



ICC report on tax challenges relating to the Belt and Road Initiative

Introduction

The International Chamber of Commerce (ICC), as the world business organization, works to promote open, rules-based multilateral trade and investment, a market economy system, sustainable economic growth, responsible business conduct and a global approach to regulation.

In the area of taxation, ICC seeks to promote sustainable and non-discriminatory treatment of foreign investments and earnings that eliminate tax obstacles to cross-border trade and investment. ICC supports transparent, efficient, predictable and stable tax regimes that incentivise long-term investment, job creation and economic growth. Through its wide membership network, ICC advocates for a consistent global tax system, founded on the premise that stability, certainty and consistency in global tax principles are essential for business and will foster cross-border trade and investment.

ICC welcomes the opportunity to provide a report to the international Belt and Road Initiative (BRI) to identify tax challenges from a business perspective for investing in Belt and Road Initiative (BRI) jurisdictions. In the context of taxation, ICC recognizes SAT's commitment to the establishment of long-term taxation cooperation for participants of the BRI as an important way to improve governance in international taxation, create a more supportive environment for investment and boost global economic growth.

The ICC report will contribute to deliberations in the context of the Conference of the Belt and Road Initiative Tax Administration Cooperation Forum (BRITACOF) to be hosted by SAT in China in April 2019, which will focus on strengthening BRI tax cooperation and building a growth-friendly tax environment, and which is expected to bring together over 70 countries from along the BRI.

To this end, four key areas have been identified for discussion, with a view to designing future action plans for BRI tax administrations and legislators.

ICC believes the BRI provides new impetus to the global economy and respectfully provides its views on behalf of the world business community to promote harmonisation of rules and practices which would allow for seamless application by businesses. While the BRI has the possibility to transform the economic environment in which territories in the region operate, there are inevitably economic and policy challenges that arise. Establishing a long-term mechanism and common approaches and practices for tax cooperation in the BRI countries and regions would be instrumental in promoting business investment and the development of the world economy.

1. Achieving tax certainty

In response to the call from G20 Leaders, the OECD and IMF produced a comprehensive report on tax certainty ([OECD/IMF Report on Tax Certainty, the "2017 Report"](#)). This report identified the sources of uncertainty in tax matters and the various tools that taxpayers and governments could use to reduce such uncertainty from the perspective of businesses and tax administrations in G20 and OECD countries. An [update](#) of the report was provided in 2018 to the G20, who reiterated continued support for enhanced tax certainty in the G20 Leaders Declaration published in December 2018.

Economic growth would be induced by increased cross-border trade and investment, which in turn would be encouraged by increased tax certainty.

For the business community, the integrity of the international tax system is of critical importance. Legal uncertainty, such as the use of complicated, inconsistent and hard-to-apply tax rules create barriers to

trade. Legal certainty is a foundational factor in attracting investment and relies, to a large degree, on strengthening the consistency of the international tax system. “Legal certainty” – in a narrow understanding – requires simple and consistent tax rules that are unambiguous and easy to apply.

A consequence of uncertainty is that it leads to a more cautious approach in the business sector, to such an extent that it may impede cross-border trade and investment. As various surveys have shown, tax is amongst one of the most important factors in determining investment and location choices, together with political stability or macroeconomic conditions¹. ICC therefore welcomes measures aimed at tackling uncertainty in the current complex tax environment, given that uncertainty distorts competition among the different players in the international field. ICC recommends that BRI jurisdictions consider exploring measures that increase tax certainty and create a more favourable environment for investment.

In the absence of a simplification of tax rules, tax certainty can be achieved through the increased use of other mechanisms such as Cooperative Compliance Programmes, Joint Audits, Advance Pricing Agreements (APAs) as well as other mechanisms, such as rulings, which serve as dispute prevention mechanisms. These instruments or mechanisms ensure that companies can get certainty as swiftly as possible on the amount of tax they must pay – and in advance of making business decisions wherever possible. Dispute prevention instruments can help businesses apply the increasingly complex international tax rules and thus reduce tax uncertainty as well as encourage investment and trade in the BRI jurisdictions.

Dispute prevention can also assist in the prevention of compliance and reputational risks. The corporate tax structure needs to be set up in such a way that it simultaneously complies with tax and corporate law requirements and enables tax administrations to audit in a risk-adjusted system. Improving compliance through cooperative compliance programs would be a step forward. This is the aim of the OECD International Compliance Assurance Program (ICAP). The ICAP programme, which is a multi-lateral form of co-operative compliance could be attractive for groups of countries/MNEs along the BRI overland and maritime route. ICC has developed a policy paper to raise the profile of co-operative compliance and works with the Vienna University of Economics and Business (WU), Global Tax Policy Center, in an effort to promote broader application of co-operative compliance as a useful mechanism in achieving tax certainty.

The use of tax charters is also a helpful mechanism for enhancing tax certainty, by creating trust and efficient co-operation between governments and the business community, which is essential to achieving a balanced and efficient tax system. In order to recognise the rights and obligations of both taxpayers and tax administrations, and in an effort to advocate for a balanced tax system, ICC developed a [Tax Charter](#) which provides a common international approach to Tax Charters for individual countries.

A key tool in building certainty is to improve dispute resolution mechanisms, particularly arbitration in cases of double taxation. This will likely have a spillover effect in that it will influence the conduct of tax administrations during audits and, in this way, help prevent disputes (see details below under 4.).

A typical example is a regulation that provides for a withholding tax with a percentage of revenue for the oil and gas industry and gives no further clarification as to its application. As a consequence, an oil company would withhold the requisite percentage of revenue for all subcontractors, regardless of their nature. A recommendation would be to provide clarification differentiating application of the regulation between the oil industry and other affected industries and determine a code that clearly identifies the list of activities or industries that are subject to the withholding tax.

2. Streamlining tax compliance (or improving taxpayer service)

Governments must assess and collect sufficient revenue to meet their goals and obligations. However, it is important that the costs of compliance and administration for taxpayers and tax authorities be reduced wherever possible.

¹ Michael Devereux. “Measuring corporation tax uncertainty across countries: Evidence from a cross-country survey”. Oxford University Centre for Business Taxation. April 2016. IMF/OECD Report for the G20 Finance Ministers. “Tax Certainty”. March 2017

ICC makes recommendations intended to improve the efficiency in administering and complying with a particular tax system, based on the following economic assumption:

- “Given a particular targeted level of tax revenue, a tax system that requires fewer resources to administer (monitor, legislate, audit and collect) and to comply with (understand, comply, report and transfer tax payers) is better than a tax system that costs more.”

ICC offers the following suggestions or best practices which can reduce the overall cost of tax compliance and administration for tax authorities and taxpayers, therefore promoting an efficient tax system. Tax authorities should view themselves as similar to businesses that provide services to customers and should constantly strive to improve the manner in which they provide such services.

- Implementing rules that are not more complicated than necessary to assess and collect tax
- Reducing the time to begin and conduct a compliance audit
- Increasing the transparency of tax rules
- Increasing the resources of tax administrations in order to perform tax audits in a timely manner and improving the training of tax administration personnel
- Making only prospective changes to tax practices and policies
- Using business records created by enterprises
- Maintaining the confidentiality of taxpayer records
- Maintaining an impartial tax appeals process

ICC believes that the suggestions proposed above would be useful in streamlining tax compliance along the BRI. Further details on each of these suggestions are available in ICC’s Policy Statement: [Improving tax efficiency: the responsibilities of tax administrations and taxpayers.](#)

The full potential of the BRI can only be achieved if the taxes (direct and indirect) that are applied by the participating countries are administered in a consistent, predictable and fair manner.

Example:

- Ongoing disputes that take an inordinate amount of time to resolve. For example, a court proceeding that has taken up to 49 years to resolve, after which time there is necessarily a loss of value. Measures should be taken to ensure that speedy and effective processes are in place in the event of disputes and that every effort is made to keep court procedures as efficient and short as possible.

3. Following the rule of law

Taxes can only be levied on the basis of laws. Countries design their own tax regimes and in doing so pursue different policy objectives. For example, countries may provide tax incentives to promote investment, jobs or economic growth. Tax competition among countries is a natural consequence of this. In itself tax competition is beneficial for governments in that it will encourage them to keep improving their tax systems and prevent inefficiencies.

It is the role of the legislature to decide what a “fair share” of tax is for the various taxpayers in a given society and to write the tax laws accordingly. The legislature also has to periodically evaluate the tax laws and to make amendments where required to take into account developments in policy objectives and expectations in society.²

ICC supports transparent, efficient, predictable and stable tax regimes that incentivize long-term investment, job creation and economic growth. In order not to dis-incentivize cross border trade and investment, profits from business activities should be taxed only once, in accordance with the applicable double taxation treaties and transfer pricing legislation.

ICC encourages greater cooperation between companies and tax authorities, with a relationship that is transparent, constructive and based on mutual trust and a focus on tax-related risks, compliance with the law and certainty on a real-time basis.

² <https://iccwbo.org/publication/iccs-perspectives-on-international-businesses-paying-their-fair-share-of-tax-2015/>

The role of tax authorities is to uphold the tax laws as written, rather than try to assess taxes based on their perception of what would raise more tax revenue or constitute a “fair share” for an individual taxpayer.

To avoid inconsistencies among national tax systems, more coordination among governments is required. Uncoordinated or unilateral actions by individual countries will lead to increased double taxation, unfair competition and uncertainty over the tax consequences of cross-border transactions and in that way impede and distort international trade and investment to the detriment of all participating countries in the BRI.

ICC therefore recommends collaboration and coordination among governments in the BRI jurisdictions to ensure harmonized and multilaterally agreed systems and approaches that would reduce barriers to trade and investment in the region.

Practical examples/implications:

- There is currently no coherent or systematic approach between BRI countries on foreign tax credits which often leads to double taxation.
- Policies with respect to tax treaties between BRI countries are not harmonised resulting in significant divergence as well as different interpretations, which necessarily lead to high compliance costs for companies and uncertainty.
- There are instances with respect to an annual corporate income tax (CIT) refund process where a law provides for a tax refund within 12 months after the final tax return, however companies are not refunded with the tax over-payments and there is no clear result after tax audit. As a result, companies may treat the CIT as a loss and in turn raise its service price and business cost. In this case, tax administrations should ensure that any tax over-payments are refunded timeously.
- Tax incentives should only be provided under clear legislative provisions. In some instances, countries grant tax incentives without a legal basis for them. Non-transparent application of tax incentives could lead to a greater risk of uncertainty and disputes between tax administrations and tax payers. The Platform for Collaboration on Tax released a toolkit on [Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment](#), which may be a useful reference in this context.

4. Expediting dispute settlement

The need for a robust dispute resolution mechanism

The risk of double taxation discourages cross-border trade and investment and this harms both countries and businesses. At the same time, a large increase in the number of tax disputes is expected in the post-Base Erosion and Profit Shifting (BEPS) era. Therefore, it is imperative that robust dispute resolution procedures are in place to reduce double taxation disputes.

Dispute prevention

ICC believes that mandatory agreements bringing competent authorities into accord on how to tax certain transactions, or, put simply, how to split the ‘tax cake’ are key to dispute prevention. The PRC’s conclusion of 54 Double Tax Treaties with BRI participating states is an important step in this process. ICC supports the PRC’s commitment to facilitate international tax coordination and cooperation, contribute to eliminating discrimination in tax policymaking and implementation, while encouraging more countries to participate in the BEPS project.

Dispute resolution

ICC believes that it is of utmost importance to identify an effective means of resolving taxation conflicts that reflects the law, tax treaties and international best practices and takes into account the interests of tax authorities as well as taxpayers. Deploying the Mutual Agreement Procedure (MAP) or mandatory and binding arbitration, is crucial for the successful implementation of the BEPS recommendations at a local level.

MAPs

The most common dispute resolution mechanism currently found in Double Tax Treaties are MAPs. These serve to prevent taxation which is not in accordance with Double Tax Treaties

through action by one or both contracting states in specific cases. It is an administrative interstate procedure which the taxpayer applies for, and which protects the taxpayer's right to be taxed according to the Double Tax Treaty.

Unlike tax litigation which needs to be pursued at the state level after tax has been assessed, a MAP can be initiated in one of the contracting states to address double taxation. It may be started before tax has been charged or a notification thereof received. However, constitutional and domestic laws may restrict access to MAP. For example, in many jurisdictions, taxpayers need to exhaust domestic remedies or waive the right to these before they can start a MAP.

The legal basis for a MAP is the Double Tax Treaty of the countries involved. Across the board, most Double Tax Treaties are based on the OECD Model Tax Convention. The provisions concerning MAPs are contained in Article 25 of the OECD Model Tax Convention and Article 25 of the UN Model Tax Convention respectively. Unfortunately, not every Double Tax Treaty includes a MAP clause and between many countries there is no Double Tax Treaty in place at all. In those cases, companies that find themselves confronted with double taxation have no possibility to apply for any dispute resolution mechanism other than available domestic remedies.

Arbitration

With regard to strengthening and expanding the application of arbitration procedures, the business community has noted that bilateral investment treaties (BITs) often provide very effective arbitration clauses. Disputes need not be brought to the competent authorities but to the court of a host state directly or to an arbitration tribunal. As such, taxpayers may initiate proceedings themselves.

With particular reference to tax disputes, international arbitration may prove useful to address some of the limitations of existing tax dispute resolution mechanisms, such as the MAP. ICC has unparalleled expertise in this area, combined with a global footprint. ICC can provide [arbitration clauses](#) and services to assist taxpayers and authorities in resolving tax disputes.

The OECD Multilateral Instrument (MLI) provides solutions for governments to close gaps in existing international tax rules by transposing results from the OECD/G20 BEPS Project into bilateral tax treaties worldwide. The MLI modifies the application of bilateral tax treaties concluded to eliminate double taxation and also implements agreed minimum standards to counter treaty abuse and to improve dispute resolution mechanisms. To date 28 jurisdictions have signed up to mandatory binding MAP arbitration.

Mediation

Mediation, being consensual resolution of a dispute with the assistance of a third party neutral, has proved useful in settling tax disputes, particularly over the past decade. ICC has a full suite of [mediation clauses](#) and services, which can be used either in conjunction with arbitration or as a standalone process. Mediation can provide a quick, cheap and private way of resolving most tax disputes.