



**Is Cooperative Compliance a Solution to African Countries?  
A Comparative Analysis based on South Africa and Nigeria**

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Master's Thesis International Business Taxation/LLM

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## Preface

Welcome to my master's thesis titled "Is Cooperative Compliance a Solution to African Countries? A Comparative Analysis based on South Africa and Nigeria". This thesis has been written as the ultimate part of the Master's program in International Business Taxation. Through this work, I hope to demonstrate the theoretical and practical insights I have acquired over the last academic year(s).

By choosing this topic, I chose something that I found (and find) very interesting. However, it was also quite out of my comfort zone, thereby challenging myself and broadening my understanding. During the trajectory of the master thesis, I have deepened my knowledge on the topic, reaching the conclusion that I made the right choice!

I would like to express my gratitude to Dr. Ricardo García Antón for his feedback and guidance throughout the entire process. At times I felt stuck while doing research and writing my thesis; the received feedback and the following discussions were of great usefulness.

*Bram Geurts*

*Rotterdam, 31 May 2024*

## **Abstract**

Over the last decade, the fight against tax avoidance has gained increasing attention, leading to an increasing aspiration to tackle this problem and create a fairer tax environment. Due to the increasing globalization, this problem does not remain limited to domestic issues. As a result, more international standards are created that enhance tax transparency and curb base erosion and profit shifting (BEPS). African countries, whose economies are in general more dependent on tax revenue than more developed countries, experience an additional challenge on this topic: an adequate and timely implementation and enforcement of international standards. This challenge is triggered by the combination of a lack of capacity, low tax morale, and a need to attract foreign investments. To solve this challenge, cooperative compliance programs can provide solutions to a certain extent. By analyzing compliance initiatives that are present in South Africa and Nigeria, it can be concluded that lessons can be learned for these countries as well as other African countries. It is not deemed realistic for African countries to directly introduce a “full” cooperative compliance program. However, based on a comparative analysis of the situation in the selected jurisdictions, a framework of minimum standards for a foundation for cooperative compliance in African countries is compiled. It can be concluded that the underlying challenges that hinder the implementation of international standards can be partly mitigated by introducing initiatives that foster a trust-based relationship between a taxpayer and the tax administration.

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## List of Abbreviations

ADR	Alternative Dispute Resolution
AEOI	Automatic Exchange of Information
ALP	Arm's Length Principle
APA	Advanced Pricing Agreement
ATR	Advance Tax Ruling
BEPS	Base Erosion and Profit Shifting
CbCR	Country-by-Country Reporting
CSR	Corporate Social Responsibility
EOIR	Exchange of Information on Request
EU	European Union
FDI	Foreign Direct Investment
FIRS	Federal Inland Revenue Service
FTA	Forum on Tax Administration
GDP	Gross Domestic Product
HNWI	High Net Wealth Individuals
ICAP	International Compliance Assurance Programme
ISORA	International Survey on Revenue Administration
MAP	Mutual Agreement Procedure
MLI	Multilateral Instrument
MNE	Multinational Enterprise
OECD	Organisation for Economic Co-operation and Development
SARS	South African Revenue Service
SVDP	Special Voluntary Disclosure Programme
TAA 2011	Tax Administration Act No. 28 of 2011
TCF	Tax Control Framework
UNCTAD	United Nations Conference on Trade and Development
VDP	Voluntary Disclosure Programme



## Section 1 – Introduction

### 1.1 Background

As identified by the Organisation for Economic Co-operation and Development (OECD), one of the causes of tax avoidance is the lack of transparency.<sup>1</sup> This means that increased transparency concerning taxation would help in the combat of base erosion and profit shifting. Tax transparency, therefore, has been a hot topic over the last decades. An important international body on this topic is the Global Forum on Transparency and Exchange of Information for Tax Purposes (hereafter: Global Forum). As part of the OECD, this body monitors the implementation of transparency measures (e.g., the exchange of information) in all OECD jurisdictions.<sup>2</sup>

Based on reports of the Global Forum, it can be concluded that developed jurisdictions are further in the process of tax transparency.<sup>3</sup> Besides the standards for tax transparency, other standards that are agreed on in the fight against base erosion and profit shifting (BEPS) are paired with extra challenges for developing countries. Prior research indicates various reasons why the implementation of international standards in developing countries can be challenging.

As identified by Oguttu<sup>4</sup>, challenges arise on this subject in African jurisdictions since the tax systems in these jurisdictions are not homogeneous, and the administrative capacities as well as the economic developments differ heavily per jurisdiction. Due to these varying aspects, an overarching implementation is difficult to achieve.<sup>5</sup> Other challenges identified in the literature are more closely linked to the design of certain transparency mechanisms. For instance, Schoueri and Barbosa<sup>6</sup> mention the criticism that developed jurisdictions would benefit more from the mechanisms than developing jurisdictions.

So, these challenges suggest that the implementation and enforcement of similar measures are easier to achieve in developed countries compared to developing countries. International bodies, like the Global Forum, do acknowledge the mentioned difficulties and therefore launched initiatives to help pioneer the progress concerning the implementation of standards, such as the Africa Initiative.<sup>7</sup>

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<sup>1</sup> OECD, *BEPS Project Explanatory Statement: 2015 Final Reports* (OECD Publishing 2016).

<sup>2</sup> OECD, 'Pioneering Global Progress in Tax Transparency: A Journey of Transformation and Development – 2023 Global Forum Annual Report' (OECD 2023).

<sup>3</sup> *ibid.*

<sup>4</sup> Annet W Oguttu, 'Tax Base Erosion and Profit Shifting in Africa – Part 2: A Critique of Some Priority OECD Actions from an African Perspective' (2016) 70 *Bulletin for International Taxation* 329.

<sup>5</sup> *ibid.*

<sup>6</sup> Luís E Schoueri and Mateus C Barbosa, 'Transparency: From Tax Secrecy to the Simplicity and Reliability of the Tax System' (2013) 5 *BTR* 666.

<sup>7</sup> OECD (n 2).

For developing jurisdictions, a *clash* arises between on the one hand multiple reporting standards, that – if implemented and enforced adequately – result in a fairer tax system with less base erosion and profit shifting that would benefit the tax administration. However, on the other hand, due to the amount and scope of these reporting standards, these jurisdictions face challenges regarding capacity, resources, experience, and the need to attract investments.

In my view, the potential negative consequences of this clash for both taxpayers and tax administration can be mitigated by cooperative compliance approaches. Cooperative compliance means that the taxpayer voluntarily complies with the tax regulations due to the creation of a trust-based relationship with the relevant tax authorities.<sup>8</sup> When this trust is present, and taxpayers voluntarily comply better with the tax regulations, the tax administration can become more effective and efficient. In other words, when the taxpayer and the tax authority have a trust-based relationship, it is more likely that the goals of the taxpayer and tax authority are better aligned: enhancing a fair and efficient tax system. When taxpayers support this goal and are aware of the value that a relationship with the tax administration can provide, the resources of the tax administration can be assigned more efficiently, optimizing the (limited) resources and capacity.

Moreover, when taxpayers and the tax authority cooperate better, I expect that the implementation of new reporting standards will become smoother. The cooperative compliance approach is supported by the OECD as it created a framework for cooperative compliance. The report written by the Forum on Tax Administration (FTA), posits that cooperative compliance is indeed valuable.<sup>9</sup> Therefore, it is interesting to evaluate whether and to what extent cooperative compliance is present in the jurisdictions that experience this clash and how other African countries can implement similar initiatives.

## 1.2 Research question

The research question that is answered in this paper is: *Can cooperative compliance programs improve transparency in African countries?* By evaluating what cooperative tax compliance approaches are present in these jurisdictions, potential differences and similarities can be identified. By looking at the effect on tax enforcement in the jurisdictions, I identify the implications and value of cooperative tax compliance approaches. So, an additional question is answered, namely whether cooperative tax compliance is a useful tool to (partly) mitigate the clash between lower resources, capacity, and experience, and the number of reporting standards that are implemented.

To provide an answer to the research question, the following sub-questions are answered:

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<sup>8</sup> Mário H Martini and Suranjali Tandon, 'A Review of India Approaches to Cooperative Compliance in Light of the International Tax Practice and the OECD Framework' (2023) 51 Intertax 667.

<sup>9</sup> OECD, *Co-operative Tax Compliance: Building Better Tax Control Frameworks* (OECD Publishing 2016).

- What are the challenges that African countries face with tax avoidance, and with the implementation of anti-avoidance measures?
- What is the definition of cooperative compliance, and what elements does it consist of?
- How do the benefits of cooperative compliance relate to the identified challenges?
- What 'trust-based' tax compliance measures are in place in South Africa and Nigeria, and to what extent do these measures qualify as cooperative compliance based on the elements?
- What recommendations can be made for other African countries based on the experiences in the selected countries?

### 1.3 Claim

Cooperative compliance provides multiple advantages to tax administrations and taxpayers in African countries. It can be seen as a win-win situation, leading to benefits for the involved parties and eventually be advantageous for the entire economy of African countries. Building a trust-based relationship between tax administration and taxpayers can provide the following benefits. The efficiency of the allocation of its limited resources can be increased by the tax administration getting a better understanding of the taxpayer and its surroundings. Moreover, risk assessments of taxpayers enable the tax administration to apply differentiated treatments for low-risk and high-risk taxpayers. Furthermore, the tax morale of taxpayers is likely to increase when there is mutual trust due to mutual clarity and transparency. Challenges related to specific challenges can also be easier addressed by the exchange of knowledge and experience on complex topics such as the arm's length principle. Lastly, if the tax administration succeeds in providing and maintaining a high level of tax certainty for the taxpayers, this can function as an incentive for foreign investors to invest in this jurisdiction.

The claim in this paper, therefore, is:

*Cooperative compliance programs are the solution for African countries that encounter problems through the implementation of international standards on tax transparency and tax avoidance.*

### 1.4 Research Methodology

For the first part of this thesis, I conduct a literature review on the topics: tax avoidance (in Africa), implementation problems concerning anti-tax avoidance measures of African countries, and the concept of cooperative compliance.

The methodology in this study is mainly comparative. A comparative analysis is conducted of a selection of two African countries. The countries that have been selected are South Africa and Nigeria. This selection is the result of three criteria: (1) level of economic development, (2) language of primary data, and (3) size of the economy. Since the clash between limited resources and tax compliance is used as a central theme in this paper, the selection is partly based on the level

of economic development. Developing jurisdictions are more likely to have fewer resources and therefore are more likely to experience the mentioned clash. South Africa and Nigeria can be considered as developing countries,<sup>10</sup> as part of the Brics countries South Africa can be seen as a leading emerging economy. South Africa, therefore, has been selected because it potentially gives insights into whether the development of a country has an impact on the effect of cooperative tax compliance. Moreover, another criterion is that the primary data (e.g., tax regulations) are available in the English language. Lastly, the jurisdictions are selected based on the size of the economy. A bigger economy suggests that there are more/bigger taxpayers; in the context of cooperative tax compliance taxpayers play an important role.

To provide an answer to the research question, the (potential) cooperative tax compliance approaches identified for each selected jurisdiction are compared to requirements of cooperative compliance. I.e., cooperative tax compliance is used as a benchmark in this paper. For this part, I use the structure of the paper written by Martini and Tandon<sup>11</sup>.

## 1.5 Main Findings

African countries face many BEPS-related challenges. The impact of tax avoidance, tax treaty abuse, and profit shifting via transfer pricing on tax revenue is relatively high compared to other, more developed countries. Some of these challenges are also acknowledged and addressed by the OECD, mainly on an international level by providing guidelines for standards to combat tax avoidance and profit shifting activities. However, the implementation of these standards also provides difficulties for African countries. Cooperative compliance is the solution for these countries to address and overcome the abovementioned challenges. Based on the requirements of cooperative compliance programs and a comparative analysis in two African countries on cooperative initiatives, a set of minimum standards is created. This set of minimum standards can function as a guide for African countries that do not have cooperative compliance programs in place. These minimum standards are focused on four main aspects: a focus on large taxpayers and voluntariness, the ability to agree to disagree, the presence of adequate risk management, and the creation of an environment wherein trust-based relationships are encouraged.

## 1.6 Interplay

The interplay that exists for this subject and that is reflected in this paper is mainly the interplay between international tax law and domestic tax law. The OECD BEPS Action Plan calls for the implementation of new and improved international standards. The translation and implementation

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<sup>10</sup> UN, 'Country classification' (2014). [https://www.un.org/en/development/desa/policy/wesp/wesp\\_current/2014wesp\\_country\\_classification.pdf](https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf) accessed 21 May 2024; WorldData, 'Developing Countries' (*WorldData.info*, May 2024) <https://www.worlddata.info/developing-countries.php> accessed 21 May 2024.

<sup>11</sup> Martini and Tandon (n 8).

of these international standards into domestic law are experienced as challenging.<sup>12</sup> Since the implementation in domestic law is analyzed for the selected countries, this interplay is present. Furthermore, the topics of tax avoidance and measures against tax avoidance are both of economic and legal nature.

## **1.7 Relevance**

On an academic level, I hope that this paper attributes to the existing literature on cooperative tax compliance in Africa. Cooperative compliance seems to receive increasing interest over the last years. However, most of the studies that have been conducted on cooperative compliance are predominantly focused on more developed countries, the literature on cooperative compliance in developing countries is, therefore, less extensive. Comparing the cooperative compliance approaches in the selected jurisdictions with the elements of cooperative compliance hopefully provides useful insights.

On a practical level, I try to improve the understanding of cooperative compliance; its application, and its impact. This could be useful for both tax administrations and taxpayers. Furthermore, assessing and comparing different approaches could be helpful in the understanding and implementation of tax administrations and policymakers of African countries without cooperative compliance initiatives in place. By creating minimum standards for African countries without structured cooperative compliance approaches in place, I aim to provide policymakers with practical advice.

## **1.8 Limitations**

This study has some limitations. First, the study in this paper has been completely based on already available information. Meaning that no contact has taken place with, for instance, the tax authorities of the selected countries. Interviews with relevant persons could, for instance, have provided useful and more specific insights. Second, this paper concludes with a set of minimum standards that is recommended to be implemented by African countries, regarding the creation of this set of standards the differences on a cultural, political, sociological (etc.) level between jurisdictions are not directly taken into account. Lastly, the selection of analyzed countries in certain sections of this paper is limited due to the availability of data.

## **1.9 Outline**

In Section 2, the concepts of tax avoidance and tax transparency are discussed. Furthermore, the challenges regarding tax avoidance and anti-tax avoidance measures that are experienced by African countries are identified and analyzed.

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<sup>12</sup> Alicja Majdańska, *An Analysis of Cooperative Compliance Programmes* (IBFD 2021).

In Section 3, the benchmark, the concept of cooperative compliance, is defined by analyzing the background of different cooperative compliance approaches. Moreover, the most important requirements for a cooperative compliance program are identified. Lastly, arguments are provided showing that cooperative compliance is the solution to African countries.

In Section 4, a comparative analysis is conducted regarding the cooperative compliance features that are present in initiatives in South Africa and Nigeria. This way, it is analyzed whether the initiatives can be classified as cooperative compliance.

In Section 5, based on the analysis in Section 4, it is concluded whether the initiatives in these countries can be useful in the formulation of minimum standards for other African countries. For African countries without a cooperative compliance approach in place, or that are currently in the process of implementing this approach, recommendations are made in the form of a framework including minimum standards for the implementation of cooperative compliance.

In Section 6, this paper is concluded with a summary of the research paired with the claim, and ideas for further research are discussed.

## Section 2 – Tax Avoidance and Tax Transparency in Africa

### 2.1 Tax Avoidance and Tax Transparency

#### 2.1.1 Tax Avoidance

For governments all over the world is taxation a highly important form of (fiscal) revenue creation. On the other side of the receiver, is the taxpayer - in the case of corporate tax: firms. For firms, however, taxation often is a significant cost.<sup>13</sup> From the perspective of a firm, that likely takes an accounting point of view, the amount of taxes that are paid have a direct impact on the profitability of this firm, affecting the shareholder value.<sup>14</sup> To maximize its profit, a firm will therefore try to lower its tax burden. This lower tax burden would result in the fact that a firm keeps more 'resources within the company that would otherwise go to the government'.<sup>15</sup> Therefore, these activities are highly undesirable for governments, simply because governments miss out on fiscal revenue. The activities wherein firms engage to lower their tax burden can be classified as tax avoidance. Tax avoidance can be accomplished by taking 'advantage of a tax law or the absence of it, which is contrary to the spirit or purpose of tax law'.<sup>16</sup>

In the light of tax avoidance, the concept of illicit financial flows (IFFs) is closely related. Illicit financial flows are defined as 'money that is illegally earned, transferred, or utilized. Somewhere at its origin, movement, or use, the money broke laws and hence it is considered illicit'.<sup>17</sup> The three main forms of IFFs are<sup>18</sup>:

- The proceeds of theft, bribery and other forms of corruption by government officials;
- The proceeds of criminal activities including drug trading, racketeering, counterfeiting, contraband, and terrorist financing, and
- The proceeds of tax evasion and laundered commercial transactions.

Looking at how the concepts of tax avoidance and IFF relate to each other, it can be concluded that the terms are not completely synonymous. Only a share of the total IFFs is directly related to tax avoidance, and more specifically, tax evasion, since tax evasion is also characterized by its illicitness.

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<sup>13</sup> Fangjun Wang and others, 'Corporate Tax Avoidance: A Literature Review And Research Agenda' (2019) 34 *Journal of Economic Surveys* 793.

<sup>14</sup> E.g., Suzanne Landry, Manon Deslandes and Anne Fortin, 'Tax Aggressiveness, Corporate Social Responsibility, and Ownership Structure' (2013) 14 *Journal of Accounting, Ethics & Public Policy* 611.

<sup>15</sup> Wang and others (n 13).

<sup>16</sup> Mika Nissinen, 'From Evasion to Avoidance: The Historical Evolution of the OECD Model in Addressing Tax Abuse' (2021) 75 *Bulletin for International Taxation* 485.

<sup>17</sup> UNECA, 'The State of Governance in Africa: The Dimension of Illicit Financial Flows as a Governance Challenge' (2013).

<sup>18</sup> *ibid.*

### 2.1.2 Tax Planning, Tax Evasion, and Tax Abuse

There seems to be no commonly accepted definition of tax avoidance in the literature. However, based on the various definitions provided in the literature a demarcation of the concept is present. The activities that classify as tax avoidance can, in general, take two main forms: tax planning and tax evasion. These forms can be differentiated based on the level of aggressiveness of the tax avoidance actions undertaken by taxpayers. Tax planning is the overall term for legal tax avoidance activities; a firm accomplished lower a lower tax burden while acting in accordance with the tax law.<sup>19</sup> These activities are characterized by a low level of aggressiveness and is also referred to as tax minimization.<sup>20</sup> On the other side, there is tax evasion. Tax evasion are aggressive activities that are out of the scope of tax law.<sup>21</sup> Thus, firms undertake illegal activities to lower their tax burden, leading to lower taxation and, eventually, lower tax revenue for governments.

Next to these two types of tax avoidance, an extra type is mentioned in some of the existing literature. This is the concept of tax abuse. Tax abuse is in line with tax planning since the actions do not have to meet the condition of illegality.<sup>22</sup> Tax abuse can be seen as arrangements focused on the avoidance of tax that are not (strictly) illegal but are morally objectionable.<sup>23</sup>

In this paper, the tax avoidance of MNEs plays a central role. Since MNEs operate in a cross-border situation, we see that firms engage in activities to exploit differences in tax systems to achieve a lower tax burden. For this type of tax avoidance, the European Commission has provided a useful definition. The European Commission states that:

Aggressive tax planning consists in taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability. ... Its consequences include double deductions ... and double non-taxation.<sup>24</sup>

### 2.1.3 Tax Transparency

Transparency can be defined as ‘the perceived quality of intentionally shared information from a sender’.<sup>25</sup> As this is a broad definition of transparency, an adjusted definition that is more applicable in the context of this paper is used. Tax transparency can be seen as the level of disclosure that a

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<sup>19</sup> Nissinen (n 16).

<sup>20</sup> Christine A Alvarrenga, ‘Preventing tax avoidance: is there convergence in the way countries counter tax avoidance?’ (2013) 67 Bulletin for International Taxation 348.

<sup>21</sup> Nissinen (n 16).

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.*

<sup>24</sup> Commission Recommendation 2012/772/EU of 6 December 2012 on aggressive tax planning [2012] OJ L 338/41.

<sup>25</sup> Andrew K Schnackenberg and Edward C Tomlinson, ‘Organizational Transparency: A New Perspective on Managing Trust in Organization-Stakeholder Relationships’ (2016) 42 Journal of Management 1784.



business provides on its – tax-related – business activities to its stakeholders, government agencies, and the public.<sup>26</sup> On a policy level, tax transparency is regarded as a useful instrument to partly mitigate – international – tax avoidance.<sup>27</sup> The idea behind this claim is that one of the reasons that MNEs can engage in tax avoidance arrangements (e.g., the use of tax havens and preferential tax regimes) is due to a lack of transparency.<sup>28</sup> An example of this lack of transparency is that MNEs do not disclose where profits are generated and where the tax on these profits is paid. Therefore, from a government's point of view, increased tax transparency should lead to a higher burden for MNEs to participate in tax avoidance activities, resulting in a fairer tax system.

## 2.2 OECD Measures on Tax Transparency and Tax Avoidance

Especially over the last decade, we have seen an increase in reporting standards that are created to fight tax avoidance. The reporting standards that are mainly discussed in this thesis are the OECD BEPS Action Plan and the GloBE Rules (Pillar Two). As mentioned above, tax transparency can help in the fight against base erosion and profit shifting. This effect can be seen in the fact that part of the measures on tax avoidance are focused on tax transparency, e.g., Country-by-Country Reporting (CbCR). Moreover, the OECD also introduced standards that are completely focused on the enhancement of transparency. The standards that are discussed in this paper are the standards on transparency and exchange of information on request (EOIR) and automatic exchange of financial account information (AEOI).

### OECD BEPS Action Plan

Due to increasing globalization, domestic tax rules increasingly “interact with each other”. This interaction, however, leads to gaps and frictions. Which in turn, could lead to double taxation, double non-taxation, and double deduction, which are all undesirable.<sup>29</sup> The OECD acknowledges the existence of these gaps and mismatches in national and international tax rules.<sup>30</sup> It mentions that tax avoidance can take place as a consequence, since ‘profits “disappear” for tax purposes, or allow the shifting of profits to no or low-tax locations where the business has little or no economic activity’.<sup>31</sup> The OECD introduced the term Base Erosion and Profit Shifting (BEPS) for these phenomena. In the fight against BEPS, the OECD created an action plan containing 15 measures: the OECD BEPS Actions.<sup>32</sup> The OECD BEPS Actions are based on three fundamental pillars<sup>33</sup>:

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<sup>26</sup> *ibid*; Annet W Oguttu, ‘Curtailling BEPS through Enforcing Corporate Transparency: The Challenges of Implementing Country-by-Country Reporting in Developing Countries and the Case for Making Public Country-by-Country Reporting Mandatory’ (2020) 12 World Tax Journal 167.

<sup>27</sup> Oguttu (n 26).

<sup>28</sup> *ibid*.

<sup>29</sup> OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD publishing 2013).

<sup>30</sup> OECD, ‘OECD/G20 Base Erosion and Profit Shifting Project: 2015 Final Reports Information Brief’ (OECD 2015).

<sup>31</sup> *ibid*.

<sup>32</sup> OECD (n 29).

<sup>33</sup> OECD (n 30).

- Introducing coherence in the domestic rules that affect cross-border activities;
- Reinforcing substance requirements in the existing international standards; and
- Improving transparency, as well as certainty for businesses that do not take aggressive positions.

### GloBE Rules (Pillar Two)

More recently, the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting introduced Pillar Two.<sup>34</sup> Similar to the OECD BEPS Actions, this measure mainly focuses on curtailing base erosion and profit shifting.<sup>35</sup> Under Pillar Two, a minimum effective tax rate of 15% is agreed upon for MNE groups that meet a certain revenue threshold. The main focus of Pillar Two is that MNEs pay their fair share, meaning that taxes are paid where the related profits are generated.<sup>36</sup> By introducing these rules, the jurisdictions that joined this initiative aim to avoid that large MNEs shift their profit toward jurisdictions with a low tax rate. Namely, under Pillar Two, when the effective tax rate of an MNE is lower than 15%, this will result in a top-up tax to be paid by this MNE to reach an effective tax rate of 15%.<sup>37</sup>

### Exchange of Information

An effective and efficient exchange of information on tax matters is regarded as an effective tool to increase tax transparency, which in turn, contributes to the fight against tax avoidance.<sup>38</sup> The standards of transparency and exchange of information are represented in the OECD Model Agreement on Exchange of Information on Tax Matters.<sup>39</sup> The OECD mentions three main components of the exchange of information<sup>40</sup>:

- The information should be available;
- The relevant authorities must have access to this information; and
- There should be a basis for the exchange in the form of adequate mechanisms.

The introductions of these measures illustrate the increasing number of standards and measures that are agreed on and that countries, therefore, have to implement. This trend is also mentioned by

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<sup>34</sup> Tjeerd van den Berg, Marcel Kriek and Ying Than, 'Tax Challenges Arising from the Digitalization of the Economy: The Calculation of the Effective Tax Rate – Pillar Two versus Financial Accounting' (2022) 29 *International Transfer Pricing Journal* <[https://research-ibfd.org.tilburguniversity.idm.oclc.org/#/doc?url=/document/itpj\\_2022\\_07\\_int\\_2](https://research-ibfd.org.tilburguniversity.idm.oclc.org/#/doc?url=/document/itpj_2022_07_int_2)> accessed 10 May 2024.

<sup>35</sup> *ibid.*

<sup>36</sup> OECD, 'Minimum Tax Implementation Handbook (Pillar Two)' (OECD 2023).

<sup>37</sup> *ibid.*

<sup>38</sup> Annet W Oguttu, 'A Critique on the Effectiveness of "Exchange of Information on Tax Matters" in Preventing Tax Avoidance and Evasion: A South African Perspective' (2013) 68 *Bulletin for International Taxation* 2.

<sup>39</sup> OECD, *Implementing the Tax Transparency Standards: A Handbook for Assessors and Jurisdictions* (2<sup>nd</sup> Edition, OECD Publishing 2011).

<sup>40</sup> *ibid.*

Devereux and others<sup>41</sup>, 'the existing regime is undergoing a sustained period of review and reform, although this has so far resulted mostly in the introduction of a number of new rules and a tightening of existing rules.' I expect that the process of introduction and tightening of rules is likely to continue in the future. The reason therefore is the continuously changing and developing environment wherein taxpayers and tax administrations operate. The emergence of crypto assets is an example of a topic that results in the need for new or renewed rules. Hence, for countries it should be a priority to create the correct foundation that enables domestic economies to adapt to this increasing number of international standards.

## 2.3 Challenges in African countries

### 2.3.1 Tax Avoidance in Africa

Like many countries worldwide, African countries have been, and are, negatively impacted by base erosion and profit shifting.<sup>42</sup> The engagement of MNEs in tax avoidance schemes results in significant tax revenue losses for African countries.<sup>43</sup> An additional problem for developing countries, thus including African countries, is the fact that the reliance on corporate tax revenue is higher relative to more developed countries.<sup>44</sup> African countries consider taxation as a highly important source of income to facilitate their economic development.<sup>45</sup> Investments connected to achieving the sustainable development goals (SDGs) are, for instance, partly financed via tax revenue.<sup>46</sup> In a report of the United Nations Conference on Trade and Development (UNCTAD) it is stated that Africa loses almost €90 billion via IFFs per year,<sup>47</sup> equal to 3.7% of the GDP of Africa.<sup>48</sup> Although IFFs and tax avoidance are not fully synonymous, it does provide an image of the problems African countries encounter. Scholars have provided different figures on the economic impact of tax avoidance on all African countries. An illustration of the severity on a domestic level is the fact that in Nigeria 30% of the companies engage in tax evasion and more notifying is that 25% of the registered companies do not even pay any tax.<sup>49</sup>

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<sup>41</sup> Michael P Devereux and others, *Taxing Profit in a Global Economy* (OUP 2021).

<sup>42</sup> Annet W Oguttu, 'OECD's Action Plan on Tax Base Erosion and Profit Shifting: Part 1 – What Should Be Africa's Response?' (2015) 69 *Bulletin for International Taxation* 653.

<sup>43</sup> *ibid.*

<sup>44</sup> OECD, 'What is BEPS?' (OECD.org) <<https://www.oecd.org/tax/beps/about/#:~:text=BEPS%20refers%20to%20tax%20planning,such%20as%20interest%20or%20royalties>> accessed 15 May 2024.

<sup>45</sup> Annet W Oguttu, *Base Erosion and Profit Shifting: A Blueprint for Africa's Response* (IBFD 2021).

<sup>46</sup> *ibid.*

<sup>47</sup> UNCTAD, *Tackling illicit financial flows for sustainable development in Africa* (United Nations Publications 2020).

<sup>48</sup> OECD, 'Tax Transparency in Africa 2023 – Africa Initiative Progress Report' (OECD 2023).

<sup>49</sup> OXFAM, 'Fair Tax Monitor – Nigeria' (Augustus 2019) <[https://cng-cdn.oxfam.org/nigeria.oxfam.org/s3fs-public/file\\_attachments/FTM%20Report%20Final.pdf](https://cng-cdn.oxfam.org/nigeria.oxfam.org/s3fs-public/file_attachments/FTM%20Report%20Final.pdf)> accessed 27 May 2024.

In Africa, certain specific types of base erosion and profit shifting can be identified that lead to significant economic challenges. One of these methods is base erosion and profit shifting via the export of commodities. A large share of African countries is characterized by the fact that they are “natural resource-rich”.<sup>50</sup> The countries are partly dependent on the export of commodities. Of the 54 African countries, in 46 of them the export of commodities accounts for at least 60% of the total export.<sup>51</sup> For developing countries, it is found difficult to establish the fair price of commodities, as a result ‘they lose substantial amounts of revenue from transfer pricing of commodities by multinational enterprises’.<sup>52</sup> Research shows that sub-Saharan countries, which are heavily dependent on their mining sector, lose \$730 million due to profit shifting by MNEs in the mining sector on an annual basis.<sup>53</sup> The arm’s length principle (ALP) addresses this challenge, however, African countries are not always able to apply this due to its complexity. As a result, mispricing is a regular occurrence, e.g., a subsidiary of an MNE transfers commodities to related parties for a low, not at arm’s length price.<sup>54</sup> Apart from mispricing the sale price, also the quantity or weight and even the nature of commodities is manipulated. Based on figures of the UNCTAD<sup>55</sup>, it can be concluded that at least \$40 billion of IFFs are commodity-related, therefore, the conclusion can be drawn that the mispricing of goods and commodities is an alarming problem. This problem is reaffirmed by the fact that the mispricing of trades accounts for approximately 50% of IFFs in African countries.<sup>56</sup> As well as, the estimation that 25% of all trades in developing countries is not correctly priced.<sup>57</sup>

Analyzing it more broadly, not only the mispricing of commodities is a significant problem of African countries, but also transfer pricing in general. The impact of transfer pricing on the economics of African countries has been studied by several scholars. UNCTAD<sup>58</sup> provides an overview of the estimated annual costs found in these studies. The estimate of the annual cost of transfer pricing manipulation for Africa ranges from \$4.8 to \$55.4 billion. We see that the tax legislation on transfer pricing in Africa is improving, but especially the enforcement is challenging.

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<sup>50</sup> UNECA, ‘Base Erosion And Profit Shifting In Africa: Reforms to Facilitate Improved Taxation of Multinational Enterprises’ (January 2018) <[https://archive.uneca.org/sites/default/files/PublicationFiles/base-erosion\\_rev.pdf](https://archive.uneca.org/sites/default/files/PublicationFiles/base-erosion_rev.pdf)> accessed 29 May 2024.

<sup>51</sup> UNCTAD (n 47).

<sup>52</sup> UNECA (n 50).

<sup>53</sup> Giorgia Albertin, Dan Devlin and Boriana Yontcheva, ‘Countering Tax Avoidance in Sub-Saharan Africa’s Mining Sector’ (*imf.org*, 5 November 2021) <<https://www.imf.org/en/Blogs/Articles/2021/11/05/blog-countering-tax-avoidance-sub-saharan-africa-mining-sector>> accessed 29 May 2024.

<sup>54</sup> Pietro Guj and others, ‘Transfer Pricing in Mining with Focus on Africa’ (January 2017) <<https://documents1.worldbank.org/curated/en/213881485941701316/pdf/112344-REVISED-Transfer-pricing-in-mining-with-a-focus-on-Africa-a-briefing-note-Web.pdf>> accessed 29 May 2024.

<sup>55</sup> UNCTAD (n 47).

<sup>56</sup> Irene Musselli, Elisabeth B Bonanomi and Anu Lannen, ‘The price of fairness: Tackling mispricing of commodity exports from poor countries’ (2022) CDE Policy Brief 19 <[https://www.cde.unibe.ch/research/cde\\_series/policy\\_briefs/the\\_price\\_of\\_fairness\\_tackling\\_mispricing\\_of\\_commodity\\_exports\\_from\\_poor\\_countries/index\\_eng.html](https://www.cde.unibe.ch/research/cde_series/policy_briefs/the_price_of_fairness_tackling_mispricing_of_commodity_exports_from_poor_countries/index_eng.html)> accessed 29 May 2024.

<sup>57</sup> *ibid.*

<sup>58</sup> UNCTAD (n 47).

Guj and others<sup>59</sup> posit that in various countries the legislation on TP is not paired with adequate guidance and systems, making the application difficult; many countries do not possess sufficient TP-specific expertise to deal with its complexity (this is already illustrated concerning the application of ALP); for the application of TP legislation, there are often too few reliable comparables databases; the majority of African countries do not have specific TP units within their tax administration; and industry-specific knowledge is often not sufficiently present at the tax administration.

Treaty-shopping is also considered to be a significant problem for African countries. African countries typically have limited numbers of tax treaties. The problems that an African country can face as a consequence are illustrated by a study of SOMO<sup>60</sup> into tax treaties of Mozambique. Mozambique only has 10 tax treaties; foreign investors not from one of these 10 countries should therefore be out of the scope of the conditions that are included in these treaties. However, we see that foreign investors from these non-signatory countries set up shell companies in countries that do have a tax treaty with Mozambique, e.g., the United Arab Emirates which is considered a tax haven. These foreign investors can, thus, via this way take advantage of this treaty, which leads to Mozambique missing out on tax revenue. This treaty shopping can take place due to the relatively unfavorable terms in Mozambique's tax treaties. African countries have, in the past, signed tax treaties with the belief that this would lead to more FDI. Due to this belief, they accepted fewer taxing rights in these treaties.<sup>61</sup> Besides, due to lower experience in the negotiation of tax treaties, many treaties of African countries contain provisions that are unfavorable for them, but instead favorable for the treaty-partner.<sup>62</sup> This is for instance illustrated by the low withholding tax rates on dividends, interest, and royalties of Mozambique. As a result, it is estimated that Mozambique lost almost \$2 billion of tax revenue regarding withholding over the last decade.<sup>63</sup> This immense tax revenue loss in only one country shows the scope of this problem for African countries with limited, unfavorable tax treaties.

African countries have, thus, limited tax treaties, and the tax treaties that they have in place, are not always beneficial. Since a tax treaty is an instrument between two countries, these treaties have to be (re)negotiated. On this topic, we see that African countries are not experienced enough and lack

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<sup>59</sup> Guj and others (n 54).

<sup>60</sup> Jasper van Teeffelen and others, 'How Mozambique's tax treaties enable tax avoidance' (March 2023) <<https://www.somo.nl/wp-content/uploads/2023/03/How-Mozambiques-tax-treaties-enable-tax-avoidance1.pdf>> accessed 29 May 2024.

<sup>61</sup> Oguttu (n 45).

<sup>62</sup> *ibid.*

<sup>63</sup> Van Teeffelen and others (n 60).

expertise.<sup>64</sup> This could eventually endanger ‘developing countries’ capacity to be effective treaty partners’.<sup>65</sup>

African countries are, thus, heavily impacted by the tax avoidance of MNEs. The measures that are designed to curb this tax avoidance are also not without any challenges for these countries.<sup>66</sup> All the challenges that African countries face result in some sort of *clash*. Since (corporate) tax revenue is of significant importance for African governments, tax avoidance is highly undesirable. Regulations and measures curbing tax avoidance and promoting transparency are therefore needed. Therefore, the trend that is present where the increasing number of international reporting standards are agreed upon seems a positive development. However, the implementation and enforcement of - part of - these standards are experienced as highly challenging due to, for instance, a lack of tax administrative capacity and the need for foreign investments.<sup>67</sup>

### 2.3.2 Underlying Challenges

To get a better understanding of the difficulties regarding the implementation and enforcement of international reporting standards that are encountered by African countries, the most impactful underlying challenges are discussed.

First, a challenge that the majority of African countries encounter by tax avoidance and the fight against it, is a **lack of capacity**.<sup>68</sup> Under capacity, ‘personnel capacity, technical knowledge and economic means’ are understood.<sup>69</sup> I believe that this lack of technical and administrative capacity can be regarded as the biggest challenge, since this challenge seems to arise in all steps of the process of – fighting – tax avoidance. Epaphra and Massawe<sup>70</sup> state that a low capacity results in lower tax revenue, since authorities are unable to adequately react to and act on tax evasion. Moreover, this challenge is also present in the implementation of complex international rules such as OECD BEPS,<sup>71</sup> an example is the lower ability to negotiate tax treaties.<sup>72</sup> Lastly, even when rules are present, the lack of capacity impacts the ability that these rules can be enforced and the ability to ensure that taxpayers comply with these rules.<sup>73</sup> This enforcement problem can be illustrated by the fact that African countries are limited in conducting tax audits due to this lack of capacity.

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<sup>64</sup> Oguttu (n 45).

<sup>65</sup> UN, *United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries* (2013).

<sup>66</sup> Oguttu (n 42); Irene Burgers and Irma JM Valderrama, ‘Corporate Taxation and BEPS: A Fair Slice for Developing Countries’ (2017) 10 *Erasmus Law Review*.

<sup>67</sup> *ibid*.

<sup>68</sup> Manamba Epaphra and John Massawe ‘Corruption, governance and tax revenues in Africa’ (2017) 13 *Business and Economic Horizons* 439; Burgers and Valderrama (n 66); Oguttu (n 42).

<sup>69</sup> Burgers and Valderrama (n 66).

<sup>70</sup> Epaphra and Massawe (n 68).

<sup>71</sup> Burgers and Valderrama (n 66).

<sup>72</sup> Oguttu (n 42).

<sup>73</sup> Oguttu (n 45).

Second, in African countries **corruption** is regarded as a substantial problem in the generation of tax revenue.<sup>74</sup> Estimates on the monetary losses of African countries due to corruption, show a staggering amount of almost \$150 billion each year.<sup>75</sup> When corruption is present, for example within the tax administration, engagement in tax avoidance – and more specifically tax evasion – is encouraged.<sup>76</sup>

Third, closely related to the challenge of corruption, is the fact that many African countries are characterized by a **large informal economy**.<sup>77</sup> Epaphra and Massawe<sup>78</sup> posit that the presence of corruption can lead to a higher informal economy. Due to this large informal economy, the generation of tax revenue is more difficult.<sup>79</sup>

Fourth, the inability of African countries to address the problems related to tax avoidance leads to **low tax morale**. The **lack of clarity and transparency** that taxpayers experience impacts tax avoidance.<sup>80</sup> This tax avoidance, in turn, leads to a lower level of trust that taxpayers experience in the domestic tax systems.<sup>81</sup> These challenges are also paired with a ‘lack of sense of civic responsibility amongst the taxpayers’.<sup>82</sup>

Fifth, Oguttu<sup>83</sup> mentions that challenges arise due to the presence of **limited relevant international tax laws**. In the past, the majority of African countries have mainly focused on domestic activities, leading to tax systems that are tailored to domestic situations.<sup>84</sup> This domestic focus in combination with the increasing globalization resulted in the fact that African countries, in the recent past, had to move towards a more international-focused tax system.<sup>85</sup> Another challenge, in line with the aforementioned, has been the low number of tax treaties that were in place, since it was regarded as a limitation of taxing rights by African countries.<sup>86</sup> The little experience regarding these tax systems renders it difficult for these countries to accomplish this change.

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<sup>74</sup> Epaphra and Massawe (n 68); Burgers and Valderrama (n 66).

<sup>75</sup> African Development Bank Group, ‘International Anti-Corruption Day: AfDB calls for stronger measures in Africa’ (*afdb.org*, 10 December 2015) <<https://www.afdb.org/en/news-and-events/international-anti-corruption-day-afdb-calls-for-stronger-measures-in-africa-15205>> accessed 29 May 2024.

<sup>76</sup> Epaphra and Massawe (n 68).

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

<sup>79</sup> Oguttu (n 42).

<sup>80</sup> Ramat T Salman and others, ‘Governance Transparency of Tax Revenue Performance in West Africa’ (2022) 6 *Business Ethics and Leadership* 14.

<sup>81</sup> Oguttu (n 42).

<sup>82</sup> OXFAM (n 49).

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

### 2.3.3 Implementation and BEPS Challenges

Based on the available information on the progress of the implementation of OECD BEPS, Table 2.1 is created. For the most up-to-date information, the *BEPS Country Monitor* of IBFD is used. A note should be placed that more African countries are part of the OECD/G20 Inclusive Framework on BEPS, and therefore committed to the BEPS measures. However, due to the accessibility of the information only the 9 countries that are monitored by the IBFD are included.

*Table 2.1: A simplified overview of the progress of OECD BEPS Actions implementation in African countries.<sup>87</sup>*

	Egypt	Gabon	Ivory Coast	Kenya	Mauritius	Morocco	Nigeria	South Africa	Tunisia
Action 1	✓	✓	✓	Partial			✓	✓	
Action 2								Partial	
Action 3	✓				✓			✓	
Action 4*	✓	✓	✓	✓			✓	✓	
Action 5	Partial			Partial	✓	Partial	Partial	Partial	
Action 6	✓	Partial	Partial	✓	✓	Partial	✓	✓	Partial
Action 7	✓			✓			✓	✓	
Action 8	✓	✓	✓	✓	Partial	✓	✓	✓	✓
Action 9**									
Action 10**									
Action 11**									
Action 12								✓	
Action 13	✓	✓	✓	✓	Partial	✓	✓	✓	✓
Action 14	Partial			Partial	✓	✓	✓	✓	✓
Action 15	✓	✓	✓	✓	✓	✓	✓	✓	✓

Note: \*Additional data from OECD has been used.<sup>88</sup>; \*\*The progress of these actions is not included, due to limited data provided.

Table 2.1 provides a clear image of the fact that the monitored countries do not have all the OECD BEPS Actions implemented. It can be concluded that differences are present across countries, but also across actions. Moreover, it is interesting to note that the included countries are not among the

<sup>87</sup> IBFD, 'OECD – BEPS Country Monitor' (20 March 2024) <[https://research-ibfd-org.tilburguniversity.idm.oclc.org/#/doc?url=/document/beps\\_o2](https://research-ibfd-org.tilburguniversity.idm.oclc.org/#/doc?url=/document/beps_o2)> accessed 16 May 2024.

<sup>88</sup> OECD, 'Interest Limitation Rules (ILR)' (OECD.org) <<https://qdd.oecd.org/subject.aspx?Subject=ILR>> accessed 16 May 2024.



African countries with the lowest GDP (per capita).<sup>89</sup> The fact that the challenges for African countries are partly capital-driven, it is not unthinkable that the African countries with a lower GDP face the challenges even stronger.

Based on Table 2.1, the progress on the implementation of Action 2 and 12 are remarkable. Of the nine monitored countries, only South Africa has implemented the standards of these measures. Action 2 (focusing on tax arbitrage via hybrid mismatches arrangements) and Action 12 (focusing on mandatory disclosure rules) are not directly prioritized by African countries.<sup>90</sup> Regarding Action 2, the complexity of the tax rules associated with hybrid mismatches can be seen as the most significant challenge which holds African countries back to sufficiently comply with the standards.

Due to the availability of information and to keep this thesis a decent length, the main focus in this section is on the four BEPS actions that are part of the minimum standards: Action 5, Action 6, Action 13, and Action 14. Since the OECD provides peer review reports on these actions, the progress in other African countries is also partly included.

#### Action 5: Countering harmful tax practices more effectively

Based on the peer reviews of Action 5, it can be concluded that this action consists of two parts.<sup>91</sup> One part consists of the assessment of preferential tax regimes, this assessment is concluded by an answer to the question whether these preferential tax regimes are considered harmful. The other part revolves around having an adequate transparency framework in place.

Concerning the first mentioned part, the challenge of attracting foreign investments plays an important role.<sup>92</sup> In general, African countries need to **attract (foreign) investments**. As mentioned before, the reliance on corporate tax is higher in developing countries than in developed countries. For African countries, the tax revenue generated via foreign investments is an important source of income.<sup>93</sup> The attraction of foreign investments is for instance accomplished via the use of tax incentives.<sup>94</sup> This challenge is reflected by the fact that countries have questioned what the implementation of the OECD BEPS Actions would mean for certain preferential tax regimes these countries had in place to attract foreign investments.<sup>95</sup> So, for the generation of tax revenue in

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<sup>89</sup> WorldBank, 'GDP (current US\$)' ([data.worldbank.org](https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?name_desc=false)) <[https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?name\\_desc=false](https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?name_desc=false)> accessed 24 May 2024.

<sup>90</sup> UNECA (n 50).

<sup>91</sup> OECD, *Harmful Tax Practices – 2018 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5* (OECD Publishing 2019).

<sup>92</sup> Burgers and Valderrama (n 66).

<sup>93</sup> Oguttu (n 45).

<sup>94</sup> Vikram Chand and Kinga Romanovska, 'The Impact of Pillar Two on Corporate Tax Incentives and Incentives Post Pillar Two – The Potential Rise of Tax Credits and Subsidies' (2023) 9 *International Tax Studies* 2.

<sup>95</sup> Burgers and Valderrama (n 66).

African countries it is on the one hand important to implement measures against tax avoidance, but on the other hand, to stay competitive for foreign direct investments.

For the transparency framework, the recommendations that are made by the OECD to African countries are to create a review and supervision mechanism, to put in place an information-gathering process, and to create the necessary legal framework.<sup>96</sup> In 2017, Burgers and Mosquera<sup>97</sup> stated that the lack of technical capacity could be an obstacle to the implementation of this action. Based on the recommendations made in the peer reviews, the difficulties are to be ascribed to a lack of capacity, and even more specifically, a lack of technical capacity.

#### Action 6: Preventing the granting of treaty benefits in inappropriate circumstances

Action 6 has been created to combat so-called treaty shopping. This phenomenon ‘typically involves the attempt by a person to indirectly access the benefits of a tax agreement between jurisdictions without being resident of one of those jurisdictions’.<sup>98</sup> To comply with the standards of this action, in the tax agreements that countries conclude two components should always be included: (1) an express statement on non-taxation and (2) one of three methods of addressing treaty shopping.<sup>99</sup>

Besides, Action 6 is partly connected to Action 15: *Developing a multilateral instrument (MLI)*. The MLI enables countries to implement tax treaty measures into existing bilateral tax treaties.<sup>100</sup> This instrument offers, among other things, ‘a means to tackle practices such as “treaty shopping”’.<sup>101</sup> For developing countries, the implementation of the MLI is paired with certain challenges.

One of these challenges is based on efficiency, which is related to the challenge that African countries have relatively low experience with international tax laws. Since African countries do not have many tax treaties in place, the process of implementing an MLI is regarded as less efficient than simply renegotiating these tax treaties.<sup>102</sup> Due to limited resources, countries make these

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<sup>96</sup> OECD, *Harmful Tax Practices – 2022 Peer Review Reports on the Exchange of Information on Tax Rulings: Inclusive Framework on BEPS: Action 5* (OECD Publishing 2023).

<sup>97</sup> Burgers and Valderrama (n 66).

<sup>98</sup> OECD, *Prevention of Tax Treaty Abuse – Sixth Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6* (OECD Publishing 2024).

<sup>99</sup> *ibid.*

<sup>100</sup> OECD, ‘Action 15 Multilateral Instrument’ (*OECD.org*) <[Action 15 - OECD BEPS](#)> accessed 20 May 2024.

<sup>101</sup> Annet W Oguttu, ‘Should Developing Countries Sign the OECD Multilateral Instrument to Address Treaty-Related Base Erosion and Profit Shifting Measures?’ (2018) CGD Policy Paper <<https://www.cgdev.org/sites/default/files/should-developing-countries-sign-oecd-multilateral-instrument-address-treaty-related.pdf>> accessed 18 May 2024.

<sup>102</sup> Nienke Oomes and others, ‘Strengthening tax systems in developing countries: policy evaluation’ (SEO Amsterdam Economics 2021).

efficiency choices. However, it can be questioned whether these choices are sustainable in the long run. Another challenge is associated with the technical capacity of countries. Some developing countries are hesitant to implement the MLI based on a wrong understanding of what the instrument entails.<sup>103</sup>

The OECD peer review on Action 6 shows that the tax treaties of a part of the African countries do not comply with the minimum standards.<sup>104</sup> The main reason is that the MLI has not taken effect; the implementation of the MLI is not sufficient, it should be ratified. In Gabon, for instance, we see a limited number of tax treaties, that all do not comply with the standard since Gabon has not ratified the MLI.<sup>105</sup> Reasons are the flexibility of the MLI in combination with the complexity, within the MLI it can, namely, be decided to not include certain provisions. African countries have been hesitant on these decisions, being concerned that these provisions can result in unfavorable treaties.<sup>106</sup> Moreover, developing countries have been skeptical regarding the legitimacy of the international tax law, since these countries have played a limited role in the creation of content of the MLI.<sup>107</sup>

#### Action 13: Re-examine transfer pricing documentation (Country-by-country reporting)

As visible in Table 2.1, all the countries do, to a certain extent, comply with Action 13: *Re-examine transfer pricing documentation*. For this action, the minimum standards consist of three key aspects: (1) a domestic legal and administrative framework, (2) an exchange of information framework, and (3) an appropriate use of CbC reports.<sup>108</sup> The sixth annual peer reviews report of the OECD provides information on all African countries that have committed to the OECD BEPS Actions.<sup>109</sup> These peer reviews show that part of the African countries do not comply with the minimum standards of this action. Examples of these countries are Angola and Namibia, where none of the standards of this action are met.<sup>110</sup>

The difficulties with the implementation of CbCR can be partly attributed to a lack of resources. To implement a CbCR mechanism that is compliant with the standards of the OECD BEPS Action, numerous technical requirements must be fulfilled.<sup>111</sup> The implementation therefore must be paired

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<sup>103</sup> *ibid.*

<sup>104</sup> OECD (n 96).

<sup>105</sup> OECD, *Prevention of Tax Treaty Abuse – Fourth Peer Review Report on Treaty Shopping: Inclusive Framework on BEPS: Action 6* (OECD Publishing 2022).

<sup>106</sup> Oguttu (n 101).

<sup>107</sup> Irma JM Valderrama, 'Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism' (2015) 7 World Tax Journal <[https://research-ibfd-org.tilburguniversity.idm.oclc.org/#/doc?url=/document/wtj\\_2015\\_03\\_int\\_3](https://research-ibfd-org.tilburguniversity.idm.oclc.org/#/doc?url=/document/wtj_2015_03_int_3)> accessed 30 May 2024.

<sup>108</sup> OECD, *Country-by-Country Reporting – Compilation of 2023 Peer Review Reports: Inclusive Framework on BEPS: Action 13* (OECD Publishing 2023).

<sup>109</sup> *ibid.*

<sup>110</sup> *ibid.*

<sup>111</sup> Oguttu (n 45).

with resource-intensive investments. Besides these investments, the implementation and enforcement of this standard also require sufficient technical personnel, which further pressures the lack of technical capacity.

Another challenge associated with the lack of technical capacity and experience is the processing and storage of business information. Developing countries and MNEs have expressed their worries that the ability of data protection and handling of sensitive information of MNEs by developing countries is concerning.<sup>112</sup> Due to this lack of resources and technical personnel, the risk of an **uneven implementation** increases. Developed countries comply with the standards earlier than African countries, therefore missing out on the advantages that CbCR can provide.

#### Action 14: Make dispute resolution mechanisms more effective

Table 2.1 indicates that multiple countries monitored by the IBFD do not comply with the standards of Action 14. Action 14 is focused on the implementation and well-operating dispute resolution mechanisms like the Mutual Agreement Procedure (MAP) and arbitration. The ultimate goal of this action is that disputes related to tax treaties are resolved in a timely and effective manner.<sup>113</sup>

Regarding the implementation of Action 14, the OECD named the four most important elements: preventing disputes, availability and access to MAP, resolution of MAP cases, and implementation of MAP agreements.<sup>114</sup> For countries to comply with these elements, MLI, again, can play a significant role. Namely, Action 14 provides minimum standards that should be implemented in tax treaties that countries sign with other countries. The MLI, as discussed above, provides the opportunity to alter existing tax treaties more easily.

Burgers and Mosquera<sup>115</sup> questioned by the introduction of the OECD BEPS Actions whether developing countries would be able to comply with the minimum standards of this action, taking into account their constrained technical and administrative capacity. The most recent peer reviews of African countries<sup>116</sup> indicate that this challenge is still present. This is, for instance, illustrated by the timeliness of MAP procedures in Morocco. Under Action 14, it is strived to close MAP cases within 24 months; in Morocco, the average closing time equaled almost 87 months.<sup>117</sup> In the peer review report it is, therefore, recommended that ‘Morocco should devote additional resources to its

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<sup>112</sup> *ibid.*

<sup>113</sup> OECD, ‘BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents’ (OECD 2023).

<sup>114</sup> *ibid.*

<sup>115</sup> Burgers and Mosquera (n 66).

<sup>116</sup> Regarding Action 14, there have been two stages of peer reviews. The only African countries that have been peer reviewed in Stage 2 are Morocco and South Africa.

<sup>117</sup> OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Morocco (Stage 2): Inclusive Framework on BEPS: Action 14* (OECD Publishing 2022).

competent authority to resolve all MAP cases that remain pending in a timely, efficient and effective manner.’<sup>118</sup>

Challenges mentioned are the confidentiality of arbitral proceedings,<sup>119</sup> leading to no known precedents; little experience in the MAP relative to other countries, leading to believe that other countries are in a more favorable position;<sup>120</sup> the costs that are paired with the process of MAP cases.<sup>121</sup> Besides, the challenges regarding sufficient capacity, both technical and administrative, also occurs here. What is interesting, is that the example in Morocco shows that not only the implementation of certain standards can lead to difficulties, but also its execution.

#### Exchange of information

The two main standards regarding the exchange of information and tax transparency are EOIR and AEOI. The Africa Initiative, as part of the Global Forum, annually tracks the progress of African countries for these standards. The main reason mentioned by African countries, why the implementation of AEOI is challenging is the lack of capacity and resources, ‘the lack of an enabling domestic legal framework and an international legal gateway’.<sup>122</sup>

A more specific challenge regarding the exchange of information is the transparency of “beneficial ownership”. By the evaluation, no African country was fully compliant with the standards dedicated to beneficial ownership.<sup>123</sup> Many countries miss a definition of this term in their domestic legal framework or do not have an adequate framework in place. These items are partly explained by the lack of expertise of the tax administrations on this topic.

#### Pillar Two

The main challenge for African countries regarding Pillar Two is the need for FDIs. African countries have closed investment and tax agreements, including certain tax incentives to increase the attractiveness for these FDIs.<sup>124</sup> Implementing the minimum tax of Pillar Two may lead to violations of these agreements with investors, resulting in other countries (resident states of these foreign investors) gaining the tax revenue instead of the African country.

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<sup>118</sup> *ibid.*

<sup>119</sup> Oguttu (n 45).

<sup>120</sup> *ibid.*

<sup>121</sup> *ibid.*

<sup>122</sup> OECD (n 2).

<sup>123</sup> *ibid.*

<sup>124</sup> Catherine Brown, ‘A global minimum tax: is Pillar Two fair for developing countries?’ (*ictd.ac*, 19 July 2023) <<https://www.ictd.ac/blog/global-minimum-tax-pillar-two-fair-developing-countries/>> accessed 30 May 2024.

## Section 3 – Development of the Normative Framework

To provide an answer to the research question, in this section a normative framework is created. This normative framework is concluded with the benchmark for this study, meaning that the found results are compared to and assessed in the light of this benchmark. The benchmark that is used in this study is cooperative compliance. I.e., cooperative compliance is used as a measure of the ability of developing jurisdictions to overcome the challenges associated with tax avoidance.

### 3.1 Definition of Cooperative Compliance

To use cooperative compliance as the benchmark, the definition used is of importance. A problem associated with this is the fact that a commonly accepted definition of cooperative compliance is missing.<sup>125</sup> The differences in definition are illustrated by the fact that multiple jurisdictions claim to have some type of cooperative compliance in place. However, these claims can sometimes be questioned when assessed more closely. To come to a definition that is used in this study, multiple definitions that are used in the existing literature are reviewed.

The starting point of the concept of cooperative compliance is that a trust-based relationship between a taxpayer and the corresponding tax administration enhances voluntary compliance.<sup>126</sup> Similar to this, the OECD mentions the ‘enhanced relationship’. It states that such trust-based relationships can be established when an environment is created where taxpayers comply with the law and go beyond statutory obligations.<sup>127</sup> Another definition provided in the literature is ‘the establishment of a trust-based cooperative relationship between taxpayers and the tax authorities based on voluntary tax compliance leading to the payment of the right amount of tax at the right time’.<sup>128</sup> The theory is that this relationship between taxpayers and tax authorities moves from a relationship that is characterized by power, authority, and control towards a relationship characterized by trust, cooperation, and transparency.<sup>129</sup> The OECD also emphasizes this paradigm shift: ‘a relationship that favours collaboration over confrontation, and is anchored more on mutual trust than on enforceable obligations’.<sup>130</sup>

The OECD specifically mentions the importance of disclosure and transparency in the context of cooperative compliance.<sup>131</sup> First, disclosure can be seen as the responsibility of the taxpayer to

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<sup>125</sup> Ronald Russo and Mário H Martini, ‘The International Compliance Assurance Programme Reviewed: The Future of Cooperative Tax Compliance?’ (2019) 73 Bulletin for International Taxation.

<sup>126</sup> *ibid.*

<sup>127</sup> OECD (n 9).

<sup>128</sup> Esther Huiskers-Stoop and Hans Gribnau, ‘Cooperative Compliance and the Dutch Horizontal Monitoring Model’ (2019) 5 Journal of Tax Administration 66.

<sup>129</sup> Ronald Russo, Joost J Engelman and Mário H Martini (2022) ‘Cooperative Compliance in the European Union: An Introduction to the European Trust and Cooperation Approach’ 76 Bulletin for International Taxation.

<sup>130</sup> OECD, *Study into the Role of Tax Intermediaries* (OECD 2008).

<sup>131</sup> OECD (n 9).

create a trust-based relationship. This disclosure is twofold, namely, the willingness of the taxpayer to communicate uncertain and controversial tax positions with the tax authority. And, the willingness to disclose beyond its statutory obligations. Second, transparency, as explained by the OECD, pertains more to the role of the tax authority in this relationship. It refers to ‘sharing information about the internal control system, including the design, implementation and effectiveness of the TCF that enables the taxpayers to be fully aware and “in control” of all the positions and issues that need to be disclosed’.<sup>132</sup> I.e., the tax authority should create this climate wherein the taxpayer is more likely to disclose the abovementioned components of disclosure.

The primary pillars of the concept of cooperative compliance identified by Russo & Martini<sup>133</sup> are: collaboration, trust, and transparency. These pillars can to some extent also be seen in the definitions provided above. Trust can be seen as the first pillar and cannot exist without the presence of the other pillars. To achieve a certain level of trust, the parties must have a mutual understanding. This trust can only be achieved if the parties are transparent to each other. Meaning that the taxpayer is transparent about its tax issues and its tax strategy, and, the tax administration is open about, for instance, its audit plans and the judgment of tax situations shared by the taxpayer. Besides this transparency, the importance of collaboration is mentioned. The taxpayer should have the intention to pair the information on tax issues and tax strategies with the necessary interpretation when needed. Likewise, the tax authority should communicate important interpretations with the taxpayer. This results in a better mutual understanding via collaboration.<sup>134</sup>

From the mentioned definitions it can be concluded that the fundamental concept of cooperative compliance seems to be aligned in the literature. The elements and pillars of cooperative compliance correspond, for the most part, with each other. Therefore, it seems to be that the problem with the definition, is the difference in interpretation of the practical implications of the elements and pillars.

### **3.2 History and Background of Cooperative Compliance**

As mentioned above, the interpretation of cooperative compliance differs in certain situations. To illustrate this, and to showcase the different forms of cooperative compliance that have been in place over time certain cases are discussed in this section.

The OECD published a report on the role of tax intermediaries in 2008.<sup>135</sup> One of the topics discussed in this report is the concept of ‘enhanced relationship’, which is the forerunner of the concept of cooperative compliance. This report is partly based on the experiences of countries

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<sup>132</sup> *ibid.*

<sup>133</sup> Russo and Martini (n 125).

<sup>134</sup> Russo and Martini (n 125).

<sup>135</sup> OECD (n 130).

where cooperation between taxpayers and tax authorities was, in one way or another, present. These countries were Ireland, the Netherlands, and the U.S.<sup>136</sup> The models that were present The Netherlands and Ireland are discussed in this section.

### The Netherlands

In 2005, Horizontal Monitoring was introduced by the Dutch tax administration as part of its broader compliance strategy.<sup>137</sup> The main idea was to test a new type of monitoring concerning multinationals,<sup>138</sup> which was more efficient and effective.<sup>139</sup> This agreement was two-sided; the multinationals had to be willing to be completely transparent about their tax issues and risks (at the board level), and, the Dutch tax administration would provide binding opinion on these tax issues in return.<sup>140</sup> This proposed type of collaboration between the taxpayer and tax authority was interesting for the boards of the multinationals that participated in this pilot.<sup>141</sup> In my view, the most important aspect of this type of monitoring is the shift from monitoring the result of (potentially wrong) decisions made, and actions taken related to uncertain or controversial tax issues, towards monitoring before these decisions are made. When the taxpayer is transparent about its tax issues, the tax administration can opine on these issues, leading to no surprises during the tax return. This way, errors can be avoided more easily, and the tax certainty increases.<sup>142</sup>

Another important aspect of this process is the application process. To engage in the program, the Dutch tax administration and the taxpayer a seven-step process should be completed.<sup>143</sup> First of all, it should be mentioned that there is no obligation to enter the program, meaning it is completely voluntary. Examples of aspects of the application process are the collection of information on the tax strategies and tax behaviors of the taxpayer by the Dutch tax administration. Besides, the willingness and feasibility to comply with the program is examined. Also, pending tax issues should be resolved.

This type of monitoring was experienced as positive by the participating multinationals during the evaluation in 2007, resulting in an increase of the relationships and the number of taxpayers.<sup>144</sup>

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<sup>136</sup> *ibid.*

<sup>137</sup> Huiskers-Stoop & Gribnau (n 128).

<sup>138</sup> *ibid.*

<sup>139</sup> OECD (n 130).

<sup>140</sup> *ibid.*

<sup>141</sup> *ibid.*

<sup>142</sup> Huiskers-Stoop & Gribnau (n 128).

<sup>143</sup> *ibid.*

<sup>144</sup> OECD (n 130).



## Ireland

In 2005, the Co-operative Approach to Tax Compliance was introduced in Ireland. This approach was available for large corporate taxpayers. The idea of this approach was, similar to Horizontal Monitoring in the Netherlands, a collaborative relationship driven by trust and transparency which would increase the compliance of these large taxpayers.<sup>145</sup> The businesses that would be able to engage in this program were divided into sectors by the Irish tax administration to get a better understanding of tax issues for each sector.<sup>146</sup> An important aspect of this approach was the fact that it was possible to manage tax risks and tax issues at the time they would occur instead of afterward during an audit.<sup>147</sup> Moreover, this approach was voluntary; large taxpayers were not obliged to participate in this program and were able to end the collaboration at any time. While the tax administration was also able to stop the cooperation, when, for example, the taxpayer did not meet the level of agreed transparency.

To participate in the program, the taxpayer had to meet certain financial criteria, such as a minimum total income or a minimum amount of taxes paid. Besides, the taxpayer should be willing to cooperate and be transparent about its tax strategies.

This program led to an increase in advice asked by taxpayers on tax issues to the Irish tax administration. As well as an increase in 'voluntary disclosures and expressions of doubt'. The conclusion of this program was therefore that the compliance of large taxpayers seemed to have improved.<sup>148</sup>

## OECD: Enhanced Relationship (2008)

In 2008, the OECD created a framework for the enhanced relationship based on the abovementioned experiences.<sup>149</sup> In this report, the OECD states behaviors that should be ensured by both the taxpayer and the tax administration. The taxpayer should ensure disclosure and transparency, similar to the abovementioned pillars. The tax administration should contribute to the relationship by 'demonstrating understanding based on commercial awareness, impartiality, proportionality, openness through disclosure and transparency, and responsiveness'. These attributes should be combined with effective risk-management processes.<sup>150</sup>

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<sup>145</sup> *ibid.*

<sup>146</sup> Eamonn Donnelly and John Heneghan, 'The Role of Tax Authorities in Encouraging Corporate Social Responsibility and Good Governance'.

<sup>147</sup> *ibid.*

<sup>148</sup> OECD (n 130).

<sup>149</sup> OECD (n 130).

<sup>150</sup> *ibid.*

### OECD: From Enhanced Relationship to Co-operative Compliance (2013)

As follow-up, the OECD published a report<sup>151</sup> based on the report in 2008 and the experiences of the tax administrations that implemented the approach mentioned in this report. This can be seen as an expansion of the approach described earlier. A reason for this change was to indicate that the relationship prioritizes the voluntary fulfillment of legal obligations. It was experienced that the focus of the enhanced relationship was too much on transparency, resulting in limited cooperation.<sup>152</sup>

### **3.3 Recent Developments of Cooperative Compliance**

In the OECD report of 2013, the concept of multilateral cooperative compliance is discussed. Due to the successful experiences of domestic cooperative compliance programs, a more international approach could be seen as the next step. Multilateral cooperative compliance can be described as an agreement between a multinational enterprise (MNE) and multiple tax administrations in different countries to apply the concept of cooperative compliance. This would lower cross-border compliance burdens.

#### ICAP

As a result of the recommendations made by the OECD, the International Compliance Assurance Programme (ICAP) was agreed on by tax administrations in various OECD countries. The first pilot was launched in 2018 when eight tax administrations participated. A year later, a second pilot was launched with 19 tax administrations participating.<sup>153</sup> The main idea of ICAP is to provide MNEs (that, logically, operate in an international context), that are willing to be transparent about their tax issues and tax strategies, an increased tax certainty.<sup>154</sup>

Although the ICAP seems to share various similarities with the cooperative compliance definition and approaches as mentioned in the previous sections, it can be questioned whether it can be classified as cooperative compliance. The reason is that ICAP primarily enhances the level of assurance for MNEs but does not directly contribute to tax certainty.<sup>155</sup>

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<sup>151</sup> OECD, *Co-operative Compliance: A Framework: From Enhanced Relationship to Co-operative Compliance* (OECD Publishing 2013).

<sup>152</sup> Diego Quiñones, Irma J Mosquera Valderrama and Esther AM Huiskers-Stoop, 'Cooperative compliance initiatives as a preventative mechanism. Manual for the Control of International Tax Planning. 5. Tools for Combatting International Tax Planning' (Inter-American Center of Tax Administrations 2022).

<sup>153</sup> Russo and Martini (n 125).

<sup>154</sup> OECD, 'International Compliance Assurance Programme – Handbook for tax administrations and MNE groups' (OECD 2021).

<sup>155</sup> Mário H Martini and Ronald Russo, 'The International Compliance Assurance Programme: Review of the Full Programme' (2021) 75 Bulletin for International Taxation 174.

### 3.4 Benchmark - Elements of Cooperative Compliance

To assess whether initiatives focused on voluntary compliance in the selected countries (South Africa and Nigeria) can be regarded as cooperative compliance approaches, the elements of cooperative compliance are identified. In the literature, scholars have listed multiple requirements of cooperative compliance programs based on the OECD reports and experiences in various jurisdictions. Martini<sup>156</sup>, for instance, states a list of elements that were used to evaluate different types of cooperative compliance. It can be argued that cooperative compliance in optima forma would check these elements.

The list of elements is relatively extensive; the decision is therefore made to select the most essential requirements. Moreover, this thesis focuses on the potential implementation of cooperative compliance in African countries without a framework for cooperative compliance, the elements that form the base for a complete cooperative compliance program are, thus, pivotal.

The selection of this set of "minimum" requirements is based on the elements mentioned by Martini<sup>157</sup> and Martini and Tandon<sup>158</sup>.

- (1) Voluntary: I believe that, for a successful trust-based relationship between taxpayers and tax administration, the foundation can be laid by giving the taxpayer the choice of joining this program.
- (2) Work in the present: initiatives that focus on cooperative compliance should provide the taxpayer the opportunity to discuss tax issues and tax positions before the taxable event. This way, the level of non-compliance can increase, and the level of litigation can decrease.
- (3) Single point of contact: to create a relationship with the taxpayer it is important to implement measures that are focused on effective and efficient communication. When the taxpayer has a single point of contact within the tax administration this will enhance the quality of the communication. Moreover, this single point of contact is more likely to be familiar with the taxpayer, its industry, its operations, its tax situations, and its overall surroundings.
- (4) Risk assessment of taxpayer: when tax administration conduct risk assessments of taxpayers, the overall tax risks can be identified. This way, tax administration can, for instance, decline taxpayers that bear a high risk, which will eventually lead to fewer resources that are needed for the supervision of taxpayers participating in cooperative compliance programs.

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<sup>156</sup> Mária H Martini, 'Introduction: An investigation of Co-operative Compliance Regimes and the ICAP' in Ronald Hein and Ronald Russo (eds), *Co-operative Compliance and the OECD's International Compliance Assurance Programme* (Kluwer Law International 2020).

<sup>157</sup> *ibid*; Mário H Martini, 'A Review of Brazil Approaches to Cooperative Compliance in Light of International Tax Practice and the OECD Concept' (2022) 50 *Intertax* 177.

<sup>158</sup> Martini and Tandon (n 8).

- (5) Agree to disagree: this means that the possibility should be provided that taxpayer and tax administration can initiate litigation regarding a specific tax issue ‘while continuing with the cooperative compliance approach’.<sup>159</sup>
- (6) Tax Control Framework (TCF): whether, mainly large taxpayers, must have a TCF in place to join a cooperative compliance approach. And, whether the tax administration provides guidelines on the TCF. A TCF are the internal controls that a company has that are aimed at identifying tax risks; this identification enables the company to prevent and/or address these risks.<sup>160</sup> The risk assessment under (4) and the TCF are part of the risk management, which is regarded as one of the main features of cooperative compliance.<sup>161</sup>
- (7) Criteria to apply/qualify: whether cooperative compliance approaches are open for all types of taxpayers. And, whether taxpayers must apply for approaches and have to fulfill certain criteria.

As mentioned in Section 3.2, the OECD identified five behaviors of a tax administration that can promote an environment wherein a trust-based relationship can be developed. These five attributes are commercial awareness, impartiality, proportionality, openness through disclosure and transparency, and responsiveness. Commercial awareness means that the tax administration understands the business of a taxpayer, including the operations, the unique characteristics, and the industry it operates in.<sup>162</sup> Assuring impartiality means that the tax administration is consistent and objective in the process of issue resolution.<sup>163</sup> Proportionality focuses on ‘the choices revenue bodies make in allocating resources, deciding which taxpayers, which tax returns and which tax issues to prioritise and how to respond appropriately’.<sup>164</sup> Openness means that the tax administration should provide certainty through being transparent about its risk-management strategy, audit, and risk assessment.<sup>165</sup> Responsiveness means that the tax administration provides a communication channel that is responsive, quick, and professional.<sup>166</sup>

### 3.5 Cooperative Compliance as Solution for African Countries

Cooperative compliance can provide benefits for both the tax administration and the taxpayers. Although the literature on cooperative compliance experiences in more developing countries is less extensive compared to developed countries, advantages of cooperative compliance for developing countries have been identified. In this section, the reasons are provided why cooperative compliance is the solution to African countries.

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<sup>159</sup> Martini and Tandon (n 8).

<sup>160</sup> Martini (n 157).

<sup>161</sup> OECD (n 151).

<sup>162</sup> OECD (n 130).

<sup>163</sup> *ibid.*

<sup>164</sup> *ibid.*

<sup>165</sup> *ibid.*

<sup>166</sup> *ibid.*

Based on the advantages and by connecting them to the faced challenges by African countries, cooperative compliance can be seen as a solution for the problems concerning the implementation of international reporting standards. Quiñones, Valderrama, and Huiskers-Stoop<sup>167</sup> mention in the context of developing countries the benefits of lower compliance costs and the ability to increase tax certainty.

- Cooperative compliance leads to a different type of relationship than there is currently present between African tax administrations and taxpayers. The current relationships are often characterized by a high level of litigiousness, meaning that litigations are a common occurrence. This impacts the level of tax morale, the level of perceived fairness, and the level of voluntary compliance. When this relationship shifts towards more cooperation and collaboration, this will reduce compliance costs for both parties (e.g., lower investigation costs for tax administrations and lower compliance costs regarding audits for taxpayers).
- They also notice that cooperative compliance is a solution for the shared goal of tax certainty.<sup>168</sup> In countries with complex tax systems that are subject to regular changes (which the increasing international reporting standards is a part of), a high tax certainty is desired and incentivized. Elements of cooperative compliance can provide this higher tax certainty for tax administrations and taxpayers. By working in the present, thus providing taxpayers the opportunity to discuss tax issues before the taxable event, and by enabling taxpayers to disagree to agree tax administration and taxpayers can reach agreements on the interpretation of the law.

These two arguments partly address the challenges of a lack of resources that tax administrations experience, the low level of clarity and transparency provided by the tax administration towards taxpayers, and the low tax morale of taxpayers. In light of the identified BEPS-related challenges, there are a variety of reasons why cooperative compliance is the solution to African countries. In general, cooperative compliance helps African countries to mitigate and control the (underlying) difficulties they face with the implementations.

First and foremost, an effective cooperative compliance program results in a win-win situation. Both parties that build a trust-based relationship, so the taxpayer and the tax administration, benefit from the accompanied consequences. Many arguments in favor of cooperative compliance are therefore two-sided; there is an interaction between the advantages that a taxpayer experiences and the benefits for the tax administration.

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<sup>167</sup> *ibid.*

<sup>168</sup> *ibid.*

One of the advantages addresses the lack of technical and administrative capacity that tax administrations face. When the tax administrator creates and constantly increases the commercial awareness of taxpayers, this will result in a better understanding of the business of the taxpayer, the industry wherein it operates, and the specific tax issues that are faced by this taxpayer and its industry peers. This commercial awareness could, for instance, be accomplished by the tax administration segmenting taxpayers by sector and by providing a single point of contact for the taxpayers within each segment. This way, the tax administration can provide more specific guidance, while at the same time, it creates more experience regarding specific tax issues. Moreover, this also allows the tax administration to implement more issue-specific education and training for personnel. For taxpayers, this provides benefits, since it enables them to ask the tax administration for instance for consultation on complex tax issues or tax positions. If this consultation is made possible before the taxable event, this avoids potential penalties for the taxpayer. The latter can be beneficial for the tax administration since this could reduce the need for extensive audits regarding these taxpayers, enabling a more effective and efficient allocation of its resources.

Another argument for the implementation of cooperative compliance is the ability of tax administrations to trust taxpayers with partly shared responsibilities. When taxpayers have set up clear and effective internal tax control processes this will better ensure the viability of the information gathered and shared by this company: '[i]f a company can demonstrate that its TCF is effective, tax authorities have an incentive to trust that the output of tax-related information is free from material misstatements.'<sup>169</sup> This could be promoted by the creation of guidelines for an effective TCF. The effectiveness of a TCF forms a foundation for the risk assessment of taxpayers. For tax administrations, it is essential to conduct these risk assessments of taxpayers since it enables the tax administration to differentiate between taxpayers based on their risk levels. Tax administrations can trust low-risk taxpayers more, resulting in a lower level of supervision that is needed for this type of taxpayer. The low-risk taxpayers are likely to appreciate this trust, incentivizing them to remain low-risk and assist in the shared responsibility of taxation. This also leads to the ability to allocate "saved" resources regarding the supervision of low-risk taxpayers towards the supervision of high-risk taxpayers.

Another broad challenge faced in Africa is the low tax morale of taxpayers, due to, among others, the low perceived tax certainty. This tax certainty of taxpayers can be increased by the tax administration by showing certain behavior and by providing certain tools. Here, the five behaviors to create a trust-based relationship are important. Namely, when the tax administration shows commercial awareness, impartiality, proportionality, openness, and responsiveness, the taxpayer is

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<sup>169</sup> Martini (n 157).

more likely to know where it stands, and what to expect. Responsiveness in combination with working in the present, for instance, allows the taxpayer to gain consultation on complex tax positions. Similarly, when the tax administration allows the taxpayer, under certain conditions, to self-regularize non-compliance instead of a direct penalty, the tax morale is likely to increase. Furthermore, the element “agree to disagree” provides multiple benefits for the taxpayer. If a taxpayer can litigate (tax) issues, without this negatively impacting the relationship between both parties the tax certainty is likely to increase. Since both parties are beforehand aware of this possibility.

As already discussed, African countries are heavily dependent on FDIs, the attraction of foreign investors is not without challenges. For instance, the importance of tax incentives provided to these investors, see Pillar Two. These tax incentives are present in various forms, ranging from reduced tax rates to favorable treatment of R&D-intensive companies. I advocate that cooperative compliance can provide tax incentives in the form of transparency and clarity leading to tax certainty. On this topic, Zagler<sup>170</sup> finds that legal uncertainty has a negative effect on the attraction of FDIs. Tax administrations allowing taxpayers to work in the present, to agree to disagree, and to self-regularize certain tax positions increases the tax certainty of taxpayers. With the implementation of Pillar Two, the effectiveness of provisions of tax incentives in the form of tax reductions is likely to decline (due to the minimum tax). I think that foreign investors are, therefore, more likely to take the level of tax certainty into consideration of where to invest.

Furthermore, tax administration can benefit from cooperative compliance since it enables them to gain more expertise and experience on specific topics. Examples of instances where complexity is a burden are the implementation of OECD BEPS Action 2, the design of the MLI, and the application of ALP on TP issues. By working together more collaboratively, the taxpayer and tax administration can provide each other guidance on complex rules and concepts. Open dialogues between the parties could lead to a better understanding of the applications of complex concepts. Moreover, a higher transparency of taxpayers including more openness can result in an increase of comparable transactions, addressing the challenge of the currently limited transactions available. Better equipping the tax administration in future ALP issues. The openness could also help in the prevention of disputes, as questionable tax positions can be signaled in an earlier stage.

Cooperative compliance can also play an important role by the applications of MAP and arbitration (OECD BEPS Action 14). An effective program could result in instances where the MAP process does not even have to be entered. Adequate risk assessments and understanding of MNEs including their tax positions and issues, enables tax administrations to also get an understanding of ‘the

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<sup>170</sup> Martin Zagler, ‘Foreign direct investment, legal uncertainty and corporate income taxation’ (2023) 173 *International Economics* 19.

perception and treatment of transactions by other tax administrations'.<sup>171</sup> This understanding could result in higher consistency and therefore fewer disputes. Moreover, when disputes arise between tax administrations and a MAP process is started, open communication and clear documentation between taxpayers and tax administration lead to access to more useful information for the tax administration, simplifying the MAP process.

Another interesting aspect of cooperative compliance is the interaction with corporate social responsibility (CSR). A trend is visible where corporate taxation is seen as part of CSR.<sup>172</sup> In the context of South Africa, it is also mentioned that corporations and investors should see taxation as a corporate responsibility.<sup>173</sup> The growing importance of CSR on a global level, increases the pressure on ethical behavior of MNEs. If MNEs commit to paying their fair share of taxes, this is an incentive to enhance their transparency and to create trust-based relationships with relevant tax administrations. The other way around, cooperative compliance can also result in an enhancement of the CSR commitment of MNEs. The benefits of cooperative compliance for taxpayers can cause a shift in the perception of taxation and transparency, leading to a higher interest in CSR strategies. Moreover, when taxpayers engage in cooperative compliance programs and are considered low risk this can increase their CSR reputation.

In conclusion, cooperative compliance forms a solution for African countries, as it helps to address both underlying challenges relating to and leading to tax avoidance and more specific difficulties faced by the implementation or enforcement of international standards. Furthermore, since the trend of more international standards will likely continue, such cooperative compliance programs facilitate a foundation for potential challenges that are paired with these standards optimizing the implementation process. In the best-case scenario, cooperative compliance results in higher compliance and transparency of taxpayers, leading to higher tax revenue in African countries benefiting the entire economy.

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<sup>171</sup> OECD, 'International Compliance Assurance Programme – FAQs' (*oecd.org*, February 2021) <<https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-frequently-asked-questions.pdf>> accessed 30 May 2024.

<sup>172</sup> Francesco Scarpa and Silvana Signori, 'Understanding corporate tax responsibility: a systematic literature review' (2023) 14 Sustainability Accounting, Management and Policy Journal 179.

<sup>173</sup> Marcus Botha, 'BEPS and Increased Tax Transparency Elevate Tax to Corporate Social Responsibility Status in South Africa' (2017) 19 Finance and Capital Markets <[https://research-ibfd-org.tilburguniversity.idm.oclc.org/#/doc?url=/document/dfi\\_2017\\_01\\_za\\_1](https://research-ibfd-org.tilburguniversity.idm.oclc.org/#/doc?url=/document/dfi_2017_01_za_1)> accessed 30 May 2024.



## Section 4 – Cooperative Compliance in South Africa and Nigeria

Similar to studies of Martini<sup>174</sup> and Martini and Tandon<sup>175</sup>, that respectively reviewed cooperative compliance approaches in Brazil and India, this study aims to review the approaches in the selected countries. In this section, the initiatives relating to cooperative tax compliance that are present in South Africa and Nigeria are therefore reviewed and assessed based on the identified elements of cooperative compliance in Section 3.4.

### 4.1 Claim of Cooperative Compliance

The International Survey on Revenue Administration (ISORA) is an initiative of multiple international bodies that focus on economic development, and more specifically on tax matters. On an annual basis, it sends questionnaires to the domestic tax administrations to gather fiscal information of all participating countries.<sup>176</sup>

One of the covered subjects in the questionnaire is the presence of cooperative compliance approaches within the tax systems of the participating countries. Within the questionnaire, information was provided on what a cooperative compliance program entail. It should be noticed that this description is not completely identical to the description provided in the literature; the ISORA provides a more general description. The following information on cooperative compliance programs was provided:<sup>177</sup>

*Cooperative compliance programs and approaches may take a variety of forms, but are characterized fundamentally by tax administrations engaging with taxpayers and other stakeholders to explore shared interests, including the resolution of material tax risks; the provision of early certainty for taxpayers; the creation of a level playing field for business at large; and the reduction of costs (for all parties). Cooperative compliance arrangements (also known as 'horizontal monitoring' and 'enhanced taxpayer relationship management') are typically conditional upon the taxpayer demonstrating: a) good governance of their tax affairs, including an appropriate level of validation and review of their accounting systems; and (b) a willingness to operate in an open and transparent manner and make full disclosure of their tax risks as they occur (i.e. in real time). In return, the tax administration commits to providing enhanced service to the taxpayer through, for example: (a) dedicated points of contact; (b) speedier resolution of technical and administrative issues; (c) assignment of a reduced risk rating to the taxpayer for audit purposes; and (d) reduced penalties.*

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<sup>174</sup> Martini (n 157).

<sup>175</sup> Martini and Tandon (n 8).

<sup>176</sup> CIAT, IOTA, IMF, OECD, International Survey on Revenue Administration, 'About ISORA' (data.rafit.org) <<https://data.rafit.org/?sk=f02eda7c-dfd9-4c15-9ff9-8c5b400e16cb&sid=1445908451587>> accessed 18 May 2024.

<sup>177</sup> CIAT, IOTA, IMF, OECD, International Survey on Revenue Administration, 'Publications/Links – Forms and Guides' (data.rafit.org) <<https://data.rafit.org/?sk=3dba84d7-1dd8-4533-b682-c0dfcb1d7f13&sid=1659971668176>> accessed 29 May 2024.

Subsequently, the questions were asked whether the country has these programs and approaches in place for (1) large taxpayers<sup>178</sup>, (2) High Net Wealth Individuals (HNWI) taxpayers<sup>179</sup>, and (3) other taxpayers.

In the most questionnaire – covering the years until 2021 – the tax administrations of South Africa and Nigeria answered the questions as follows:

*Table 4.1: Answers to survey concerning cooperative compliance.*<sup>180</sup>

	A cooperative compliance approach exists for		
	Large taxpayers	HNWIs	Other taxpayers
South Africa	Yes	Yes	Yes
Nigeria	Yes	No	Yes

The selected countries, thus, indicate that they have certain approaches in place which classify as cooperative compliance. A part of the other African countries responded that no cooperative compliance approaches are present.<sup>181</sup>

## 4.2 Cooperative Compliance Approaches in South Africa

The tax administration of South Africa answered the question of whether cooperative compliance approaches were present for the three types of taxpayers, affirmative. However, Erasmus<sup>182</sup> states that no ‘specific and formal cooperative compliance or horizontal monitoring programmes’ have been implemented by the South African Revenue Service (SARS), the tax administration of South Africa. Notwithstanding, there are certain initiatives present that promote a relationship between SARS and taxpayers based on cooperation and transparency.

<sup>178</sup> This question was paired with the following definition of “large taxpayers”: ‘Large taxpayers make significant tax payments and account, in aggregate, for a large proportion of total tax revenue. Countries tend to define large taxpayers by reference to: annual sales/turnover; annual income; value of assets; level of imports or exports; amount of tax paid; and/or type of economic sector (e.g. financial services or mining sector).’

<sup>179</sup> This question was paired with the following definition of “HNWI taxpayers”: ‘High Net Wealth Individuals (HNWIs) refer to individuals at the top of the wealth or income scale, usually defined by specific criteria determined by a country. Some HNWIs pose significant challenges to tax administrations through their use of tax planning schemes and offshore investments.’

<sup>180</sup> CIAT, IOTA, IMF, OECD, International Survey on Revenue Administration, ‘Stakeholder interactions: Compliance and innovation’ (data.rafit.org, 2023) <<https://data.rafit.org/regular.aspx?key=64362634>> accessed 22 April 2024.

<sup>181</sup> African countries, that responded to the questionnaire, without cooperative compliance approaches in place are Benin, Burundi, Eswatini, Gabon, Gambia, Guinea, Guinea Bissau, Libya, Malawi, Mauritius, Namibia, and Senegal. It should be noted that this is based on the answers of tax administrations, therefore, it does not necessarily mean that the cooperative compliance approaches of countries that claim to have them, genuinely classify as cooperative compliance.

<sup>182</sup> Daniel N Erasmus, ‘South Africa – Tax Risk Management’ (1 January 2024) < [Document - South Africa - Tax Risk Management - Latest Information - Tax Research Platform - IBFD \(oclc.org\)](#) > accessed 21 May 2024.

#### 4.2.1 Taxpayers Engagement Strategy 2004

As mentioned by the OECD in its report in 2013, South Africa already had some sort of cooperative compliance in place in 2004.<sup>183</sup> This is the so-called 'Taxpayers Engagement Strategy'. With this program, SARS pursued to improve its services towards taxpayers and to improve the effectiveness of the enforcement of tax law. Which, in turn, was aimed at building a culture wherein voluntary compliance the standard is.<sup>184</sup> By creating this culture, SARS 'encourages compliance, discourages non-compliance and strives to eliminate all opportunities for evasion'.<sup>185</sup>

Looking at the goals of SARS with the implementation of this strategy, it does not seem that SARS directly prioritizes a trust-based relationship with the taxpayer. The focus is more on maximizing voluntary compliance. It seems more like an attempt to shift towards normalizing a higher level of voluntary compliance. Moreover, as the name already suggests, it is a strategy that SARS is implementing rather than a tangible program. A shift in thinking, approaching taxpayers, and providing services towards a system with more interactions with the taxpayers, does not directly mean that an actual cooperative compliance program is present.

When certain aspects of this strategy are assessed, it can however be concluded that there are various aspects of cooperative compliance in place. One of these elements is a differentiation in engagement with taxpayers based on their behavior, compliance, risk levels, and history.<sup>186</sup> This element implies, to a certain extent, that risk assessments of taxpayers are conducted.

#### 4.2.2 Large Business Centre

Potentially as output of the Taxpayers Engagement Strategy, SARS introduced the Large Business Centre (LBC) in September 2004.<sup>187</sup> With the LBC, SARS aimed to increase voluntary compliance at a low cost for both parties. At the launch of the LBC around 9100 taxpayers were part of this initiative, and quickly doubled within three years.<sup>188</sup> The LBC also contained a unit specially for HNWIs, to ensure that these individuals receive the same benefits and guidance as large taxpayers.

The activities of LBC were focused on three pillars: (1) creating an enhanced relationship with the taxpayer and attaining adequate knowledge of this taxpayer; (2) ensuring highly effective tax services to the taxpayer; and (3) providing 'a one-stop, single point of entry for all tax types'.<sup>189</sup>

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<sup>183</sup> OECD (n 151).

<sup>184</sup> SARS, *Working together for the good of South Africa – Annual Report 2004* (2004).

<sup>185</sup> *ibid.*

<sup>186</sup> *ibid.*

<sup>187</sup> SARS, *South African Revenue Service – Annual Report 2005/06* (2006).

<sup>188</sup> SARS, *South African Revenue Service – Annual Report 2006/07* (2007).

<sup>189</sup> SARS (n 184).

In 2015, by a restructuring, the LBC was dismantled.<sup>190</sup> The idea behind this dismantling was the thought that the resources needed for the LBC could be used more efficiently.<sup>191</sup> However, the elimination of the LBC did not have the desired consequences, it mainly led to a decreasing ability of SARS to collect taxes.<sup>192</sup> Furthermore, it 'had a major impact on the way they deal with complex issues, the manner and time in which queries was solved, audits conducted, and disputes resolved'.<sup>193</sup> In 2018, the LBC was re-introduced, this time under the name "Large Business and International Unit" (LBI). Last year, SARS experienced an increase in corporate tax revenue that it contributed to this initiative.<sup>194</sup>

For taxpayers to be included in this unit, SARS has set certain inclusion criteria.<sup>195</sup> There is a general revenue threshold for all companies, paired with sector-specific revenue thresholds. For listed companies and MNEs, there is no financial threshold. When the taxpayer meets one of these criteria, they are automatically registered to the LBI.<sup>196</sup>

With this unit, SARS wants to increase the compliance of these types of companies by providing a variety of services based on all types of taxes. Examples of the benefits that taxpayers receive from this unit are:

- Providing a one-stop service to assist large businesses on tax matters;
- Opportunity to apply for an advance tax ruling (ATR);
- Increased certainty;
- Relationship management;
- End-to-end service.

An important service that SARS provides with the LBI, is the possibility for large taxpayers to apply for an ATR. By providing this opportunity, SARS aims to provide clarity and certainty on the interpretations that it has on a specific, proposed tax transaction.<sup>197</sup> Here, the element of "real-

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<sup>190</sup> Ettiene Retief, 'Return of the Large Business Centre eagerly awaited' (*saipa.co.za*) <<https://www.saipa.co.za/return-large-business-centre-eagerly-awaited/>> accessed 21 May 2024.

<sup>191</sup> SAIPA, 'Turnaround time at SARS' (*saipa.co.za*, 16 July 2018) <<https://www.saipa.co.za/turnaround-time-at-sars/>> accessed 21 May 2024.

<sup>192</sup> Retief (n 190).

<sup>193</sup> *ibid.*

<sup>194</sup> SARS, 'SARS is committed to supporting fiscal consolidation through improved tax administration' (*sars.gov.za*, 21 February 2024) <<https://www.sars.gov.za/media-release/sars-is-committed-to-supporting-fiscal-consolidation-through-improved-tax-administration/>> accessed 21 May 2024.

<sup>195</sup> SARS, 'Large Business and international (LBI)' (*sars.gov.za*) <<https://www.sars.gov.za/businesses-and-employers/large-business-and-international/>> accessed 21 May 2024.

<sup>196</sup> SANews, 'SARS launches re-established Large Business Centre' (*sanews.gov.za*, 24 October 2019) <<https://www.sanews.gov.za/south-africa/sars-launches-re-established-large-business-centre>> accessed 29 May 2024.

<sup>197</sup> SARS, 'Comprehensive Guide to Advance Tax Rulings' (June 2013) <<https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-TAdm-G02-Comprehensive-Guide-to-Advance-Tax-Rulings.pdf>> accessed 22 May 2024.

time" is visible. Namely, before the taxpayer must take a tax position it can receive consultation on this tax matter.

As part of the LBI, SARS also introduced the "Relationship Management". For an effective relationship management, SARS divides the large taxpayers into three groups, with each a designated senior manager and multiple relationship managers.<sup>198</sup> With the introduction of this relationship management SARS provides a single point of contact for the taxpayers, making regular contact more accessible and more efficient. Via this communication channel, both parties can inform each other on (the progress of) tax issues or on newly introduced processes. Moreover, this way the SARS is more likely to get a better understanding of the business of the various taxpayers, and more important the associated risks.

In conclusion, the main elements identified concerning this initiative:

- Possibility to receive assistance on tax matters;
- A single point of contact: relationship manager;
- Segmentation of taxpayers by sector;
- Criteria to qualify as a large taxpayer;
- Responsiveness;
- Commercial awareness;
- All taxpayers meeting the criteria are subject to LBI, so it is not voluntary.

#### 4.2.3 Voluntary Disclosure Programme

After a successful pilot program of the Voluntary Disclosure Programme (VDP) in 2010 and 2011, the VDP was established in 2012.<sup>199</sup> This program is implemented to provide taxpayers the opportunity to 'voluntarily disclose and regularize their tax affairs'.<sup>200</sup> With this program, SARS aims to increase the voluntary compliance of taxpayers and to allocate its resources more efficiently.<sup>201</sup> Regarding the latter, when taxpayers disclose their tax affairs voluntarily, fewer resources will be necessary for enforcement (e.g., audits, investigations, and litigation).

In general, when taxpayers do not submit information regarding their taxes or do not submit accurate information, or do not submit complete information, (i.e., non-compliance) they risk

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<sup>198</sup> SARS, 'Relationship Management' (*sars.gov.za*) <<https://www.sars.gov.za/businesses-and-employers/large-business-and-international/relationship-management/>> accessed 21 May 2024.

<sup>199</sup> Mahdi Meyer Steyn, '1. VDP and SVDP, what does this mean for me?' (*saipa.co.za*) <<https://www.saipa.co.za/1-vdp-svdp-mean/>> accessed 22 May 2024.

<sup>200</sup> SARS, 'Voluntary Disclosure Programme (VDP)' (*sars.gov.za*) <<https://www.sars.gov.za/legal-counsel/voluntary-disclosure-programme-vdp/>> accessed 22 May 2024.

<sup>201</sup> SARS, 'Guide to the Voluntary Disclosure Programme' (August 2023) <<https://www.sars.gov.za/wp-content/uploads/Ops/Guides/Legal-Pub-Guide-TAdm14-Guide-to-the-Voluntary-Disclosure-Programme.pdf>> accessed 22 May 2024.

consequences like penalties. The VDP allows all taxpayers (both companies and natural persons) to disclose non-compliance regarding all taxes except customs and excise taxes.<sup>202</sup> A successful application for VDP results in the taxpayer avoiding potential penalties as a consequence of the tax default.<sup>203</sup>

Based on Section 225 of the Tax Administration Act No. 28 of 2011 (hereafter: TAA 2011), taxpayers may apply for this program except for two instances: taxpayers may not apply for this program (1) if they are aware of a current audit or investigation into the taxpayer, or (2) if an audit or investigation has taken place but is not yet concluded.

In Section 227 of the TAA 2011 the requirements for the disclosure are summed up, the disclosure must:

- be voluntary;
- involve a 'default' which has not previously been disclosed by the applicant;
- be full and complete in all material respects;
- involve the potential imposition of an understatement penalty in respect to the 'default';
- not result in a refund due by SARS; and
- be made in the prescribed form and manner.

This initiative is heavily focused on voluntary compliance of taxpayers, but few elements of cooperative compliance can be identified regarding this initiative. The only requirement that is met, is that participation in this program is voluntary. Another interesting aspect of this program that relates to the elements of cooperative compliance is the opportunity of a taxpayer to recover non-compliance before a penalty is applied, thus, self-regularization.

#### Special Voluntary Disclosure Programme

Similar to the VDP, SARS also has a Special Voluntary Disclosure Programme (SVDP). This program was introduced in 2016 as a consequence of developments in the automatic exchange of information.<sup>204</sup> Due to the changing exchange of information standards, starting in 2017, SARS receives offshore financial data from other tax authorities.<sup>205</sup> This could result in the detection of non-compliance of taxpayers related to offshore assets and income.

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<sup>202</sup> Steyn (n 199).

<sup>203</sup> SARS (n 201).

<sup>204</sup> SARS, 'DRAFT GUIDE: SPECIAL VOLUNTARY DISCLOSURE PROGRAMME (v1.0)' <<https://www.sars.gov.za/wp-content/uploads/Legal/Drafts/LAPD-LPrep-Draft-2016-52-Draft-SVDP-Guide-v1-0.pdf>> accessed 22 May 2024.

<sup>205</sup> *ibid.*

As the procedure of SVDP is similar to the VDP, apart from the tax subject, it can be concluded that this initiative also shows little resemblance with cooperative compliance approaches.

#### 4.2.4 Service Charter

For tax administration to enhance compliance, it is necessary to create an environment wherein taxpayers are encouraged to be transparent and enhance disclosure.<sup>206</sup> The OECD identified five elements that should be ensured to reach this higher level of disclosure: commercial awareness, impartiality, proportionality, openness, and responsiveness.<sup>207</sup>

The charter of a tax administration presents the rights and obligations that the taxpayers have. As mentioned by the OECD<sup>208</sup>, this charter indicates, to a certain level, what the taxpayer can expect from the tax administration. SARS outlines its "Service Charter" on an annual basis. Comparing the charter of SARS with the five identified elements indicates whether SARS provides an environment wherein taxpayers are open to a trust-based relationship.

*Table 4.2: Analysis of Service Charter SARS.*<sup>209</sup>

Commercial awareness	‘Receive customized support’
Impartiality	‘All to be equal before the law’
Proportionality	-
Openness	‘Clarity and certainty (to be informed)’
Responsiveness	-

#### 4.2.5 Advanced Tax Rulings

In the discussion of the LBI Unit of SARS, the possibility of applying for an ATR was already mentioned. SARS provides this mechanism 'to promote clarity, consistency and certainty regarding the interpretation and application of a tax Act by creating a framework for the issuance of 'advance rulings'.<sup>210</sup> This mechanism is open for all provisions of a tax Act.<sup>211</sup> The outcome of an advance ruling can either be a binding or non-binding ruling.<sup>212</sup> I focus on one type of binding rulings and this is the 'binding private ruling' as written down in Section 75 of the TAA 2011. One or more parties can request such a ruling about a transaction that they have not yet carried out but is

<sup>206</sup> OECD (n 130).

<sup>207</sup> *ibid.*

<sup>208</sup> OECD, *Tax Morale II: Building Trust Between Tax Administrations and Large Businesses* (OECD Publishing 2022).

<sup>209</sup> SARS, ‘Service Charter’ (*sars.gov.za*) <<https://www.sars.gov.za/about/service-charter/>> accessed 22 May 2024.

<sup>210</sup> Tax Administration Act No. 28 of 2011, s. 76.

<sup>211</sup> Tax Administration Act No. 28 of 2011, s. 77.

<sup>212</sup> Tax Administration Act No. 28 of 2011, s. 75.

proposed.<sup>213</sup> Based on the proposal, the applicant is informed on SARS' interpretation and application of a tax Act. The binding effect entails that SARS is bound to the appliance of the tax Act must be the same as the interpretation provided in the ruling.<sup>214</sup>

Besides a binding ruling, SARS can provide a non-binding private opinion: an 'informal guidance issued by SARS in respect of the tax treatment of a particular set of facts and circumstances or [transaction]'<sup>215</sup>.

The opportunity to apply for an ATR matches with the idea of cooperative compliance. It provides the ability for the tax administration to give clarity – and to some extent certainty – to taxpayers. The requirements of cooperative compliance that are aligned with this initiative are:

- Providing clarity on tax issues;
- Openness;
- Responsiveness;
- Real-time consultation.

#### 4.2.6 Dispute Resolution

##### Alternative Dispute Resolution

When tax disputes arise between SARS and a taxpayer, SARS provides the opportunity to resolve this dispute via Alternative Dispute Resolution (ADR), which is less formal, less expensive, and less time-consuming than a court process.<sup>216</sup> The process of ADR can be initiated by both parties: the taxpayer or SARS, where the latter, in all cases, determines whether the dispute is suitable for ADR and thus whether the process will take place.<sup>217</sup> The process of ADR is open when the taxpayer does not agree with a final conclusion or assessment of the SARS concerning various taxes, such as income tax, VAT, and duties.<sup>218</sup>

In the annual report of 2022/23, SARS reported the latest statistics on the ADR process.<sup>219</sup> The most interesting statistics are the increase in the number of inflow of appeals in ADR (from 6.147 appeals during 2020/21 to 9.379 during 2022/23), and the decrease in the number of finalized ADR appeals (a decrease in 2022/23 of 12% compared to 2021/22). The reason for the latter is that the rate of inflow was higher than the rate of finalization. This is potentially impacted by a lack of capacity.

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<sup>213</sup> Tax Administration Act No. 28 of 2011, s. 75.

<sup>214</sup> Tax Administration Act No. 28 of 2011, s. 82.

<sup>215</sup> Tax Administration Act No. 28 of 2011, s. 75.

<sup>216</sup> SARS, 'Appeals' (*sars.gov.za*) <<https://www.sars.gov.za/individuals/what-if-i-do-not-agree/appeals/>> accessed 24 May 2024.

<sup>217</sup> SARS, 'ALTERNATIVE DISPUTE RESOLUTION: QUICK GUIDE' (October 2014) <<https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-TAdm-G06-Quick-Guide-on-Alternative-Dispute-Resolution.pdf>> accessed 24 May 2024.

<sup>218</sup> *ibid*; Tax Administration Act No. 28 of 2011, s. 104.

<sup>219</sup> SARS, *Annual Report 2022/23 – South African Revenue Service* (2023).



However, the effectiveness of ADR can be seen in the fact that almost no appeals enter into the litigation process, since they are solved via taxpayer engagement: from the 7.207 finalized appeals, only 19 were not solved through taxpayer engagement.<sup>220</sup>

Main elements of this initiative connected to cooperative compliance:

- The possibility to agree to disagree;
- Transparency;
- Impartiality;
- Responsiveness.

### Mutual Agreement Procedure

South Africa complies with the standards of Action 14 focusing on dispute resolution mechanisms. For taxpayers it is, therefore, possible to submit a MAP request. This MAP can be requested for disputes that are related to double taxation of the taxpayer, or disputes relating to a different interpretation of application of an article in a Double Taxation Agreement by the Contracting States.<sup>221</sup>

In order to request a MAP procedure, SARS outlines the steps that have to be taken in advance by the taxpayer.<sup>222</sup> It is advised that the taxpayer first tries to solve the issue by raising it to the “other State”, since a solution at this point in the process will avoid the need for a MAP. When this is not successful – or if the error is made by SARS (in case of a taxpayer resident in South Africa) – the taxpayer is able to request a MAP. Based on the subject of the issue it will either be a Transfer Pricing MAP or an Interpretation MAP.

The MAP statistics of 2022 collected by the OECD<sup>223</sup> show that South Africa, in that year, had a start inventory of 32 MAP cases. During the year, 12 cases were started, and 8 cases were concluded, creating an end inventory of 36 MAP processes. In accordance with the standard of Action 14, SARS mentions that they strive to reach a resolution together with the other competent authority within 24 months.<sup>224</sup> The most recent statistics on the average time that it took for the

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<sup>220</sup> *ibid.*

<sup>221</sup> SARS, ‘Mutual Agreement Procedure (MAP)’ (*sars.gov.za*) <<https://www.sars.gov.za/legal-counsel/international-treaties-agreements/double-taxation-agreements-protocols/mutual-agreement-procedure-map/>> accessed 30 May 2024.

<sup>222</sup> *ibid.*

<sup>223</sup> OECD, ‘Compare your country – Mutual Agreement Procedure Statistics’ (*compareyourcountry.org*) <<https://www.compareyourcountry.org/map-statistics/en/0/all/default>> accessed 30 May 2024.

<sup>224</sup> SARS, ‘Guide on Mutual Agreement Procedures’ (March 2020) <<https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-IT-G24-Guide-on-Mutual-Agreement-Procedures.pdf>> accessed 30 May 2024.

authority of South Africa to close a MAP case, show that this equals 26.5 months. Therefore, just over the prescribed 24 months.<sup>225</sup>

Regarding the position of South Africa on MAP arbitration, it is visible that South Africa did not commit to MAP arbitration as mentioned in Action 14. The opportunity for taxpayers to request arbitration on this topic is considered on a treaty-by-treaty basis, as a consequence only the Double Taxation Agreements with Canada, the Netherlands, and Switzerland contain an arbitration provision.<sup>226</sup>

#### 4.2.7 Tax Control Framework

An adequately implemented and functioning TCF provides benefits for both the taxpayer and the tax administration: the taxpayer is able to address its tax risks since the processes and internal controls are established and defined, this enables the taxpayer to communicate these risks with the tax administration which enhances transparency. The tax administration can benefit from TCFs as it could provide assurance of the reliability of tax information of taxpayers.<sup>227</sup> Therefore, when a taxpayer has an effective TCF in place, in theory, fewer resources have to be allocated for audits and corrections. In the light of cooperative compliance, it can be useful to have the requirements for an effective TCF established by law.

There are no specific guidelines present in the legislation in South Africa for the design of a TCF for taxpayers. As identified by Erasmus<sup>228</sup>, in certain legislations, however, articles are dedicated to the risk management of organizations. Applying to all companies, the Companies Act No. 71 of 2008 provides a partial framework for corporate governance. Rules regarding the direction, board, solvency, registration of secretary, and appointment of auditor are included. As well as financial-related regulations regarding the form and standards of company records, accounting records, and financial statements. On the topic of risk management, the only aspect that is provided is that the audit committee of a company is responsible for a report (that must be included in the annual financial statements) ‘commenting in any way the committee considers appropriate on the financial statements, the accounting practices and the internal financial control of the company’.<sup>229</sup> Regarding government entities and financial institutions, it is visible that the legislator provides more guidelines on effective internal control and risk management.<sup>230</sup>

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<sup>225</sup> OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, South Africa (Stage 2): Inclusive Framework on BEPS: Action 14* (OECD Publishing 2021).

<sup>226</sup> SARS (n 224).

<sup>227</sup> OECD (n 151).

<sup>228</sup> Erasmus (n 182).

<sup>229</sup> Companies Act No. 71 of 2008, s. 94(f)(iii).

<sup>230</sup> Erasmus (n 182).

On the topic of risk assessment, SARS seems to apply differentiated approaches towards high-risk and low-risk taxpayers. The level of risk that a taxpayer provides, is based on various aspects, such as the compliance history of a taxpayer, whether it engages in large or complex transactions, and whether certain risk-enhancing patterns are present.<sup>231</sup>

### 4.3 Cooperative Compliance Approaches in Nigeria

The Federal Inland Revenue Service (FIRS) has indicated that there are cooperative compliance approaches in place for large taxpayers and other taxpayers in Nigeria. By analyzing compliance approaches in the Nigerian tax system, the initiatives discussed in this section were identified. Like South Africa, Nigeria does not have a formal cooperative compliance program in place. Since the types of initiatives and their outlines are similar to the above discussed initiatives in South Africa, the discussion in this section is less elaborate.

#### 4.3.1 Voluntary Assets and Income Declaration Scheme (VAIDS)

By an executive order in 2017, FIRS implemented the Voluntary Assets and Income Declaration Scheme (VAIDS) focusing on self-regularization of non-compliance by taxpayers.<sup>232</sup> Similar to the VDP in South Africa, this initiative provides all taxpayers to ensure full tax compliance when in default, without the risk of penalties, prosecution, or tax audits.<sup>233</sup> This initiative also aims to increase the tax revenue of FIRS.<sup>234</sup>

The requirements for using the VAIDS are that the<sup>235</sup>:

- disclosure must be voluntary;
- disclosure must be full, frank, complete, and verifiable in all material respects;
- disclosure must be in the prescribed form; and
- assessment of tax payable must be carried out by relevant tax authority.

This initiative is slightly further reaching than the similar initiative in South Africa, VDP. In addition to this approach, VAIDS is also open to taxpayers that are – at the time of applying – audited or investigated by the tax authority.<sup>236</sup> Additionally, FIRS provides the opportunity to settle tax disputes out of court via VAIDS.

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<sup>231</sup> *ibid.*

<sup>232</sup> Federal Republic of Nigeria, 'Executive order No. 4 2017' <[https://www.nipc.gov.ng/ViewerJS/?#./wp-content/uploads/2019/03/EXECUTIVE-ORDER-4\\_2.pdf](https://www.nipc.gov.ng/ViewerJS/?#./wp-content/uploads/2019/03/EXECUTIVE-ORDER-4_2.pdf)> accessed 27 May 2024.

<sup>233</sup> *ibid.*

<sup>234</sup> OXFAM (n 49).

<sup>235</sup> Federal Republic of Nigeria (n 232).

<sup>236</sup> *ibid.*

The statistics of the performance and impact of this initiative show that this program only accomplished limited success. VAIDS led to a tax revenue increase of \$5 million, which is only a fraction of the expected amount \$50 million that FIRS aimed to generate.<sup>237</sup>

#### Voluntary Offshore Assets Regularization Scheme (VOARS)

Like SARS, FIRS implemented a similar scheme to VAIDS regarding offshore assets and income in 2018. As this initiative is similar to SVDP and to VOARS, it is not discussed elaborately. However, one difference that is worth mentioning, is that a fine is included in VOARS. When taxpayers declare their (previously non-declared) offshore assets, a 35% fine is to be paid.<sup>238</sup>

#### 4.3.2 Service Charter

*Table 4.3: Analysis of Service Charter FIRS.*<sup>239</sup>

Commercial awareness	-
Impartiality	‘be honest and impartial’
Proportionality	-
Openness	-
Responsiveness	‘ensure that communications are acknowledged within 24 hours of receipt’ ‘commit to closing all requests/complaints within 10 working days’

On the other behaviors, FIRS does not explicitly address goals or commitments. There are services mentioned that FIRS provides that partly relate to these five attributes. Regarding “commercial awareness”, FIRS mentions that it strives to ‘assess persons including companies, enterprises chargeable with tax’ and ‘endeavor to accommodate persons and corporate bodies with special needs and unique features’. To some extent these goals align with commercial awareness, I, however, think that it does not specifically portrait the fact that a deep understanding of the taxpayer is strived for.

<sup>237</sup> OXFAM (n 49).

<sup>238</sup> Federal Republic of Nigeria, ‘Presidential Executive order No. 008 of 2018 on the Voluntary Offshore Assets Regularization Scheme “VOARS”’ (October 2019) <[Gazette No.198 Vol.106 VOARS Presidential Executive Order 008 Amendment 2019 A4.pdf](https://www.firs.gov.ng/wp-content/uploads/2022/10/FIRS-SERVICE-CHARTER.pdf) (voars-nigeria.org)> accessed 27 May 2024.

<sup>239</sup>FIRS, ‘Service Charter’ (June 2021) <<https://www.firs.gov.ng/wp-content/uploads/2022/10/FIRS-SERVICE-CHARTER.pdf>> accessed 28 May 2024.

### 4.3.3 Guidelines on Tax Compliance Inquiry Activities

Similar to the service charter, FIRS also published its guidelines on tax compliance inquiry activities. In this guideline, the description and scope of the three tax compliance inquiry activities – desk examination, tax audit, and tax investigation – are provided.<sup>240</sup> By communicating these guidelines with taxpayers, they get a better understanding of these activities which could also enhance the acceptability.

To create a better understanding of the reasons why FIRS engages in the inquiry activities, benefits for both parties are mentioned. These are to curb tax avoidance, to educate taxpayers on tax matters, and to provide a channel that taxpayers can use for risks connected to tax issues.<sup>241</sup> The FIRS states that its level of inquiry is related to ‘the projected severity of compliance risk’.<sup>242</sup> This indicates that FIRS makes use of risk profiling for taxpayers.

Main elements of this initiative connected to cooperative compliance:

- Openness;
- Increased certainty;
- Understanding;
- Tax inspection focused on higher risks;
- Trust.

### 4.3.4 Advanced Tax Rulings

In Nigeria there seems to be no formal process to obtain an ATR as taxpayer. One of the departments of FIRS, the Tax Policy & Advisory Department, is responsible for tax rulings on tax issues.<sup>243</sup> However, there seems to be no (or limited) information available as to how this process works.<sup>244</sup>

### 4.3.5 Tax Appeal Tribunal

The Tax Appeal Tribunal (TAT) was established by the Federal Inland Revenue Service (Establishment) Act 2007. The TAT is responsible for settling tax disputes concerning various types

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<sup>240</sup> FIRS, ‘Guideline Desk Examination, Tax Audit, Tax Investigation Exercises and Other Tax Inquiry Processes: Clarifications on the Nature and Scope of Inquiry’ (October 2023) <<https://assets.kpmg.com/content/dam/kpmg/ng/pdf/guidelines-on-tax-compliance-enquiry-activities.pdf>> accessed 28 May 2024.

<sup>241</sup> *ibid.*

<sup>242</sup> *ibid.*

<sup>243</sup> SPA Ajibade & Co, ‘Nigeria Tax Issues: The Legal Regime Of Advance Tax Rulings (ATR)’ <[Nigeria Tax Issues: The Legal Regime Of Advance Tax Ruling \(ATR\) - S.P.A. Ajibade & Co \(spaaajibade.com\)](https://spaaajibade.com/)> accessed 31 May 2024.

<sup>244</sup> *ibid.*

of taxes, out of court.<sup>245</sup> The opportunity to settle tax disputes out of court, via TAT is introduced to further increase the fairness and transparency of the tax system, therefore enhancing the confidence of taxpayers in the domestic tax system.<sup>246</sup>

Initially, the rules regarding the procedure of TAT are established by *Tax Appeal Tribunal (Procedure) Rules 2021*. Herein, it is mentioned that all the taxable persons can appeal to TAT, thus, natural persons as well as companies. Another important paragraph is *Order XXVII* which states that an appeal to the court is still open after the decision of TAT.

#### Mutual Agreement Procedure

Similar to SARS, FIRS provides the opportunity for taxpayers to submit for a MAP.

#### 4.3.6 Tax Control Framework

On the topic of corporate governance, Nigeria provides similar guidelines as South Africa. In *Companies and Allied Matters Act, 2020* certain rules are laid down on the framework for corporate governance. Rules regarding directors are, for instance, provided in Chapter 11; Chapter 14 provides regulations for accounting records and financial statements. In contrast to the South African law, this legislation provides slightly more detailed regulation on a company's risk management. Section 405, for instance, states the corporate responsibilities of the chief executive officer and chief financial officer. These are, among others, that they have '[establish and maintain] internal controls [have] designed such internal control to ensure that material information ... is made known to the officer by other officers of the companies.'<sup>247</sup>

#### 4.4 Conclusion on South Africa and Nigeria

Based on the initiatives introduced by the tax administrations of South Africa and Nigeria, the conclusion can be drawn that no complete cooperative compliance program is present. The discussed initiatives and their main features, however, do provide an adequate basis for the implementation of a cooperative compliance program. The initiatives in all the countries have characteristics and do check certain requirements of cooperative compliance. Having these approaches in place means that the tax administrations, taxpayers, and policymakers have gained useful experiences on working together more closely. For the implementation of a formal cooperative compliance approach, these countries can "simply" build upon the – already existing – approaches and experiences.

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<sup>245</sup> Ibifubara Berenlbara, 'Tax Appeal Tribunal's Jurisdiction under Enabling Act not in Conflict with Jurisdiction of the Federal High Court over Tax Disputes' (2018) <[Jurisdiction-of-the-Tax-Appeal-Tribunal-confirmed-by-Court-of-Appeal.pdf \(aelex.com\)](https://www.aalex.com/2018/05/24/tat-jurisdiction/)> accessed 28 May 2024.

<sup>246</sup> Tax Appeal Tribunal, 'About us' ([tat.gov.ng](http://tat.gov.ng)) <<https://www.tat.gov.ng/about.php>> accessed 28 May 2024.

<sup>247</sup> Companies and Allied Matters Act, 2020, s. 405.

When comparing the current situation in both countries, South Africa seems to have a broader basis for cooperative compliance than Nigeria. The main driver of this is the presence of a good functioning large business unit. A program for large taxpayers is via this unit easier to facilitate. Moreover, it is remarkable that similar initiatives have been implemented earlier in South Africa relative to Nigeria. An explanation for this could be the fact that the South African economy is further developed. The earlier an initiative is adopted, the longer it is and has been in place, the more experience is gained by both tax administration and the taxpayer. Lastly, the ATR in South Africa is further developed, meaning that it is more used and more useful, therefore, providing more tax certainty.

## Section 5 – A Framework for African Countries

As stated in this paper, cooperative compliance can play a positive role in the clash that African countries encounter regarding tax avoidance and in the implementation of anti-tax avoidance measures. The main recommendation for African countries is, thus, to introduce a form of cooperative compliance. It should, however, be acknowledged that the currently encountered (underlying) challenges are likely to also arise in the context of implementing standards/approaches on cooperative compliance (e.g., lack of resources and lack of administrative capacity). The conclusion is therefore not as simple as just saying: *based on the benefits that cooperative compliance provides, all African jurisdictions should directly implement initiatives to enhance cooperative compliance since it will help the tax administration and the country as a whole*. So, the recommendations are more focused on minimum standards that countries can implement with the emphasis on cooperative compliance with large taxpayers and MNEs since this is more realistic to be accomplished within a reasonable time horizon. The choice of large taxpayers was made, since they are seen as the most important and impactful, meaning that the benefits connected to a trust-based relationship with this type of taxpayer will be the most beneficial for addressing the tax avoidance challenges.

The analysis of the current situation in South Africa and Nigeria is used for certain practical implications, based on the experience and functioning of the initiatives.

To build an adequate basis for cooperative compliance, the minimum standards should address the following elements: participating in the program should be voluntary; risk management should be adequately addressed; the taxpayer should be able to agree to disagree; and the creation of a trust-based environment should be enhanced.

- (1) The tax administration of African countries should ensure the conditions that are needed to create an environment for taxpayers, wherein the latter want to engage in a trust-based relationship. As mentioned earlier, this is accomplished by showing behavior that is in line with the five attributes mentioned by the OECD: commercial awareness, impartiality, proportionality, openness, and responsiveness. To make this recommendation more tangible, the adoption of an adequate service charter is advised. When tax administrations actively provide services that are related to these five attributes, the communication thereof is key. The service charter provides an overview of the overall goals and commitments of the tax administration, which provides, to some extent, certainty to the taxpayer. Moreover, it can contribute to a changing image of the tax administration, so taxpayers see it more as a stakeholder on a horizontal level. Another attribute of this standard is the communication of the tax audit strategy used by the tax administration. Following the example of FIRS in Nigeria, which published its guidelines on tax compliance inquiry activities, the tax administrations of



African countries benefit from sharing a detailed document of its inquiry activities. This way, the tax administration shows transparency on their behalf, attributing to the overall environment to build relationships.

- (2) African tax administrations should have a unit dedicated to large taxpayers. As visible in South Africa, the LBI provides various advantages for both tax administration and taxpayers. A centralized center that deals with the taxation, tax issues, and tax compliance of large taxpayers provides a foundation for further cooperative compliance programs. Within the large business unit, the tax administrations should create segmentations of different types of taxpayers, based on the sector, or more specifically the industry, they operate in. These segmentations enable to create sub-units within the large business unit, leading to a better understanding of the taxpayers and their environment, as well as gaining more experience and expertise on taxpayer-/industry-specific tax issues. Furthermore, an adequate form of relationship management must be implemented. This allows the tax administration to install managers that function as the point of contact for the taxpayer. By providing this single point of contact, communication with the taxpayer becomes more effective and efficient.

As a consequent step (also for South Africa and Nigeria), it is recommended to start a pilot project on a specific program of cooperative compliance for a voluntary program facilitated by this unit that focuses more on mutual trust. Here it is recommended that the tax administrations oblige a strict application process. Enabling to differentiate the treatment between low-risk and high-risk taxpayers. Moreover, the participation in this program must be voluntary. The LBI in South Africa, for instance, has a mandatory element. This mandatory element does not enhance the desired cooperation and associated trust. To realize a paradigm shift in the way that large taxpayers think about taxation and the tax administration, the level of voluntariness should be prioritized.

- (3) Another minimum standard is the conduction of risk assessments. Regarding a pilot program as mentioned under (2), the tax administration should only accept taxpayers who can ensure that they have effective risk management. Tax administration must conduct risk assessments on the large taxpayers to establish this effectiveness. With the help of this risk assessment, tax administrations should decide which taxpayer can join the program, so it can allocate the resources most efficiently. Besides, the tax administration should adapt the treatment of each taxpayer based on this assessment; if a taxpayer has very weak risk management, the supervision of this taxpayer should be intensified.

Related to this risk assessment is the minimum standard of providing guidelines on an effective TCF. To provide taxpayers better guidance and supervision on the implementation of effective

risk management, African countries should prescribe the requirements of this TCF. By including these requirements in their legislation, the tax administration can enhance the assurance of information provided by the taxpayer. It is also recommended to include the presence of a TCF as one of the criteria to join cooperative compliance programs. The elements that should at least be included in the guidelines of a TCF are a description of the tax strategy, an own risk assessment paired with responses on identified risks, a description of tax processes and internal controls, and a test of these processes and controls.

- (4) The fourth minimum standard aims to ensure that the taxpayer can agree to disagree with the tax administration. This can be seen as one of the fundamentals of a trust-based relationship. By legislation or by agreement in the case of a formal cooperative compliance program, it should be secured that both the taxpayer and the tax administration can litigate the tax issues whereon no agreement can be reached. By securing this possibility, it is also implicated that these litigations do not affect the relationship between the two parties. I.e., the treatment of the taxpayer (or the tax administration) should not change when this party starts a litigation process.

Moreover, as mentioned in Section 4.2.6, the ADR in South Africa shows positive results; almost all appeals were resolved through taxpayer engagement. Therefore, it is recommended that African countries implement a similar ADR. The countries should provide guidelines with administrative specifications: which decisions are subject to an appeal; which types of taxes are covered; the deadline for the submission of a request. Taxpayers should be given the choice of whether they want to make use of ADR. Lastly, it should be ensured that in cases where the dispute is not resolved via the process of ADR, it can still be resolved in court.

These minimum standards can provide a foundation for more advanced and further-reaching cooperative compliance initiatives, and eventually a structured cooperative compliance program for different types of taxpayers.

## Section 6 – Conclusion

The economies of African countries suffer relatively more from tax avoidance than more developed economies, leading to various challenges in the African economies. These difficulties also impact the implementation and enforcement of international measures curbing tax avoidance. These measures aim to mitigate tax avoidance by, among other things, enhancing the tax transparency of MNEs. The *clash* that African countries encounter, where the increasing number of international standards are beneficial for the economies since they should increase the fairness of the tax system. But at the same time, resource and capacity constraints hinder these implementations. This study shows that cooperative compliance can provide a partial solution to the challenges faced by African countries. Approaches of cooperative compliance result in various benefits for both the taxpayer and the tax administration. These benefits enable a trust-based relationship between both parties which will result in increased transparency. Since cooperative compliance enables tax administration to allocate its resources more effectively and efficiently; to differentiate the treatment of high-risk and low-risk taxpayers; to provide more tax certainty for taxpayers; to discuss complex tax issues; to provide higher consistency between the treatment of tax issues; and to be more transparent in all the processes. In relation to this, by providing facilities that are beneficial for taxpayers, the taxpayers are likely to be more transparent about their (tax-related) activities. This increased transparency is, in turn, beneficial for the tax administration, enabling it to address the challenges it faces. Cooperative compliance can therefore be seen as a suitable solution for African countries that face difficulties in tax avoidance.

To make recommendations for the implementation of cooperative compliance in African countries, current initiatives in South Africa and Nigeria are analyzed showing certain aspects of cooperative compliance. Based on these experiences the following minimum standards are created for the policymakers and tax administrations in African countries:

- Create an environment for trust-based relationships, via (1) a clear communication of the services the tax administration provides to the taxpayers, and (2) the communication of the tax audit strategy.
- Create a large business center, including (1) taxpayer segmentation based on industry or sector to get a better understanding of specific tax issues, and (2) adequate relationship management to provide a single point of contact for taxpayers. In addition to this large business center, it is promoted that the countries start a pilot program which is voluntary and has an application process in order to assess the risks of the taxpayer.
- Conduct risk assessment of taxpayers and create guidelines for an effective TCF.
- Ensure that taxpayers and tax administration can agree to disagree, by (1) ensuring that the possibility of litigation is known by both parties (e.g., using a signed agreement), and by (2) the introduction of an effective ADR mechanism.

Since, it is expected that African countries face certain similar challenges in the implementation of cooperative compliance initiatives as they face in tax avoidance, further research on the cost-benefit for both the tax administration and the taxpayer could be very useful. As further research, it would be insightful to analyze these initiatives from a more financial point of view. E.g., how much costs are associated with the existence of the Tax Appeal Tribunal and what are the financial benefits. Another interesting topic for further research is the possibility of multinational cooperative compliance approaches for African countries. With ICAP and ETACA a trend is visible that cooperative compliance is used in an international context. Research into whether African countries could join, for instance, ICAP, or whether they would be able to realize a similar program can provide various insights.

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