activity in the country, and insulation of their operations from the local economy. Unlike the traditional preferential tax regimes, such as banking and insurance businesses, that have little activity in the host country, ExxonMobil engages its production activities 200 km off the shorelines of Guyana. However, the local population and businesses have very little interaction with ExxonMobil’s operations and management.

Article 19 of the Agreement makes reference to a requirement for the Contractor to employ Guyanese citizens having appropriate qualifications and experience in the conduct of Petroleum Operations in Guyana. It also requires the Contractor to contribute $300,000 each year towards the education and training of Guyanese. The practical effect of these requirements is that the petroleum industry is alien to Guyanese and do not possess the appropriate qualification and experience contemplated in this Agreement. Also, any education and training are not likely to materialize into employment opportunities in the short term.

The Agreement, under Article 18, requires that the Operation give preference to the purchase of Guyanese goods and materials, provided that such goods and materials are available on a timely basis and in the quantity and in the quality required at competitive prices. It also requires preference to be given to the employment of Guyanese Sub-contractors insofar as they are commercially competitive and satisfy the Operator’s financial and technical requirements. But, businesses and sub-contractors in Guyana have no prior dealings in the petroleum industry. Further, the Agreement did not spell out quota or formula arrangements for local content contribution.

The management of the operations is conducted by expatriate ExxonMobil personnel living outside of Guyana. Although some office facilities are set up in Guyana, management essentially takes place in the Contractor’s permanent establishment outside of Guyana.

It will require ExxonMobil to integrate its operations and management in substantial ways to overcome any accusation of it being insular from the Guyanese economy.

Conclusion

This Paper explored the “crisis” phenomenon of MNEs indulgence in aggressive tax planning that results in base erosion and shifting of profits from host countries that spill over to other countries, resulting in MNEs not paying their fair share of taxes. It uses the OECD BEPS framework to explain the two main harmful tax practices, namely, tax haven and preferential tax regimes. The Paper emphasizes that implementing domestic laws to prevent harmful practices, while substantial, is not sufficient without adequate information and analysis. In this regard, it points to the importance of transparency, disclosure, and exchange of information under the BEPS framework.

Developing countries face both conceptual and practical difficulties when dealing with MNEs. The general sway is for taxes to be charged where value is created, using arm's length amounts for transfer pricing principles. This concept does not take into consideration the special externalities of individual countries. Some countries are calling for radical changes to have the international tax system move towards a value realization or fair-share principle.

Guyana, with its small population, zero investment and enforcement capacity, and minimal social and legal infrastructure signed a Petroleum Agreement with ExxonMobil. Guyana oil reserves are estimated at the market value of some $600b over the next 10 years. This represents a seismic shift in Guyana's economy.

An examination of the Agreement reveals that Guyana is guaranteed 2% royalty for the extraction of its fossil fuel with a blanket tax holiday to ExxonMobil. Following the argument of the value realization and the fair-share principles discussed earlier, this Agreement could be interpreted as Guyana placing a value of its only externality – it's oil reserves – at 2%. This appears to seriously undermine the value realization and fair-share principle that should be attached to Guyana's oil resource.

The Agreement provides for Guyana to share half of the costs and net profits of the project. But Guyana does not have the domestic law nor the enforcement capacity to determine the authenticity of those costs and net profits. It suffers from the asymmetry of information and does not have the treaty network to secure the necessary information. Also, the indirect benefits expected from ExxonMobil integrating its operations in Guyana's market has not materialized so far. Guyana would need an enforceable structured plan with appropriate penalties in place to ensure substantial local activity content of ExxonMobil's operations. This will alleviate the harmful effect of zero taxation sealed in the Agreement.

Guyana must of necessity seek participation in the regional and international network of countries and organizations that can provide support and assistance for it to fairly determine the costs and profits of the project. It can start with Tax Inspectors without Borders who assist in building tax capacity by arranging for developed and developing countries tax experts work side-by-side on local tax audit matters. Also, Guyana will benefit from applying, with homogenous modifications, OECD BEPS Action 13 framework to obtain disclosure in a transparent manner through the free exchange of information.

Ultimately, without a stable and adequate revenue base, Guyana will lose the financial capacity to provide the lasting infrastructure, social services and development opportunities important to its citizens.