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South East Asian tax administration issues in the drive to attract foreign direct investment: Is a regional tax authority the way forward?

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Abstract

The Association of South East Asian Nations (ASEAN) region is of growing importance to foreign investing New Zealand businesses. Under the umbrella of a case study focusing on Vietnam, this paper utilises interviews and phenomenology observations to ascertain the particular tax administration issues that are of concern to foreign investors. The research then explores the possibility of establishing an ASEAN-based Regional Tax Authority (RTA) as a way of alleviating such tax administration issues and, ultimately, increasing foreign investment into the ASEAN region. It is suggested that the establishment of an ASEAN RTA is the 'best way forward'.

Keywords: *ASEAN, foreign investment, interviews, New Zealand, regional tax authority, tax*

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1. INTRODUCTION

1.1 Overview

Over recent decades, developing South East (SE) Asian nations have been the subject of monumental political, cultural and economic change. Association of South East Asian Nations (ASEAN) members such as the Philippines, Vietnam, Laos, Cambodia and Myanmar, are at varying points on the journey to development, yet the combined economic significance of the region is undisputable.[4] In relation to Vietnam, Tran-Nam considers economic growth to be the most important determinant of economic development, with good tax policy a cause rather than a result of such progress.[5]

It has been argued that promoting economic growth is almost synonymous with attracting inbound foreign direct investment (FDI).[6] The United Nations Conference on Trade and Development (UNCTAD) recognised that deciding whether to invest in a nation is a vexed decision, with a nation's 'policy framework' being one factor considered by potential investors, along with economic considerations (market size, infrastructure etc.) and the ease of doing business in the chosen nation.[7] There is a plethora of research pertaining to the inverse relationship between corporate income taxes (CIT) and Gross Domestic Product (GDP), including Hartman's quantitative study.[8] However, the majority of this literature is United States (US) centric in nature with a focus on inbound US investment, and thus fails to consider the tax administration challenges unique to developing countries. Despite this limitation, Hines' survey of multiple quantitative studies found an elasticity of –0.5 to –0.6 between CIT rates and FDI, which, due to being less than perfect, supports the view of the UNCTAD that the decision to invest in a nation is multifaceted and not solely dependent on corporate tax rates.[9] Instead, an effective tax administration is one of many important considerations.[10] Therefore, it is clear that an effective, legitimate tax administration is a key determinant of attracting FDI and stimulating economic development.

The tax literature pertaining to FDI focuses almost exclusively on the relationship between tax rates and investment levels. Administrative factors, such as 'red tape' and compliance costs, can also weigh significantly on investment decisions. However, somewhat alarmingly, it is observed that 'empirical studies have practically ignored these important considerations'.[11] Tax administration issues not only fall within the ambit of the UNCTAD's 'policy framework' category but also under the 'business

[4] Nolan C Sharkey, , "Greater China and South East Asia" in Nolan Sharkey (ed) *Taxation in ASEAN and China: Local Institutions, Regionalism, Global Systems and Economic Development*, (Routledge, 2012), 1–13.
[5] Binh Tran-Nam, "Tax Reform and Economic Development in Vietnam" in Nolan Sharkey (ed.) *Taxation in ASEAN and China: Local Institutions, Regionalism, Global Systems and Economic Development*, (Routledge, 2012), 126–147.
[6] Tran-Nam, n 5 above.
[7] United Nations Conference on Trade and Development (2003), *World Investment Report, 85, 1-322* <http://unctad.org/en/Docs/wir2003_en.pdf>.
[8] David Hartman, 'Tax Policy and Foreign Direct Investment in the United States' (1984) 37 *National Tax Journal*, 475–488.
[9] James R Hines, 'Lessons from Behavioral Responses to International Taxation' (1999) 52 *National Tax Journal* 305–322.
[10] United Nations Conference on Trade and Development, n 7 above.
[11] Tran-Nam, above n 5,137.

facilitation' head due to the intrinsic link between tax administration and the ease of doing business. It is thus conceivable that tax administration issues can play a significant role in attracting FDI, giving a basis for the present study to test this relationship in addition to identifying current SE Asian tax administration issues relevant to foreign investors, and also investigating whether a Regional Tax Authority (RTA) may be an appropriate solution.

While some researchers have argued that 'externally imposed initiatives in tax administration are likely to be resisted, if not rejected, by local interests', they fail to explore the potential acceptability of a less radical proposal aimed at 'foreign interests' as opposed to 'local interests'.[12] Vehorn appositely observes that administrative reform should aim for simplification of the law and taxpaying processes and ideally be implemented by a government with a strong political will for modernisation under a structured plan, preferably incrementally.[13] This is in accordance with Bird's suggestion that administrative reforms are most effective when simple and well sequenced.[14] It is in agreement with these remarks that the present research explores the feasibility and perceptions from a range of businesses, academics and tax practitioners of an RTA which would conceivably act as an intermediary between foreign investors and SE Asian governments/tax authorities to pragmatically address current problems prohibiting the ease of foreign investment.

1.2 Importance of South East Asia as a trading partner for New Zealand

Due to SE Asia's rapid development and emergence as a global economic powerhouse, there is substantial demand for reform proposals from SE Asian nations wishing to maintain such high growth rates (due in part to FDI capital injections), and also from foreign enterprises which require certainty and transparency in a tax administration as a prerequisite to making foreign investments. From a New Zealand (NZ) perspective, SE Asia is of immense importance to future economic growth, with China recently having overtaken Australia as NZ's largest trading partner and the wider Asian region constituting a significant 40 percent of total merchandise imports and exports with NZ.[15] With the Trans-Pacific Partnership (TPP) negotiations on-going, NZ trade and investment in SE Asia is set to markedly increase from an already substantial 29 NZ companies investing $2.37 billion as of 2011.[16] While NZ's network of Free Trade Agreements (FTAs), which lay the legal 'groundwork' for investment in Asia continues to grow, such investment opportunities may be neglected if the tax administration in that country is uncertain or problematic.

This study aims to side-step the current tax administration challenges faced by foreign investors by exploring the possibility of establishing an RTA at the international

[12] David Chaikin and Maria Dyball, 'Tax Compliance and Administrative Challenges: Lessons from the Philippine experience' in Nolan Sharkey (ed.) *Taxation in ASEAN and China: Local Institutions, Regionalism, Global Systems and Economic Development* (Routledge, 2012) 73–97, 91.
[13] Charles L Vehorn, 'Fiscal Adjustment in Developing Countries through Tax Administration Reform', (2011) 45(1) *The Journal of Developing Areas*323–338.
[14] Richard Bird, 'Administrative Dimensions of Tax Reform', *Asia-Pacific Tax Bulletin* (2004) March, 134–150.
[15] Hugh Dixon and Jason Leung-Wai (2012), *Foreign Direct Investment: New Zealand and Asia,* Asia: New Zealand Foundation<http://asianz.org.nz/files/Foreign_Direct_Investment_New_Zealand_and_Asia.pdf>.
[16] Dixon and Leung-Wai, n 15 above.

(regional) level. This is achieved through use of qualitative research techniques, namely interviews and direct author observations.

After spending three months living and working in Vietnam, from late 2012 though to early 2013, one of the authors was able to witness the 'hunger' for FDI from state authorities whilst also sensing the hesitation and concerns held by potential investors with regard to issues including uncertainty in the tax administration. The identification of tax administration issues that curtail the alignment of foreign investor and SE Asian state interests has motivated the current research's normative, forward-looking orientation. Increased FDI will accelerate SE Asian growth rates, whilst also benefiting foreign investing enterprises and their 'home' nations, which ultimately receive the after-tax profits from off shore operations and investments. Such research is also motivated by the notable lack in the literature of such studies and reform proposals as is discussed in the following sections.

The tax literature is arguably lacking a recent study of SE Asian tax administration issues specific to foreign investors. It is also notably lacking any normative consideration of an RTA which would ostensibly administer taxes exclusively for foreign investors. Whilst Sharkey has proposed a SE Asian Regional Tax Organisation (RTO), the following discussion shows that Sharkey's proposal is more extreme in its functionality, with few features in common with the proposed RTA.[17] Despite these conceptual differences, the present study seeks to comment on the feasibility and attractiveness of the Sharkey proposal to determine whether it may be an 'end point' that could be reached after the initial establishment of an RTA through a process of gradualism. Therefore, the interrelated research questions are:

RQ1 What are the tax administration issues faced by foreign investors in SE Asia nations and to what extent do such tax administration issues influence FDI decisions?

RQ2 What is the feasibility/perception of an RTA as a means of countering such issues?

RQ3 Pragmatically, is it feasible to view the RTO proposed by Sharkey as an 'end point' subsequent to the establishment of an RTA?

2. REVIEW OF PRIOR RESEARCH ON SOUTH EAST ASIA TAX ADMINISTRATIONS AND REGIONAL/GLOBAL TAX ORGANISATION PROPOSALS

This review first examines recent studies of SE Asian tax administrations and notes a number of thematic administration issues. Secondly, previously proposed solutions to deficient tax administrations of large taxpayer units (LTUs) and autonomous or semi-autonomous revenue authorities (SARAs) will be critiqued. Finally, recent calls for a global or SE Asian RTO will be noted and distinguished from the present, less radicalised proposal for reform.

2.1 Prior studies on South East Asian tax administration issues

With foreign investment being critical to the region's economic growth, it is curious to note that literature on tax administration in SE Asia tends to focus on issues related to

[17] Sharkey, n 4 above.

domestic compliance problems rather than the subcategory of administration issues which are of relevance to foreign investors. Despite this general trend, several papers contain analysis of issues relevant to the present study, including Chaikin and Dyball's study[18] of the Philippines tax compliance and administration issues. Chaikin and Dyball's study surveys various compliance and administrative challenges in the Philippines, seemingly on the basis of pre-existing literature and empirical data. It is noted that corruption is rampant and so deeply entrenched in the Bureau of Internal Revenue (BIR) that the Philippines Congress has considered the BIR's complete disestablishment 'in favour of starting out fresh'.[19]

Additionally, Chaikin and Dyball refer to a 2008 Social Weather Station (SWS) survey gauging the extent that businesses encountered corruption in the revenue authorities. An alarming 71 percent of respondents reported having been asked for a bribe, 31 percent when paying import duties and 46 percent when paying income taxes. More telling, 79 percent of respondents did not report the solicitation accompanying these bribes as they believed that 'nothing would be done'.[20]

Perhaps of greater relevance to potential investors, the corruption perceptions index (Transparency International) shows markedly high levels of perceived corruption in the Philippines.[21] This index is calculated by country analysts through extensive surveying of business people, with unbiased hard data being inherently difficult to obtain on such a politically 'sensitive' issue.[22]

As with Chaikin and Dyball, Tran-Nam's case study of Vietnam does not focus directly on tax administration issues relevant to foreign investors, yet it still notes several systematic administration issues relevant to the present study.[23] After critiquing the gradual lowering of CIT rates, Tran-Nam claims that 'administrative reform is needed', yet refrains from detailing 'how' or 'what' the reform should be.[24] It is observed by Heij that issues in the Vietnamese tax administration include taxpayer compliance costs stemming from legal problems, the time taken to deal with bureaucracy, hidden fees and the objection and appeal process.[25] Other issues identified include high corruption, low education and low compensation of tax officials who are also subject to low political accountability due to the single party political system. Tran-Nam reasons that these issues are contributing factors towards Vietnam's low ranking in the World Banking Group's 'ease of doing business' report series, and suggests that 'commitment and implementation of tax administration measures [by the government] will send a very positive signal to foreign investors'.[26] However, the study did not investigate what reform options may be appropriate.

[18] Chaikin and Dyball, above n 9.
[19] Ibid 73.
[20] Ibid 75.
[21] Transparency International, (2012), *Corruption Perceptions Index 2012*, <http://www.transparency.org/cpi2012/results>.
[22] Chaikin and Dyball, above n 12.
[23] Tran Nam, above n 5.
[24] Ibid 137.
[25] Gitte Heij, 'Costs of Compliance: the Taxpayer's Hidden Tax Burden' (1995) 1(1) *Asia-Pacific Tax Bulletin*,22–24.
[26] Tran Nam, above n 5, 142.

A quantitative study by Ajaz and Ahmad was the first to test the relationship between corruption, good governance and total tax revenues collected.[27] Through the use of an econometric model, it was found that high corruption levels in a tax administration result in lower revenue collections, while a positive relationship was observed between tax collection and good governance (including strategic planning) of such authorities. A more recent study by Mansor and Tayib is the first to look at the existence of strategic planning (a feature of good governance) in a SE Asian tax administration, finding disparities between the practices observed and international norms.[28] Ajaz and Ahmad's study is particularly significant for the present study as it was found that tax administration issues relevant to foreign investors, which have been identified by prior studies, have an adverse impact on revenue collection.[29] This enables the inference to be drawn that both SE Asian revenue authorities and foreign investors are experiencing sub-optimal investment outcomes due to tax administration issues.

2.2 Large Taxpayer Units (LTUs) and Semi-Autonomous Revenue Authorities (SARA)

A survey of the literature reveals a plethora of 'solutions' to tax administration problems, although few have proved to be successful or adaptable to the unique circumstances of developing nations. Vehorn reviewed proposals arguing for and against the establishment of large taxpayer units (LTUs) in developing countries, finding that such bodies are fundamentally flawed in their conception.[30] LTUs have been propagated by the International Monetary Fund (IMF) as a way of enhancing revenue flows by way of creating a specialised unit within a nation's revenue authority tasked with collecting taxes from large taxpayers.[31] Proponents for such units observe that less than 10 percent of enterprises in developing countries typically contribute between 50 percent and 90 percent of tax revenue, with a highly trained 'one stop shop' LTU creating fewer opportunities for corruption, thus increasing tax collection.[32]

Through statistical analysis of economic data collected before and after the implementation of LTUs by 40 developing countries, Vehorn found that while tax revenue rose in 32 of the 40 countries, tax share (collections/GDP) increased in only 10 of 40 countries, with a decline witnessed in 43 percent of the nations studied. Pertinently, it was found that the implementation of an LTU in developing nations suffering tax administration issues such as corruption is 'not systematically associated with higher economic growth'.[33] However, Vehorn reaches these conclusions based on the experience of developing nations outside SE Asia, and fails to take into account external events such as wartime conflicts and the global financial crisis (GFC). Regardless, this study indicates that the establishment of LTUs guarantees neither economic growth nor (significantly) enhanced revenue flows.[34]

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[27] Tahseen Ajaz and Eatzaz Ahmad, 'The Effect of Corruption and Governance on Tax Revenues' (2010) 49(4) *The Pakistan Development Review*, 405–417.
[28] Mansor Muzainah and Mahamad Tayib, 'Strategic Planning in Public Organisations: The Case of a Tax Administration in a Developing Country (2012) 1(8) *Business Management Dynamics* 20–33.
[29] Chaikin and Dyball, above n 12,; Tran-Nam, above n 2; Mansor and Tayib, above n 28.
[30] Vehorn, above n 13.
[31] International Monetary Fund (IMF), *Improving Large Taxpayers' Compliance: A Review of Country Experience* (2002),<http://www.imf.org/external/pubs/nft/op/215/index.htm>.
[32] Vehorn, above n 13.
[33] Ibid 334.
[34] Ibid.

Another solution to many of the unique challenges faced by developing countries is the establishment of an autonomous or Semi-Autonomous Revenue Authority (SARA) operating under an organisational structure with many features in common with private sector organisations.[35] Devas, Delay and Hubbard, for example, note in this regard that the role of the government is to 'steer, not to row'.[36] The authors state that the rationale behind a SARA is that independence from the government can yield greater efficiencies as a result of lower levels of corruption than is found in the public sector and being able to invest in sophisticated staff training. Mann adds that SARAs are typically introduced as a measure to remedy the lack of transparency in revenue authorities which can be indicative of corruption.[37]

A more recent IMF survey of various SARAs found that they operate with varying degrees of autonomy, yet they share common features.[38] A later Organisation for Economic Co-operation and Development (OECD) analysis found that indicators of autonomy, or rather, the SARA's ability to operate independently of government, include its independence in organisational planning and budget management, whether it sets its own performance measurement standards, and whether it has control over its human resource policies.[39] Through comparative analysis of SARAs in existence, Crandall found that 75 percent have empowered management boards, 70 percent operate outside the public service and 30 percent are funded independently by retaining a percentage of their tax collection.[40]

With extensive use of the SARA model in Africa, Devas et al.'s study of the Ugandan experience exposes several weaknesses with this reform option.[41] Uganda introduced a SARA to combat extensive corruption and staff training deficiencies that were thought to be the reason for its poor tax share.[42] Devas et al. observe that 'while the desired results were initially obtained with dramatic increases in tax share', problems of corruption have re-emerged highlighting that SARAs 'do not guarantee isolation from political interference, incompetence or malpractice'.[43] There is no discussion in the literature on whether the effectiveness of the SARA model in developing nations may differ if it were fully autonomous and operating at an international (or regional) level.

2.3 Reform proposal: A World Tax Organisation

While SARAs and LTUs are currently in existence, Sawyer proposed the forward looking and normative establishment of a World Tax Organisation (WTO) as a

[35] William Crandall, 'Revenue Administration: Autonomy in Tax Administration and the Revenue Authority Model', *IMF Technical Notes and Manual 10/12* (2010) <http://www.imf.org/external/pubs/ft/tnm/2010/tnm1012.pdf>.
[36] Nick Devas, Simon Delay and Michael Hubbard, 'Revenue Authorities: Are they the Right Vehicle for Improved Tax Administration?' (2001) 21(3) *Public Administration and Development*, 211–222.
[37] Arthur J Mann (2004), 'Are Semi-Autonomous Revenue Authorities the Answer to Tax Administration Problems in Developing countries? A Practical Guide' *Research paper for the project: Fiscal Reform in Support of Trade Liberalization* <http://pdf.usaid.gov/pdf_docs/PNADC978.pdf>.
[38] International Monetary Fund (2006), *Revenue Authorities: Issues and Problems in Evaluating Their Success* WP/ 06/240 <http://www.imf.org/external/pubs/ft/wp/2006/wp06240.pdf>.
[39] Organisation for Economic Co-operation and Development (OECD) (2009), *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series (2009)*,(OECD, 2009).
[40] Crandall, above n 35.
[41] Devas et al., above n 36.
[42] Crandall, above n 35.
[43] Devas et al., above n 36, 213 and 221.

solution to certain tax challenges in 'an increasingly integrated and globalised world with many cross-border transactions and companies operating across many jurisdictions'.[44] Sawyer proposes that the initial jurisdiction of such a body be limited to binding (advance) rulings and advance pricing agreements (APAs) accompanied by a dispute resolution function giving standing to private parties. Sawyer argues that over time, 'through gradualism, an international organisation should assume ever greater authority for coordinating administrative tax policy and processes for cross-border business transactions', although Sawyer adds the caveat that he is not a proponent of 'complete harmonisation'.[45]

Pinto and Sawyer reason that a WTO could have the subsidiary benefit of being a global 'relationship bridge' to share research and best practices in tax administration.[46] Usefully, their study examines the limited roles of a wide range of international organisations that may constitute 'associations of tax organisations', ultimately concluding that the proposed WTO would be an appropriate body for such a function. Sawyer acknowledges that his research 'is certainly not the final work on the topic [of a WTO]' with several aspects unexplored including the potential 'expansion of its jurisdiction'.[47] The possibility of a regional tax authority with the independence and jurisdiction of the proposed WTO is also not examined by these studies.

2.4 Proposed regional tax organisations

It is appropriate to recognise that the OECD plays a limited but significant role in international tax administration, primarily by encouraging double tax agreements (DTAs), Tax Information Exchange Agreements (TIEAs) and by setting guidelines for complex issues such as transfer pricing (TP) and exchange of information standards. It should also be noted that the United Nations (UN) Model Double Taxation Convention between Developed and Developing Countries,[48] is used extensively in the negotiation of DTAs, placing an emphasis on *source* taxation. However, the OECD DTA model is often used where a developing country is negotiating a DTA with an OECD member. The OECD's limited role in this sphere has been subject to criticism from academics including Bazo who claim that standards set by the OECD are viewed dimly by developing economies, with the perception being that the OECD's interests are ostensibly for the benefit of developed economies.[49]

Further, Sharkey criticises the OECD as merely entrenching established tax principles of *source* and *residence*, which makes fundamental changes in international tax policy

[44] Adrian Sawyer, *Developing a World Tax Organisation: The Way Forward*, (Birmingham, Fiscal Publications, 2009), ix. This study builds upon the pioneering work of Tanzi; see Vito Tanzi, 'Is there a Need for a World Tax Organisation?' in Assaf Razin and Efraim Saka (eds), *The Economics of Globalisation: Policy Perspectives from Public Economics*, (Cambridge University Press, 1999) 173–186.
[45] Sawyer, above n 44, 9. Kerrie Sadiq, 'The Traditional Rationale of the Arm's Length Approach and Transfer-pricing. Should the Separate Accounting Model be Maintained for Multinational Entities?' (2004) 7(2) *Journal of Australian Taxation*, 196, 241.
[46] Dale Pinto and Adrian Sawyer, 'Building Bridges between Revenue Authorities: Would a World Tax Organisation be a Key Facilitator?' (2011) *Journal of Applied Law and Policy*, 25–38.
[47] Sawyer, above n 44, 208.
[48] United Nations (5 April 2012), *Model Double Taxation Convention between Developed and Developing Countries* < http://www.un.org/en/development/desa/publications/double-taxation-convention.html>.
[49] Andres E Bazo, (2008), *The International Tax Organization, a Proposal Destined for Failure?* Working Paper <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319929>.

increasingly difficult.[50] Sharkey and Bain argue that the 'jurisdictional nexus rules of *source* and *residence*' are incompatible with the current era of international business and economic transnationalism. Thus organisations such as the OECD, which are perceived as serving the interests of developed countries over developing countries, and which have a conservative approach to international taxation reform, may not be appropriate bodies to further an agenda of radical tax administration reform in the SE Asian region.[51]

As previously noted, ASEAN is a geo-political and economic organisation with membership comprising Singapore, the Philippines, Malaysia, Indonesia, Thailand, Brunei, Vietnam, Laos, Cambodia and Myanmar, and it operates with social, economic, defence and cultural mandates. An ASEAN policy document stipulates that economic integration is one of the aims of ASEAN, with the end goal being a single unified market comparable to the European Union (EU).[52]

Sharkey uses this mandate as the foundation for a proposed SE Asian RTO which would contribute towards economic integration of ASEAN countries whilst refraining from political harmonisation as seen in the EU.[53] The motivation for such a change is the interconnected nature of the regional economies, with globalisation and the elimination of harmful regional tax competition argued to be better served by the establishment of an RTO. In support of Sharkey and Bain, Sharkey proposed the establishment of a 'regional' concept of *source* and *residence*, not restricted by national or geographical borders.[54] Sharkey then proposed that a regional common tax rate be set, with the administration and collection of SE Asian taxes being undertaken by the RTO before being distributed to the various nations.[55]

Significantly, however, it must be noted that the proposal fails to address the issue of how the common tax rate would be set. Any international organisation requiring a state to hand over the sovereign task of setting its tax rates is inherently radical in nature. It should also be recognised that a proposed RTO would encounter numerous complexities if tasked with assessing the hundreds of millions of 'domestic residents' within the SE Asian region as opposed to merely concentrating on foreign investors. Regardless, the Sharkey proposal provides a useful reference point for the present study. Its radicalism leaves a notable 'gap' between the status quo and the proposed RTO in which a less radical but equally effective RTA can be explored.[56]

2.5 Conclusion from the prior research

The preceding examination of the prior research has shown that there are many tax administration issues plaguing the SE Asian region. However, not only is there a lack of research into these issues beyond a relatively small number of isolated studies, but these studies fail to determine which particular issues are faced by foreign investors as opposed to 'taxpayers' in general. Research on 'domestic level' LTUs and SARAs

[50] Nolan Sharkey, 'A South East Asian Tax Organisation', (2013) *British Tax Review*, 2, 175–191.
[51] Nolan Sharkey and Katherine Bain, 'Tax Residence and Regions: Addressing South East Asian Transnationalism through ASEAN', in Nolan Sharkey (ed.) *Taxation in ASEAN and China: Local Institutions, Regionalism, Global Systems and Economic Development,* (Routledge, 2012),236–258, 236.
[52] ASEAN (1997), *Vision 2020*, ASEAN <http://www.asean.org/news/ item/asean-vision-2020>.
[53] Sharkey, above n 50.
[54] Sharkey and Bain, above n 51.
[55] Sharkey, above n 50.
[56] Ibid.

was also examined, indicating that such 'solutions' have failed in practice due, primarily, to a failure to prevent the re-emergence of corruption. However, aspects of the LTU and SARA 'solutions', such as increased staff training, will be considered in the present study as possible features of the proposed RTA.

Likewise, the proposed WTO is radical in its conception and, although not directly concerned with the SE Asian region, contains several attractive features such as an accessible disputes settlement function and the issuance of binding rulings.[57] Sharkey's proposed RTO is radical and extreme and could potentially be viewed as an 'end point' rather than a 'starting point' for reform.[58] Thus, it is clear that there have been no proposals in the literature exploring the feasibility of a less radical RTA acting as an intermediary between foreign investors and SE Asian States.

3. RESEARCH APPROACH

This study focuses on Vietnam, although some of the data collected relates to the wider ASEAN region as opposed to being Vietnam specific. This case study utilises mixed research methods, which primarily consisted of semi-structured interviews, but also includes phenomenological observations. Interviewees were asked questions pertaining to their perceptions of a potential RTA, both in relation to the identified administration issues, and whether it would likely prove attractive to foreign investors in their capital investment decisions.

3.1 Interviews

The interview subjects included three academics with knowledge of ASEAN tax administration, senior executives or tax managers of NZ companies that have invested or are considering investing in Vietnam, one who has worked for New Zealand Trade and Enterprise (NZTE) in SE Asia, and a NZ tax adviser, who provides advice to NZ companies on SE Asia market entry. For practical and ethical reasons, individuals currently residing in Vietnam were not interviewed. While this may appear to be a limitation, it was largely to improve the validity of the study, as individuals living in Vietnam may not feel that they are in a position to be 'open' to discussing challenges in the tax administration, and may subsequently provide opaque, misleading or false information.

With this study being explorative, there is no intention to seek to generalise the findings from the interviews. Nevertheless, it was our intention to interview a sufficient number of subjects so as to ensure any emerging themes had qualified support. Eight interviews were undertaken with the subjects selected on the basis of their expertise and experience concerning FDI and Vietnam. In the case of the academic subjects, these were selected from a very small pool of established Australasian researchers examining SEA tax administration issues. The senior executives, tax managers, and advisors were either key personnel in businesses that one of the authors had established prior contact with or were known to be actively involved in undertaking or advising on FDI in Vietnam.

[57] Sawyer, above n 44.
[58] Sharkey, above n 50.

The literature suggests that a defensible absolute minimum number of interviewees is six, with typical interview samples involving twelve or more subjects (or ceasing at the point of saturation when no new information is gleaned from the last interviewee).[59] As Morse observes, it is not the quality of data that is theoretically important but the richness of the data derived from the detailed description.[60] In this study, given its exploratory nature and the relatively small number of experts and NZ businesses known to be actively involved in FDI in Vietnam, the number of potential interviewees was small. The resulting findings give us no reason to believe that had a wider pool of subjects been included, the emerging themes and issues would be significantly different.

The interviews were semi-structured enabling the 'what' and 'why' questions to be asked with regard to administrative issues before delving into the exploratory aspects of the case study, which sought to gauge the interviewee's perceptions of the proposed RTA as a solution to the tax administration issues raised in the earlier phase of the interview. Issues raised by interviewees in early interviews formed the basis of questions in later interviews. Although this means that the interview findings could not be directly compared, the 'evolving' nature of some of the interview questions benefited the research findings.

Each interview subject was provided with a non-exhaustive overview of the questions to be discussed approximately 24 hours prior to the interview, along with an information sheet which outlined the scope of the research. Prior human ethics approval was sought and granted. All interview subjects were presented with a consent form prior to the interview with all but one subject consenting to their names being included in the results section. One interview was conducted via telephone, with the remainder being conducted in person. With the consent of all interviewees, the interviews were electronically recorded to allow for accurate transcription of relevant quotes. The transcripts were then analysed to ascertain common themes and concerns among interviewees. Interviewee's companies and names have been anonymised.

3.2 Author observations

Phenomenological research unsurprisingly is a study of a phenomenon, which could be a relationship or activity. It differs from ethnographic research in that it is not constrained to studies of culture and the phenomenological researcher tends to experience the phenomenon being researched as opposed to merely observing other participants.[61]

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[59] With research involving phenomenology (as in the current study), Creswell suggests five to 25; see John Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Traditions*, (Thousand Oaks, Sage, 1998), 64. Morse suggests the minimum should be at least 6; see Janice M Morse (1994), 'Designing funded qualitative research' in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (Thousand Oaks, Sage, 2nd ed, 1994), 220–35, 225. See also Glenn A Bowen, 'Naturalistic Inquiry and the Saturation Concept: A Research Note (2008) 8(1) *Qualitative Research*, 137–152. Further useful guidance is provided by Greg Guest, Arwen Bunce and Laura Johnson, 'How Many Interviews Are Enough? An Experiment with Data Saturation and Variability', (2006) 18(1) *Field Methods*, 59–82.

[60] Janice M Morse, 'The Significance of Saturation'(1995) 5(2) *Qualitative Health Research*, 147–149, 148.

[61] Margaret McKerchar, *Design and Conduct of Research in Tax, Law and Accounting*, (Thomson Reuters, 2010).

The phenomenological observations were collected by one of the authors while living and working in Vietnam for three months from late 2012 through to early 2013. Unlike ethnography, the observations do not pertain to internal phenomena within the observer's 'employer' organisation, but rather, to what was observed during interactions with the Vietnamese tax authorities when one of the present authors was effectively an 'agent' of foreign investors. As such, the observations are largely between one of the authors and the Vietnamese tax administration (a public authority). The observations pertain to the problems faced by foreign investors in the administration of their taxes. The observations, recorded in diary form, are limited in their scope and are intended to supplement the empirical data gained through the interviews discussed above.

4. THEMES AND ANALYSIS EMERGING FROM THE INTERVIEWS AND OBSERVATIONS

The present section identifies common themes that have been drawn from an analysis of the interview and phenomenology data. Illustrative quotes collected from the interviews are included to support the thematic observations. The findings are analysed in relation to the preceding research questions and literature review, before being discussed in a more general sense in the following discussion section.

4.1 The importance of South East Asia for New Zealand businesses

All interviewees perceived the SE Asia region to be an area of high growth, with exponentially increasing consumer demand levels presenting opportunities for NZ businesses that are unmatched by the relatively stagnant domestic NZ market. While all interviewees noted that China has historically been the Asian investment destination of choice for NZ businesses looking to break into the Asian market since the 1998 Asian financial crisis, there was a common theme of caution against over-investing in a single market. This is illustrated by the following interview extract from 'Company A':

> Companies like to diversify, so companies will not put all their 'eggs' in one market, so we will see growth in both SE Asia and China. If you're concentrating on only one [market], you will lose opportunities in the others.

It is also apparent from the interviews that it is not only Vietnam which is regarded by investors as an attractive investment destination, but also a range of other SE Asian markets, as indicated by 'Company B':

> We see it [SE Asia] as a growth spot and have looked around Singapore, Malaysia and Indonesia. However, we see a lot more interest from NZ clients looking to go into Vietnam … a three hour circle [flight time] around NZ includes a [much] smaller range of customers than three hours from Hanoi and HCMC [Ho Chi Minh City] … so we see growth across the SE Asia region, but would be looking to hub it through Vietnam.

Also of note, 'Adviser A' observed that intra ASEAN trade is relatively low when compared to other global regions due to the poor surface infrastructure plaguing developing ASEAN nations. As a result, it was reasoned by 'Adviser A' that FDI is in high demand from developing SE Asian nations to either directly assist with infrastructure development, or provide tax revenues to fund such projects stating:

> NZ companies can get involved with infrastructure development in the region. The time is now. We will see more in the next 10 years in the way of demand for investment than the 5 years after that.

As such, it is clear that there is a strong desire from NZ companies to invest in SE Asia in addition to there being a correlating demand for such investment from SE Asian countries.

4.2 Factors considered in foreign direct investment decisions and the role of the tax administration

An important aspect of the present research is to determine whether a potential investment destination's tax administration is a factor considered by foreign investors when making investment decisions. If not, then the rationale underpinning the establishment of an RTA aimed at increasing FDI flows through improved tax administration would be undermined. Fortunately, the interviews found that tax administration is one factor considered by investors.

However, a common theme expressed by all interviewees was that it is one of many considerations, and is usually not the predominant factor driving investment decisions. The prevalent considerations for businesses tended to be either the region's low manufacturing costs as a result of affordable labour rates or, alternatively, SE Asia's rapidly rising wealth and resulting consumer demand for western products and services. 'Company B' invested primarily because of the former consideration, which has given its services a competitive advantage when sold in the NZ market. 'Company A' invests primarily on the latter consideration, with the region's low manufacturing costs largely irrelevant to its FDI decisions by virtue of its product being produced in NZ. 'Academic B' commented that tax considerations are ever-present, yet secondary considerations when deciding whether to invest in Vietnam:

> Investment into Vietnam is very dependent on international macro-economic conditions … as is evidenced by the fact that FDI [into Vietnam] fell dramatically during the [1997] Asian financial crisis.

This theme was supported by other interviewees:

> Investment decisions are largely commercially driven, with tax considerations becoming important at the 'how' stage as opposed to the 'if' stage.
>
> 'Company A'

> While tax [administration] is an important consideration, it cannot lead the discussion. However, there is no question that you want to make sure [that you are] paying the correct amount. It [tax administration] has to be considered.
>
> 'Adviser B'

'Company B' expressed similar views, noting that its investment into Vietnam was primarily motivated by increasing domestic NZ demand for software products coupled with the desire to reduce labour costs, to allow the business model to employ idle staff

so it can be in a position to bid for projects with immediate start dates. However, Vietnam's political stability, relative to neighbouring ASEAN nations (which is inextricably linked to many tax administration functions), was also a fundamental investment consideration.

'Adviser A' agreed that tax administration tends to be a secondary consideration, although he reasoned that transparency and consistency in the law is a crucial prerequisite for any potential host State. As such, tax administration can be relevant when deciding whether to invest in one SE Asian State over another. 'Academic A' supported this view, arguing that tax administration is relevant when deciding between the likes of Singapore or Malaysia, but not so relevant when deciding between Singapore and Vietnam.

The thematic finding that the tax administration is not the primary investment determinant is perhaps best encapsulated by the following observation by 'Company C':

> We don't let the tail wag the dog, which you can do with tax if you're not careful.

Group tax manager of 'Company A' added:

> … and people have let the tail wag the dog and they've got themselves in [trouble] because of it.

These results confirm the findings of UNCTAD that the decision to invest in a foreign country is vexed, with tax administration being one of many considerations.[62] However, the finding that it is not the most important consideration should not undermine its nominal importance, as by virtue of being a consideration, it is capable of influencing FDI flows.

4.3 The role of double tax agreements in foreign direct investment decisions

The interviewees were asked about the importance they placed on the existence of DTAs when making investment decisions. In particular, the interviews sought to gauge perceptions of the recently signed DTA between NZ and Vietnam.[63] Overwhelmingly, the common theme was that while DTAs can be attractive 'in theory' as a way of achieving greater predictability in both tax law and administration, their effectiveness differs markedly in 'practice'. As noted by 'Company A':

> DTAs are one factor, but they do not determine why we invest, but more, how we invest. DTAs can create predictability, but like FTAs, we often have to actually tell the [tax] officials that they exist. Also, if Vietnam does not like the [outcome from] a DTA, they will ignore it. We have found this all across Asia, with half the problem being that many of these countries aren't even members of the OECD, so have never bought into OECD rules, and [they] don't understand them. So in practice, they don't work so well.

[62] United Nations Conference on Trade and Development, above n 7.

[63] See *Agreement between the Government of New Zealand and the Government of the Socialist Republic of Viet Nam for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income* (5 August 2013) <http://taxpolicy.ird.govt.nz/tax-treaties/viet-nam>.

4.4 Vietnam/ASEAN tax administration issues

The present section of this paper identifies the tax administration issues that are currently of concern to foreign investors. Most of the findings were made in relation to Vietnam; however, several interviewees commented on issues encountered in other developing ASEAN members. These findings are included and presumed to be generalisable on the assumption that many such issues are common across developing countries in the region.

It was found that the native written language of tax laws is not a significant tax administration issue for foreign investors. Vietnamese tax laws are published by Vietnamese tax authorities in both Vietnamese and English. However, where a conflict arises, it is the Vietnamese version that takes precedence. Despite this potential conflict, 'Company A', 'Company B' and 'Adviser B' found the English versions of tax statutes to be readable, accessible and not an issue in themselves.

A common tax administration concern among interviewees was the uncertainty of tax laws arising from the seemingly arbitrary application of the law as opposed to any concern over the substance of the law. 'Company A' commented:

> Often, in the interpretation of tax laws there are three answers. One, technical, being what the rule says. Two, policy based, which may differ from the technical answer and three, what happens in practice. So depending on how you approach things, you can come up with three different answers. Vietnam is right up there with practice differing from rules … so understanding tax laws is not [only] technical, but tactical.

The interviewees were willing to pay whatever taxes are applicable according to the letter of the law, as a result of favouring a risk averse approach for their SE Asian investments. However, they found it difficult and frustrating to ascertain precisely what laws were applicable, and how they apply to complex tax situations. Such difficulty is partially due to the ad-hoc passing of tax law through decrees as opposed to statute, and partially due to a cultural misunderstanding by the tax department and local advisers of the desire for foreign investing entities to pay tax according to the letter of the law, even if such an amount exceeds what is paid 'in practice'. The difficulty in ascertaining what laws are applicable due to their ad-hoc enactment was noted by 'Adviser B':

> Vietnam and Indonesia are problematic as they change the law by regulation and not by statute. Regulation can be contrary to statute and statute contrary to statute.

Similarly, 'Company C' commented:

> [Constant reform of tax laws] can cause a bit of a kerfuffle before things settle down and people [taxpayers and tax authorities] understand them. How they [laws] read and how they work [in practice] can be two quite separate things.

The desire to pay the legally correct amount of taxes as per the letter of the law is evidenced by the following remark by 'Company B':

> I'm very risk averse. I don't want to be escorted off to a small room next time I land in Vietnam. I like to pay per the letter of the law, so I need to know what the law says I must pay or what I must do … Also, to me, if you want to do long term business in a country, you need to do what is right, not what is perceived to be right.

The difficulty of ascertaining the correct legal position is also symptomatic of the broader administration issue of the difficulty of attaining binding rulings from tax authorities, as noted by 'Adviser B':

> Vietnam and Indonesia are the most difficult [countries] in the region to get binding rulings from. It can be difficult to get a decision let alone a binding ruling. Even getting consistent views from two independent advisers can be difficult. I can go to two different legal firms in Vietnam and get two different opinions. This is why we have to structure investments through Hong Kong, but you shouldn't have to do that to get certainty of profit.

'Academic B' hypothesised that the cause of such inconsistent tax interpretations is twofold. First, this is due to a lack of competently trained staff in the tax department, and second, it is a result of corruption stemming from poor remuneration of tax officials:

> There is an inability to attract quality staff with expertise who can get paid much more working for a private firm … [which is] expounded by the fact that you cannot get a tax degree in Vietnam, so graduates don't have the technical expertise. They [tax departments] are trying to train staff internally, but the results are slow. More digitalisation is needed to reduce face-to-face contact which leads to corruption. The lack of staff rotation is also a problem.

This was supported by 'Academic A':

> There are few people employed by each ASEAN tax authority who have the required expertise to deal with complex situations. This is often due to the small size of the authorities, which are not large organisations like the Australian Tax Office. You may have one person who has tax treaties as one tenth of their job.

A further tax administration issue linked to the uncertainty of law and inconsistent interpretations of tax laws is a culture of corruption in the tax administration with an (incorrect) assumption by tax officials that international investors are willing to participate in such practices. While in Vietnam during 2013, one of the authors observed the following practice:

> Several trips had been made to the HCMC tax department (HCMCTD) over the previous months. The normal procedure is to walk into the waiting area, take a ticket number from the automatic dispenser and wait for your number to be called over the loud speaker, at which time you would meet with an official. However, the procedure was somewhat different in late January, following the recent end of financial year and immediately before the festive Chinese New Year holiday period known locally as 'tet'. As the only 'foreigner' in the vicinity, I was immediately struck by the sight of everyone else walking into the HCMCTD carrying enormous gifts, typically hampers

> filled with the likes of champagne, French cheese and high quality spirits. Instead of waiting for their assigned number to be called, those with the largest gifts would proceed almost immediately to a waiting tax officer to have their tax issue 'addressed'.

'Academic C' also recognised the existence of corruption, noting that:

> Some [foreign investing] companies like this, as it can be efficient to just go to the tax office and find out the outcome and that's that. On the other hand, when it turns against you, you don't have much of a leg to stand on.

Other interviewees, emphasising that their risk averse approaches demand that they do not engage in any corrupt practices, confirmed the latter:

> We do what's right, not just what's perceived to be right. This can be a point of [cultural] confusion in getting Vietnamese tax advice. You have to say, 'I don't care what you just told me, I will actually pay four times as much, I don't care'.
>
> 'Company B'

> We have a zero tolerance corporate policy towards corruption, and any 'in practice' approach [to tax administration] is dangerous.
>
> 'Company A'

Another common theme was the difficulty faced by investors if they decide to challenge a tax ruling or assessment made by a SE Asian tax authority. It was found that dispute settlement functions did not allow for the timely resolution of disputes, as is desirable in a commercial context. There is also a significant imbalance of power in the dispute settlement process which is expounded by a lack of transparency in judicial systems, and the fact that breaches of tax law are subject to criminal penalties if an offence is established. As a result, investors and their agents are reluctant to challenge tax assessments directly, even when there may appear to be significant legal merit supporting their argument. Ultimately, this creates a greater level of commercial uncertainty for foreign investors. This is supported by the following comments:

> Our employees are very reluctant to engage with the local tax authorities because they are scared of them. Tax advisers will often pay the disputed amounts themselves, as they don't want to deal with the tax authorities- even [they are] scared of them.
>
> 'Company A'

> It [challenging determinations] takes time, probably as NZ is not big enough to demand the time [of tax officials] that big countries such as the USA can. Also, New Zealanders and Australians are too honest to pay 'assistance' which is not a bad thing. It is not uncommon to wait 3 to 4 months for a reply, but business moves faster than that.
>
> 'Adviser B'

A further tax administration issue experienced by investors in Vietnam was the significant cost and time required to collect accurate transfer pricing (TP) benchmarking data. The complexity of the process often necessitates the involvement of a highly competent locally based tax adviser.

As noted by 'Company B':

> TP is an issue. We have spent a lot on TP benchmarking every two years. It costs a lot of money, but having [a big four's] name on the document gives credibility in the case of a potential audit.

The lack of readily available TP data is not only a problem for investors, but also for the tax departments which often do not have the expertise or resources to know what a fair TP price is, and when tax avoidance may be taking place. As observed by 'Academic B':

> A lack of TP expertise is a major issue (for the Vietnamese tax authority), with some companies having taken advantage of Vietnam … causing a loss of tax revenue. The government has stated that TP is one of their main priorities, and they have been sending staff overseas to try and foster expertise. Still, their staff are at a knowledge disadvantage in such negotiations.

A further issue identified by 'Company B' was the difficulty of getting profits out of Vietnam and back to NZ due to anti money-laundering (AML) laws. Under such regulations, letters confirming that the investor has paid all outstanding taxes must be shown to the bank prior to the international transfer. However, the Vietnam tax department (HCMC) can be very slow to issue such letters, as observed by 'Company B':

> It can be very difficult to get money out of Vietnam. I waited 5 years to make my first dollar and then another 7 months to bring it back. Many documents need to be verified and sealed, including TP and CIT confirmations.

4.5 A Regional Tax Authority (RTA)

The latter part of the interviews sought to collect perceptions on a range of aspects regarding the proposed establishment of an RTA. Prior to the interviews, the interviewees were given an advance question outline, which listed several possible features of an RTA (see Appendix). The interviewees were told that the prospective RTA would be established at the international level and used by foreign investors to pay their SE Asian region taxes. It was suggested that the RTA would be fluent in the investor's native language(s), and that the staff would be highly trained. The interviewees were informed that a dispute settlement function and the ability to issue binding rulings could also be included. It was made clear to the interviewees that this list of features is not exhaustive.

4.5.1 Desirability of a Regional Tax Authority

All interviewees supported the establishment of an RTA, with greater commercial certainty and predictability of the law seen as the major benefits for investors. Multiple interviewees emphasised that an RTA could prove to be particularly valuable

for NZ companies considering SE Asia market entry, as they will be able to clearly identify the tax ramifications flowing from the commercial decision of entering an Asian market. These themes are evident in the following comment by 'Company A':

> If you got all [ASEAN] countries to buy into it, it would be attractive, it would be fantastic. It would add a lot of value. While we invest on the basis of commercial reasons, it would create certainty and predictability which is key [for such investments].

4.5.2 Desirable features

The interviewees commonly agreed that the establishment of an RTA could alleviate many of the tax administration issues identified in the preceding section. Overarching attributes of timeliness, predictability and accountability were identified as necessary traits by the interviewees. An effective dispute settlement function capable of resolving tax disputes in a timely and decisive manner without recourse to the national level courts of RTA member states was recognised to be highly desirable, as was the ability to issue binding rulings upon request. In addition to the establishment of a quasi-judicial dispute settlement organ, several interviewees emphasised the need for an arbitration and/or mediation function. 'Company A' stated:

> It's attractive to have some sort of arbitration or mediation. Court processes should be avoided as there is nothing to be won from a court case, anything can happen. From a commercial and business point of view there is often some sort of middle ground, so arbitration is preferred.

'Academic B' added:

> I think that a body that can give binding determinations is a wonderful idea; it would give much greater certainty and consistency among [RTA member] countries.

Before further remarking:

> It [the dispute settlement function] has to be seen as the ultimate authority. The countries will have to put significant faith in the ruling to be judged in accordance with [their] national laws and conventions, so any vetoing of the ruling will undermine it. So it must be binding to both parties. I expect the RTA to be quite effective, quite powerful, because otherwise it is just wasting time.

When commenting on the practical workings of a dispute settlement organisation, 'Academic B' suggested:

> There should be multiple levels of dispute resolution. Parties should try to come to an agreement before going to mediation or before judges [of a quasi-judicial function]. The appointment of judges can also be problematic as judges tend to have a bias towards their own countries' viewpoint. Judges should not be involved in cases pertaining to their home country. So if the dispute was between Vietnam and the US, a Singapore or Thai judge should preside.

4.5.3 Transfer pricing

There was overwhelming support among the interviewees for the RTA to establish a function tasked with producing TP data for the benefit of both investors and RTA member states. As noted by 'Adviser B':

> TP is particularly difficult in the region as there is a lack of publicly available data and it [any available data] is extraordinarily expensive and not necessarily accurate. If the RTA could provide data, this would be very helpful.

The attractiveness of such a function not only to foreign investors, but also to RTA member states, was emphasised by 'Academic B':

> I think it would be a key role to be played by the organisation. The Vietnamese government would be happy to use TP data provided from independent research as they [themselves] currently lack benchmarking data.

Further support came from 'Academic C':

> It sounds like something sensible [to include]. TP is something that the countries would be interested in getting right if you are going to preserve the independent tax systems, as TP is going to affect their tax take.

4.5.4 Impact on tax adviser use

An additional theme to emerge was an expectation that the establishment of an RTA would decrease a foreign investor's reliance on tax advisers. Primarily, this was due to the greater predictability, certainty and transparency of tax administration that would be achieved by an English speaking RTA. As observed by 'Company C':

> We would still use a tax adviser, but we would decrease our reliance on them. It would be more of a review use rather than a preparation use. We would be attracted to the potential cost savings.

Similarly for 'Company B':

> 'Company B' is in 'maintenance' mode post set up, but if you were to ask me as a company about to embark on an investment, I would love it. If 'Company B' does expand our SE Asian investment beyond Vietnam, we would use it [the RTA] instead of advisers.

4.5.5 Challenges/feasibility

The interviewees identified a number of challenges that would have to be overcome prior to establishing a functional, politically 'palatable' RTA. The issues of cost, political attractiveness, the physical location of the RTA's headquarters and the seemingly arbitrary differential treatment for foreign and domestic businesses were the major concerns thematically identified across interviewees.

4.5.6 Cost

The funding of an RTA was seen as a significant issue that would have to be addressed. 'Academic B' argued that the cost should be borne by both the investors and RTA member nations:

> There needs to be a cost sharing agreement between countries and users. The formula for cost sharing would have to take into account that some countries receive more FDI than others.

Moreover, 'Company C' warned:

> Cost would be an issue, how much we would use it depends on how much it would cost.

'Adviser A' suggested:

> Cost wise, it may be best to sit under ASEAN so that all countries can help pay for it, perhaps as a proportion of its tax take. Myanmar and other developing countries may go to the World Bank to pay for their share of it- this fits within their [the World Bank's] objectives.

4.5.7 Political acceptability

Interviewees were sceptical of whether culturally, politically and economically diverse ASEAN States would be willing to cede certain sovereign rights of taxing and cooperate as members of an RTA. 'Company A' observed:

> Inter ASEAN rivalries are potentially a massive barrier. The underlying general hate of countries in Asia [pause] … you'd be amazed, and it goes back hundreds of years. These countries are incredibly nationalistic and don't easily cede sovereignty.

Similarly, 'Adviser B' commented:

> Resistance would come from member states. I can just see the discussion in member parliaments 'we are giving away our taxing rights' – wow!

'Adviser A' emphasised that there will likely be differences between modern nations such as Singapore and Malaysia, and undeveloped nations like Vietnam, Cambodia and Myanmar:

> Resistance will be two ways; from developed countries saying 'what's in it for me' through to undeveloped countries looking at it from a legal standpoint, worried about whose laws would be applied.

'Academic A' added:

> ASEAN nations can be divided into three levels of economic development. This can be problematic when working together as I don't think they have a common economic goal, or common economic history. Singapore could resist it as Singapore and Malaysia currently have an administrative advantage.

This was emphasised by 'Academic C':

> There will always be resistance from those who already have their houses together, just like people; States don't like to put their hands in their pockets unless there is something coming back.

Before further reasoning:

> However, they have committed to the joint ASEAN vision of closer integration, and the AEC (ASEAN Economic Community) 2015.

As a result of these findings, it is clear that the bounds of the taxing rights signed over to the RTA by members would have to be well defined and narrowly drafted to cover only tax administration. Additionally, the RTA stands a greater chance of attracting developed nations such as Singapore if it is established under the ASEAN umbrella.

4.5.8 Location of headquarters

Interrelated to the aforementioned issue of the inter-ASEAN tensions and rivalries is the issue of where to domicile the RTA. It was suggested by 'Company A' that Indonesia's nationalism as a potential barrier can only be overcome with it being located in Jakarta:

> Indonesia is problematic as they have announced that they wish to be self-sufficient by 2022. … In saying that, the ASEAN secretariat is in Jakarta, so locating it there could be quite strategic.

However, the majority of interviewees thought that Singapore was the best location, both for investors and as an inducement to encourage Singapore to join the RTA. 'Academic B' stated:

> With Singapore it would have to be 'tit for tat', you would have to give them some benefit such as locating it in Singapore. I think this would be acceptable to Vietnam as Vietnam has a good relationship with Singapore, and the ministers would enjoy visiting Singapore. Singapore hosting the RTA … would be the most practical way forward …

4.5.9 Differential treatment

A further concern was raised by 'Academic C' over the potential for differential treatment between foreign investors and domestic ASEAN businesses:

The downside is that you are offering two different treatments to domestic and foreign businesses. It would be nice to say 'administrative treatment' and not 'legal treatment', but administrative treatment becomes a real substantive economic difference in a weaker rule of law environment.

However, it is equally plausible to argue that any such difference would put pressure on RTA members to improve tax administration for domestic companies, with an RTA thus benefiting both foreign and domestic taxpayers in the long run.

4.6 Comparison to the Organisation for Economic Co-operation and Development Semi-Autonomous Revenue Authority model

The academic interviewees were asked whether they thought the proposed RTA would be plagued by the same troubles as the OECD recommended SARA model. The predominant theme to emerge was that an RTA would not suffer the same problems of corruption and low quality staff, primarily due to the fact that it would be at the international level as opposed to being a domestic based solution. 'Academic B' stated:

> The RTA differs as it is at the international level, so is much more transparent, much more robust. It would be self-policing as each member could check each other.

4.7 Practical considerations

Certain practical considerations are inextricably linked to the feasibility of a potential RTA. A common theme to emerge was that an RTA should be representative of all member nations. In order to achieve this end, multiple interviewees suggested the establishment of a 'rotating' chair or secretariat, whereby each Member State would provide a secretariat to the RTA for a stipulated time period. Likewise, the dispute settlement function would retain judges and mediators from every state, but such personnel would not preside over disputes involving their home states. Therefore, a Vietnamese tax law being disputed by an NZ investor may be heard before a Thai judge. Interviewees thematically noted that certain functions of the RTA would have to be carried out by ASEAN nationals in order to maintain political 'palatability'. However, all academic interviewees identified the importance of employing expatriates for certain functions, such as TP data production, which require a high level of both independence and technical skill.

It became apparent from the interviews that a RTA is only feasible if it includes various accountability mechanisms capable of holding the organisation's leadership to account. Given the vested interests of each state, a high degree of transparency needs to be maintained in order for each member to be confident that they are receiving the correct revenues. 'Academic C' emphasised the importance of auditing:

> It would have to be audited, and as a public body everything would have to be publicly available – I don't think it's even an option; you would have to do that.

'Academic B' added that the RTA should produce a comprehensive annual report, with an organisational review taking place every five years to ensure that the RTA is following its constituted aims.

4.8 Relationship with ASEAN

All interviewees argued that the RTA should sit under the ASEAN 'umbrella' in order to gain legitimacy and leverage off the existing shared ASEAN vision. As noted by 'Academic B':

> If set up under ASEAN, it will be more attractive to ASEAN leaders. Perception-wise, it will be more attractive to investors.

One problem of basing it under ASEAN is that it would require the common agreement of ASEAN members, including potentially problematic nations such as Singapore before being established. However, 'Academic A' appositely notes that recent amendments to the ASEAN Charter allow for differential treatment of members. Therefore, it would be possible to have several ASEAN members, such as Vietnam, Laos, Myanmar, Indonesia and the Philippines, establish a RTA. If successful, non-member ASEAN States may decide to join the RTA rather than compete against it. Ultimately, it can be concluded that the RTA should be linked to ASEAN.

5. A MORE RADICAL APPROACH?

An important aspect of this study was to assess the bounds of a potential RTA, including whether it could, through gradualism, morph into the more radical RTO proposed by Sharkey.[64] A common theme to emerge from those interviewed was that there would be crippling political resistance to Sharkey's RTO proposal. Interviewees viewed it as highly unlikely that nationalistic ASEAN States would be willing to surrender the high degree of sovereignty called for by the RTO. Instead, an RTA was viewed as far more feasible than an RTO.

A commonly identified reason for resistance was the differing levels of economic development and political mandate across ASEAN members. This is manifested in drastically different tax structures, as noted by 'Adviser B':

> There are huge differences in the structure of tax systems across Asia. You have socialist regimes through to extremely free market regimes and tax is an important part of how they want to redistribute wealth. Many ASEAN nations have youthful populations; if you don't have a fair distribution of wealth, you would have riots and civil disobedience.

Similarly, 'Adviser A' added:

> It would be impossible, but it [a RTO] would be a utopia, as it would make it so much more transparent and simple. It just wouldn't happen as these countries need to use tax as a tool to manage their economies.

'Academic B' emphasised the historical political tensions between ASEAN nations and how this may prohibit a convergence of tax policy:

> For countries that have been fighting for independence for so long, I don't think they are ready to hand over such sovereignty. ASEAN countries have surprisingly little in common … and are not that united. The RTA is just about right [in terms of feasibility] but they [ASEAN members] would never accept a RTO, as the differences are just too great to find a common ground.

All interviewees reasoned that a RTA was far more realistic. For example:

> Pipedream! It [a RTO] has merits from an idealistic point of view, but has no chance politically or even practically.
>
> 'Company A'

> The RTA proposed is much more realistic, each country involved will still want to have their own rights and set their own tax rates …
>
> 'Company C'

[64] Sharkey, above n 50.

5.1 A 'social conscience'

In addition to the theme suggesting that an RTO would be unfeasible due to varying levels of development across ASEAN members and diverse political systems, multiple interviewees also expressed concern that their taxes would not go directly to the state in which they operate. Such a 'social conscience' was first raised by 'Company B', before being confirmed by 'Company A', which is a larger company, suggesting that such a concern is held by investors regardless of size. 'Company B' initially raised the point:

> To me, I like that my tax revenue goes back to the Vietnamese government. It feels good that it's going there, whereas if it was going to one big pool, I would be concerned.

This was then confirmed by 'Company A':

> The element of social responsibility is a genuine one these days, so socially, we should pay the right amount of tax for what we are doing in a particular country and we have no problem with that.

'Academic A' suggested that such a 'social conscience' can be part of a wider theme of organisations wanting to legitimise their operations and maintain a positive public perception:

> It's an ongoing theme. If all else is the same, companies will go to the country where they believe in the government and have faith that the government will do right with their money.

5.2 Whether a Regional Tax Organisation should be viewed as an 'End Goal'

On the basis of the above interview findings, it can be concluded that the Sharkey proposal should not be viewed as an end goal as it lacks political feasibility, and would be immensely difficult to implement.[65] However, it is important to note that such a conclusion should not preclude certain aspects of the RTO proposal from being added to an RTA through a process of gradualism. A detailed analysis tasked with categorising each feature of the RTO proposal as either feasible or unfeasible is beyond the scope of the present study.

6. DISCUSSION

From the findings, it is apparent that SE Asian investors face a vast array of tax administration issues. Thematically, these include corruption, uncertainty of the law, cumbersome dispute settlement mechanisms and a lack of transfer pricing data. These issues were similar to Chaikin and Dyball's study of the Philippines tax administration.[66] It was found that tax administration issues are creating an environment of greater uncertainty for foreign investors when making foreign investment decisions.

[65] Sharkey, above n 50.
[66] Chaikin and Dyball, above n 12.

The research also confirmed the findings of the UNCTAD[67] that foreign investment decisions are multifaceted, with investors taking into account a wide range of factors. Nonetheless, it was found that tax administration is a factor in such decisions. Therefore, it is possible to draw the inference that improved tax administration can lead to increased FDI.

There was substantial support from the interviewees for an RTA as a means for addressing the tax administration issues that they identified in the earlier part of the interviews. Particular attributes including a dispute settlement function, the production of transfer pricing benchmarking data and the ability to issue binding rulings were viewed as highly desirable by the investors, the tax adviser and the academics interviewed. Significantly, it was found the Vietnamese government may support the RTA taking over certain functions, as it currently lacks 'in-house' expertise to be able to produce complex transfer pricing data and administer the DTAs. Such a 'win-win' outcome for foreign investors and RTA member states ultimately improves the likelihood of states handing over the degree of sovereignty called for by the RTA.

Despite the overwhelming support for the proposed RTA, the research identified major challenges that such a proposal would have to overcome. Such challenges include cost, political acceptability and the location of headquarters. The interviews suggest that funding may be sourced from the World Bank and that the RTA headquarters may have to be located in Singapore in order to ensure its membership in the RTA. It was found that ASEAN members are highly nationalistic, with limited historical, cultural or current economic links. As such, it is suggested that the RTA have a rotating Chair, and include staff from all members in order to remain 'neutral' as opposed to becoming affiliated with one particular nationality. Ultimately, careful planning of the RTA organisational structure will be critical for determining whether it will be politically 'acceptable' for ASEAN members.

It is suggested that any RTA employ highly trained staff from both RTA member states and other nations as expatriates. Expatriate influence would be valuable for collecting and publishing transfer pricing data, where neutrality between investors and RTA member states is important for all parties. The dispute settlement function could include a pool of mediators and judges from a range of nationalities, to ensure that there is always a perception of judicial independence in the settlement of disputes. Together with the numerous accountability mechanisms of auditing and publicly available data, these features should collectively ensure that the RTA model is far more successful in countering developing country tax administration issues than the domestic level SARA or LTU models. As a result, although beyond the scope of the present research, the RTA model could be attractive to investors and developing countries in other global regions plagued by similar tax administration issues, such as Africa and South America.

The interview findings pertaining to the RTO proposed by Sharkey[68] indicate that an RTO in its current form is not viewed as an 'end point' to be worked towards through a process of gradualism after the establishment of an RTA. Primarily, this is due to the severe political resistance that the proposal would likely face due to the need for members to cede a far greater degree of sovereignty than is called for under the

[67] United Nations Conference on Trade and Development, above n 7.
[68] Sharkey, above n 50.

proposed RTA. However, this research also found that resistance to an RTO could come from investors who have a 'social conscience' towards the societies in which they operate, and therefore demand that their taxes benefit their investment host nation(s) as opposed to being distributed among RTO members on other grounds as is proposed by Sharkey.[69] Despite these criticisms, there is substantial scope for an RTA to adopt additional features over time. Further, if RTAs are adopted in other global regions such as Africa and South America, it is possible that there could be features shared by such RTAs, and interaction with the WTO as proposed by Sawyer.[70]

7. CONCLUSIONS, LIMITATIONS AND FUTURE RESEARCH

7.1 Conclusions

Foreign direct investment is immensely important for maintaining the high GDP growth rates in SE Asian nations, which are contributing to increased wealth and ever higher standards of living. The present research confirmed that tax administration is a consideration evaluated by foreign investors when making FDI decisions. Therefore, it is in the interests of both developing ASEAN members and profit maximising foreign investors to resolve the plethora of tax administration issues such as corruption, untimely and inconsistent dispute settlement, lack of transfer pricing data and difficulty of obtaining binding rulings which the present study found to be plaguing the region. While the RTO proposed by Sharkey[71] may have theoretical merit, the present research suggests that its implementation would be highly problematic. In contrast to an RTO, the present research found that an RTA is attractive to foreign investors while remaining within the bounds of what is practical and politically feasible. It is suggested that the establishment of an RTA is the best way forward as a 'first step' that could potentially morph into a more radical organisation over time through a process of gradualism.

This research addresses the lack of literature into the particular tax administration issues faced by foreign investors before proposing an RTA with a pragmatic orientation that has not yet been suggested in the literature. The RTA is intended to be pragmatic, distinguishing itself from the forward looking, yet problematic, proposals that have been put forward by academics as a solution to a much broader range of tax administration issues (not just those faced by foreign investors).

While the proposed RTA at the centre of the research differs from previous reform propositions, it should not necessarily be viewed as contrary to all such proposals. Over time, the relatively less radical, foreign investor-oriented RTA could expand in its functionality towards the larger, multi-faceted World Tax Organisation as developed by Sawyer,[72] although this is not explored by the present study.

Aside from academia, the practical implications, and demands for such research from investors and SE Asian 'host' States is significant. SE Asian States stand to benefit from increased FDI and tax collections through such an organisation, whilst foreign investors will also stand to benefit as they will be able to enter foreign export markets

[69] Ibid.
[70] Sawyer, above n 44, 208.
[71] Sharkey, above n 50.
[72] Sawyer, above n 44.

with increased ease and certainty. Ultimately, this increased FDI and trade will benefit the economies of investors' 'home' nations which receive the benefits of the after tax profits from the increased offshore capital investments. It is hoped that the RTA proposed by this research will be further developed to contribute towards a 'win-win-win' solution for foreign investors, ASEAN nations and non-ASEAN investor 'home' economies.

7.2 Limitations

The present research contains several limitations and assumptions that warrant acknowledgement. First, it may be susceptible to criticism on the basis that it is fundamentally normative in nature. A further limitation of generalizability arises due to the methodology of a single country case study being used as a basis for the proposed RTA which will involve numerous SE Asian nations.

However, many of the interviewees commented not only on their tax administration issues in Vietnam, but also on many issues that they had encountered in other developing ASEAN countries. As discussed in the findings section, similar issues were found to exist in Vietnam, Cambodia, Indonesia and the Philippines. Comments made by interviewees suggested that Singapore, Malaysia and Thailand do not suffer from the same degree of tax administration issues as Vietnam, so certain findings may not be as generalisable to these ASEAN members. However, it should be noted that Vietnam can be viewed as at a 'mid-point' of development relative to other ASEAN members which acts to improve generalisability, illustrating the suitability of using Vietnam as a case study subject.

Additionally, it is arguable that the data collected with regards to Vietnam may not, in itself, be generalisable to the Vietnamese situation due to the small number of interviewees. Given the small potential pool of interview subjects, the interviews undertaken, together with the observations of one of the author's (phenomenology), collectively provide a justifiable means of collecting data pertaining to foreign investor administration issues, and enabling triangulation of the findings.

It is also assumed as a foundation of the present research that FDI leads to economic development, which leads to growth, which in turn, leads to improvements in living standards. This view is 'mainstream' and is not challenged by the present research in its discussion of why SE Asian nations should support the establishment of an RTA. Indeed, the existence of CIT competition in the region indicates that SE Asian nations hold a belief that increased FDI is in their economic interests. The present proposal does not address the issue of tax rate competition, and instead focuses on the significant benefits that can accrue from improving the region's tax administration.

7.3 Future research

The present research leaves many 'avenues' open for future research to explore. First, there is scope for the Vietnam case study to be replicated by future studies examining other ASEAN nations. Additionally, there is the need for future research to consider the practical aspects of a potential RTA, including how it should be constituted and how it should overcome the challenges identified in this study. Such research should further consider the Sharkey[73] proposal and how some of its features could be

[73] Sharkey, above n 50.

included in an RTA despite the present research finding that it is a highly unlikely 'end point' in its entirety.

Further, given the present research findings coupled with a global move towards regionalisation, future research could explore the possibility of establishing organisations akin to the proposed RTA in regions such as Africa and South America, where developing countries suffer from many of the same tax administration challenges as developing SE Asia nations. Future research could also explore the interplay between such regional tax organisations and a WTO as proposed by Sawyer.[74] Ultimately, it is hoped that future research can refine such proposals to a point where they can be practically considered by policy makers and global leaders.

[74] Sawyer, above n 44.

8. APPENDIX

Interview Question Outline and Guide- (Semi-structured interviews)

Sections 1, 2 & 4 are intended for all interviewees. Section 3 is directed towards the academic interviewees, although it may also be utilised with the other interviewees.

1 Current Vietnam tax administration issues faced by foreign investors

1.1 What is the extent of your current SE Asian investments (i.e. which nations, percentage of your business, history of operating in the area etc.)?

1.2 Do you view the SE Asia region as a 'growth area' for your business warranting future expansion?

1.3 Is the recently signed Double Tax Agreement (DTA) with Vietnam likely to be a factor in any future investment decisions?

1.4 When/if making a decision whether or not to invest in a foreign country, what are the most important factors to consider? The least important?

1.5 To what extent is a potential investment destination's tax administration an important consideration?

1.6 What issues with the Vietnamese tax administration or other SE Asian nation tax administrations are you aware of?

1.6.1 Do you find the regions tax laws clear/ easy to understand and interpret? Why/why not?

1.6.2 Is language a complicating factor in understanding your tax obligations and paying your taxes? Why/why not?

1.6.3 Do you find it easy to challenge tax determinations that you may disagree with?

1.7 Do you consider any of these issues to impact upon foreign investment decisions, and if so, how?

1.8 Do you currently use a tax adviser to advise on your SE Asian tax obligations?

2. A Regional Tax Authority (RTA) as a potential reform avenue.

(*The interviewer reiterates that an RTA would be an organisation established at the international level which may be used by foreign investors to pay national level taxes in addition to other functions such as possibly dispute settlement and the issuance of binding rulings.)*

2.1 Do you consider the establishment of some form of RTA to be an attractive proposition for foreign investors? Why/why not?

2.2 Do you consider it likely that such reform would be positive in encouraging Foreign Direct Investment (FDI)? Why/Why not?

2.3 Do you think that frequency of the tax administration issues discussed earlier in the interview would decrease with the establishment of such a body? Why/why not?

2.4 What are the potential challenges of establishing such a RTA?

2.5 Do you currently use a tax adviser in SE Asia? If so, would your use of such an adviser decrease or increase with the introduction of such an RTA? Why?

2.6 What resistance do you think such a proposal is likely to encounter? From whom? Why?

2.7 What features do you think should be included in the formation of such a RTA at the time of formation? Why?

2.8 What features do you consider to be the most important in order to maximise FDI? Why?

2.9 What features do you consider to be the least important to attaining the goal of maximising FDI? Why?

2.10 Do you consider it desirable for the jurisdiction of such an RTA to expand over time beyond the administration of taxes for foreign investors?

2.11 What features do you think should be added over time to expand the jurisdiction of the RTA?

2.12 (*The interviewer reiterates Nolan Sharkey's recent proposal, as published in the British Tax Review in 2013, for a South East (SE) Asian Regional Tax Organisation (RTO) which includes such features as the setting of a common tax rate among SE Asian nations through the formation of a single SE Asian tax jurisdiction and the introduction of a 'SE Asian resident' for tax purposes.)*

2.12.1 What are your thoughts on this more radical approach compared to the less radical RTA proposal outlined above?

2.12.2 Would a single SE Asia tax rate administered by such an organisation be attractive to you when looking to increase its investment in the region?

3. Additional questions for the interview subjects who are academics:

3.1 Could such an RTA be effective in countering transfer pricing uncertainty? If so, how?

3.2 How do you think such an organisation be structured/formed? By treaty? By any other method?

3.3 Who do you believe should be employed by the RTA to maximise effectiveness? SE Asian nationals? Expats? Why/why not?

3.4 What accountability mechanisms do you consider it important to include in such a body?

3.5 What are the advantages/disadvantages of establishing such an organisation as an extension of ASEAN as opposed to under an independent treaty or any other method?

3.6 Do you consider such an RTA to be a better solution than the OECD Semi-Autonomous Revenue Authority (SARA) model (*interviewer explains if required)* in countering the tax administration issues faced by foreign investors? Why/why not?

4. For all interview subjects:

4.1 Are there any other comments that you wish to make?