Defining Collective Investment Vehicles for Tax Purposes in Developing Countries: Focus on Kenya, Mauritius, Morocco and South Africa

Investment through collective investment vehicles (CIVs) is a global trend. The domestic laws of developed countries tend to consider only domestic issues relating to CIVs. Developing countries often have no such laws. This article analyses the definition of CIVs in four developing countries: Kenya, Mauritius, Morocco and South Africa.

1. Introduction

An investment fund is a vehicle that allows a number of separate and (un)related investors, which may be a group of individuals or companies, to make investments together. It involves the receipt, pooling and re-investment of investor finance on a collective basis. Investment funds are divided into collective investment vehicles (CIVs) and non-collective funds. Within an investment fund, each individual investor shares in the profits and losses in proportion to the amount of their investment. In this article, the authors only refer to CIVs, and use CIVs interchangeably with the term investment funds and, in some instances, collective investment schemes (CISs).

While the primary purpose of any investment is to realize profit from a practitioner perspective, there are, at least, two other viewpoints on the role of investment funds, i.e. (i) financial; and (ii) regulatory. The financial perspective views an investment fund as an entity that collects capital from a number of investors to create a pool of money that is then reinvested into stocks, bonds and other assets, often domestically. The regulatory perspective involves comparing the different legal frameworks of various countries in deciding how and where to invest – often across borders.

The world has witnessed an explosive growth of investment funds since their debut more than a century ago. With globalization, investors are diversifying across international markets so as to hedge currency and market risks. The ongoing popularity of investment funds is demonstrated by the size of assets under management (AuM) worldwide, which, by 2017, was valued at more than USD 79 trillion. Potentially by way of the professional management of pooled resources, CIVs enable many investors to invest in asset categories on scales at an unprecedented level. As a profit-making entity, the authors opine that a CIV should be subjected to taxation whether the approach taken in investment is regulatory or financial.

Most developed countries have dealt with the domestic tax issues arising from groups of investors pooling their funds in CIVs. These countries also tend to have a tax system that provides for neutrality between direct investments and investments through a CIV, which levels the playing field domestically. However, developing countries have weaker legislative frameworks, or none at all, to guide the issues facing domestic investment by CIVs.

Furthermore, the financial literacy of the users of CIVs in developing countries may impede neutrality for small investors or small groups of investors, thereby resulting in a playing field that is not level. As a result, the legislative framework guiding the domestic investment by CIVs....

2. There is no precise definition to CIVs. The authors consider this aspect of CIVs in sections 2. and 3.
3. This term is not well defined, but such bodies have been described to mean many types of securitization, private equity funds, venture capital, real estate funds, private debit, hedge funds, trusts and pension funds.
6. Id.
7. There are two distinct markets for CIVs – domestic and global (international) markets.
9. Hwang & Weidmann, supra n. 5, at p. 170, who argue that the Member States of the European Union have established a common system to classify investment funds under EU directives, while many non-EU countries do not have specific regulatory laws applying to investment funds, for example, Argentina, Canada, Indonesia, Japan, Mauritius, Mexico, New Zealand, Panama, Peru and Taiwan.
partially exists in some countries in the form of legislation surrounding investments, but does not exist in the case of CIVs operating across borders.

While some countries have defined CIVs, no country has a clear set of laws and regulations guiding cross-border investment by CIVs. Both the UN Committee of Experts on International Cooperation in Tax Matters (UNTC) and OECD identified this as being an area requiring exploration. Accordingly, while the OECD released its first paper on taxation of CIVs in 2016, the UNTC in 2018 issued its first draft position paper, which is still under discussion. The UNTC and the OECD have identified the fact that there is a clear lack of research and analysis on the tax status of CIVs in both developed and developing countries.

The purpose of this article, which is part of a series of research pieces on taxation of CIVs, is to establish a clear understanding of the concept of a CIV, its historical development and growth before focussing on the chosen developing countries. As a result, an extensive literature review was carried out followed by interviews and questionnaires sent to key persons and institutions in the relevant countries.

This article analyses the definition of CIVs for tax purposes, with regard to cross-border investments by considering four African countries – Kenya, Mauritius, Morocco and South Africa. These countries were selected for a number of reasons in reflecting on their geographical location, language, legal history, investment links with the rest of the world and CIV activity. Two francophone countries, i.e. Mauritius and Morocco, and two anglophone countries, i.e. Kenya and South Africa, were selected. One country was selected as an island state, while the remaining three are on continental Africa.

All regions of the continent were considered, together with their links to the rest of the world and CIV activity, i.e. Morocco in North Africa, which links Europe and Africa; South Africa in the south has a developed CIV legal regime; Mauritius is a low-tax jurisdiction with links to Asia; and Kenya is an East African country and is at a nascent stage of CIV development. West Africa is not represented in the study, as CIV-based legislation is at the nascent stage of CIV development. As a result, an extensive literature review was carried out followed by interviews and questionnaires sent to key persons and institutions in the relevant countries.

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Section 2. of this article conceptualizes CIVs in a global context. Next, section 3. defines CIVs in the African countries selected for study, i.e. in Kenya, Mauritius, Morocco and South Africa. Within this context, the historical development of CIVs and their operations are considered. Then, section 4. makes some recommendations on a definition for CIVS. Finally, section 5. concludes the article.

2. Conceptualizing CIVs in a Globalized World

2.1. Introductory remarks

In order to understand CIVs and their effects, it is necessary to understand the historical development of CIVs (see section 2.2.), set out the rules that guide their operations (see section 2.3.), provide a definition of these bodies (see section 2.4.), as well as summarize some of the principles of taxation of CIVs in the countries under investigation (see section 2.5.). This section explores these perspectives in respect of CIVs, while focusing on the direction taken at the level of the UN and the OECD. In this regard, the authors use the UN Model (2017) and OECD Model (2017) as the basis for the discussion of the definition of CIVs.

2.2. Historical development of CIVs

The first mutual fund – the raw form for a CIV – was created because of a financial crisis in Europe in the second half of the 18th century. The British East Indian Company had borrowed heavily to support its colonial interests. However, as expenses increased and revenues decreased, it sought a bailout from the British government in 1772. The effects were felt throughout Europe, and, in 1774, a Dutch merchant – Van Ketwich – had the foresight to pool money from multiple investors to form an investment fund. This body was referred to as “Eendragt Maakt Magt”, meaning “Unity Creates Strength”. The closed-end fund was available until all 2,000 units had been purchased. A similar fund was created in the United Kingdom in 1868 and the United States in 1893.

The first modern mutual fund – the Massachusetts Investors Trust – was established in 1924. It was the first open-end mutual fund. After just one year, the value of the fund grew from USD 50,000 to USD 392,000. This growth was revolutionary, as it democratized investments for the average person. Ordinary investors with minimal capital could pool their resources in a professionally managed, diversified basket of investments, rather than going through the more expensive (and risky) route of buying individual stocks of varying risks. However, as investment funds operated within the private sector, there is insufficient information to build a clearer picture of their historical development, with no information being available in an African context. From the 1960s onwards,
information began to emerge regarding the tax treatment of CIVs and Real Estate Investment Trusts (REITs) in regional discussions within the European Union carried out, for example, by the International Fiscal Association (IFA) in 1962, 1971 and 1997.\(^\text{17}\)

In Africa, collective savings can be traced to the 1800s in the form of mutual life savings and assurance societies, but these bodies were not companies and had no shareholders.\(^\text{18}\) In 1845, the Cape of Good Hope Mutual Life Assurance Society (currently, The Old Mutual) was formed in Cape Town, South Africa. While not formed with capital, it was built on “the trust of like-minded individuals and unwavering belief that together people can achieve more than alone.”\(^\text{19}\) Three major factors are used to judge the position of life insurance companies. First, the rate of mortality prevailing among the lives insured.\(^\text{20}\) Over the past century and a half, such companies have expanded across Africa, China and Latin America.

In 1965, South African collective investments took the form of a unit trust, and a single fund was established to offer the ordinary investors a convenient investment product. This situation permitted assets to be managed professionally, allowed risk to be spread across a broad portfolio of shares, and provided investors with the ability to liquidate the investment at short notice. It also required low initial investment amounts, and ensured tax effectiveness and low cost compared to other products available at the time.\(^\text{21}\) The single unit trust of 1965 has since grown into 567 different funds, the controlled assets of which are valued at more than ZAR 415 billion by December 2005.\(^\text{22}\)

In addition, in countries such as Mauritius and Morocco, mutual funds were formed in the 1980s and 1990s. As of 2001, offshore mutual funds in Mauritius were managing assets valued at USD 6.7 billion – about 15 times the GDP of the country at that time – while the assets of domestic mutual funds were relatively small. The offshore fund sector experienced considerable growth, with there being significant indirect positive effects on telecommunications and the development of excellent legal, accounting, auditing, financial and asset management skills.\(^\text{23}\)

In 2006, when cross-border investments were estimated to be worth more than USD 16 trillion, a roundtable was organized by the OECD, resulting in the launch of a project on taxation of CIVs. Currently, the cross-border portfolio of investments is increasingly being held through CIVs.\(^\text{24}\) The most recent OECD report on the activity of CIVs was released in 2019.\(^\text{25}\) However, the report has not yet been finalized. The UN has had numerous discussions around CIVs, which are currently before the UNTC.

2.3. Understanding the CIV structures

It has been established already (see section 1) that a large part of cross-border investment is carried out by way of CIVs, which permits the pooling of investments by groups of investors. Consequently, these bodies constitute one of the largest categories of investors in foreign markets. In this section, the authors discuss the structures of CIVs. It should be noted that CIV investors include both individual and institutional investors.

CIVs may be marketed privately or publicly. Structurally, financial services firms, including securities firms, banks and insurance companies, typically organize CIVs. The organizing firm is often referred to as the CIV “manager”, which may well have hundreds and thousands of employees, and provides services, such as portfolio management (advisory) and transfer agency (shareholder record-keeping). The CIV manager may also delegate advisory responsibility to other firms with regard to the portfolio. Such an adviser decides which securities the CIV will hold, and when the securities will be bought or sold. The advisor must also ensure that the CIV portfolio is consistent with the applicable regulations.\(^\text{26}\) Thereafter, interests in the CIVs are distributed through affiliated or unaffiliated firms, which is regulated in many developed countries through disclosure statements, i.e. a prospectus, that is subject to review by regulators. This situation results in a fairly level playing field. Interest in CIVs acquired through intermediaries are registered at the CIV through nominee and/or anonymous accounts. This position obfuscates customer identity. While investments in a CIV are typically long term, a CIV’s shareholder base may change on a daily basis, and the CIV manager may not be aware of changes in the underlying investors.\(^\text{27}\)

CIVs take different forms, depending on the country in which they are established. These forms include companies, trusts, contractual arrangements and partnerships. As a result, most countries have a tax system that provides for neutrality between direct investments and investments made through a CIV when the investments are all located domestically.\(^\text{28}\) The problem that arises when CIVs operate across borders is that there are no such regulations.

\(^{17}\) H. Vermeulen et al., *The Tax Treatment of Collective Investment Vehicles and Real Estate Investment Trusts* (H. Vermeulen ed., IBFD 2010), Books IBFD.


\(^{19}\) Id.


\(^{22}\) Id., at p. 51.

\(^{23}\) Ongore & Nyamori, *supra* n. 11.


\(^{26}\) OECD, *Granting of CIV Treaty Benefits*, *supra* n. 4.

\(^{27}\) Id.

\(^{28}\) Id.
The UNTC is currently considering this issue. This examination includes arguments that the finance theory recommends that investors diversify risks between equity and debt, securities, real estate, and other assets. CIVs permit small investors to obtain the benefit of investing on a large scale through the pooling of their investments with other small, medium or large-scale investors. Small investors also benefit by accessing market experience and the insights of professional money managers. However, these advantages tend to be accessible only to CIVs in developed countries. Accordingly, the operation of CIVs in developing countries is unprotected and characterized by little or no regulation, informality and a playing field that is not level together with the absence of tax neutrality. Figure 1 is a pictorial representation that sets out how CIVs broadly operate.

![Figure 1 – Pictorial representation of CIV operations](image)

The key stakeholders include investors, being individuals or institutions, the fund manager, and the entity into which the investments are made. The CIV, i.e. the fund, itself includes pooled resources, such as stocks, bonds, real estate and debt.

While Figure 1 appears to make CIVs deceptively simple, in reality it involves the pooling of funds from multiple jurisdictions into one jurisdiction from diverse sets of stakeholders, all of whom are regulated by their domestic laws. The additional step undertaken by the CIV manager to invest across borders results in an additional set of legislation and regulation. Consequently, the absence of a guiding regulatory framework can also allow access to illicit money, which potentially could be laundered through the fund. Accordingly, while the authors attempt to understand CIVs and their operations, sourcing data on CIVs is a significant challenge. As a result, two sets of principles – those of the UNTC and the OECD – guide the discussion in section 2.4 to further create a clearer picture on CIV functionality and the need for CIV taxation.

2.4. The UNTC and OECD definitions

The problem that this article tries to deal with is to understand CIVs and to recommend how they should be defined for tax purposes in a developing country context. In order to do so, the authors analyse the UNTC and OECD definitions. Furthermore, the authors explore country positions, although the analysis already shows that there is a clear disparity between developed and developing countries marked by an absence of legislation in most developing countries (see section 1). For developing countries that have the relevant legislation, the degree of regulation varies. However, CIVs often operate across borders and, from a tax perspective, without regulation there can be no taxation if an entity is unrecognized by domestic legislation. It is the authors’ premise that, in order to level the playing field, there is a need to ensure that investors are subjected to similar regulations across the multiple jurisdictions in which they operate. As a result, any profits they realize should be taxed fairly as is the case for all other investments.

On the one hand, the UNTC has defined a CIV as a fund that pools the investment of many investors and is therefore widely held, holds a diversified portfolio of securities and is subject to investor-protection regulation in the country in which it is established.29 This definition is a direct adoption of the OECD definition. However, the UNTC is currently at a very early stage in trying to decide what a specific developing country definition should look like and there has been no official documentation setting out its position on this issue.

2.5. Selective principles for the taxation of CIVs between developed and developing countries

2.5.1. Opening comments

This article moves forward on the premise that the effect of regulating this topic leads to not only the levelling of the playing field domestically and across borders, but also enhances neutrality within tax systems. As a result, this section deals with the following two terms: the levelling of the playing field (see section 2.5.2.) and neutrality within the context of CIVs (see section 2.5.3.). In concluding the section, the concept of fairness is also considered (see section 2.5.4.)

2.5.2. Levelling the playing field

Levelling the playing field, though not precisely defined, is a theory commonly used in international trade. It is not a tax theory, but its concepts and principles can be used to analyse tax. In recent years, states are no longer content to concentrate on domestic markets in respect of the goods and services produced in their jurisdictions. Investors who have capital are seeking increasingly foreign market opportunities.30 Accordingly, the levelling of the playing field in taxation must allow for how it affects those investing across borders.

With the diversification of investments across markets, there is a need to build a fair international rules-based taxation system. This position requires cooperation between many countries with different histories, legislative frameworks, interests, cultures and levels of development. While

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29 UNTC, supra n. 8, at p. 3, art. 6.
closing loopholes in global rules may take time due to the disparities across borders, scholars have emphasized that states can only flourish in international trade where the playing field is levelled domestically first. Consequently, there has been progress in reducing legislative and policy impediments and distortions to trade over the years.\(^\text{31}\)

However, in the case of CIVs, where there is little or no legislation covering domestic investments and limited rules regarding cross-border CIVs, the principles of taxation are fairly clearly defined.\(^\text{32}\) As a result, they can be relied on by the tax system, as it almost organically chooses and adheres to certain principles or characteristics.\(^\text{33}\) A key principle is equity in taxation, which is about “fairness” in the taxation system (see section 2.5.4.). This is a fluid concept that depends on many other non-tax factors, such as culture, political influence and the importance of redistribution.\(^\text{34}\) The traditional thinking with regard to equity within a tax system hinges on the “benefit principle” and the “ability to pay” principle. Both of these concepts are intertwined with other concepts, such as levelling the playing field.

On the one hand, the benefit principle proposes that all persons contribute, i.e. pay taxes, in accordance with the benefits that they receive from public goods and services. In this regard, the difficulty is the measurement of the “benefits” received. Nonetheless, numerous functions provided by a state serve all of the people of the state, irrespective of whether they contribute. Accordingly, the principle is interpreted on the basis that persons contribute in accordance with their ability to pay so that all may receive access to the collective benefits provided by the state.\(^\text{35}\)

On the other hand, the ability-to-pay concept is defined as:

\[ \text{A principle of tax economics based in the theory that taxes should be equitable, that a taxpayer’s burden should reflect his/her economic capacity to bear that burden relative to other taxpayers.} \]

Income is traditionally considered to be the best measure of an individual’s ability to pay. Consequently, it relates to economic justice, which looks at the differing circumstances of taxpayers, e.g. their ability to pay and scales of taxation. This situation permits states that lack clear legislation to look towards the equitable levelling of the playing field as they address new developments in their economies, including but not limited to CIVs.

2.5.3. **Tax neutrality**

Tax neutrality means that a tax should not give rise to an advantage or a disadvantage with regard to any transaction or investment. This concept of neutrality extends to both inward-looking, i.e. capital import neutrality (CIN), implying that investments are subject to the same level of taxes irrespective of whether the investor is a resident, and outward-looking, i.e. capital export neutrality (CEN), implying that investments made within or outside the country are subject to the same taxes for residents, perspectives.\(^\text{37}\)

Neutrality also has a direct link to the concept of equality as discussed in section 2.5.2. in that the avoidance of distortions prevents a move from highly taxed activities to activities taxed at lower levels. Accordingly, tax neutrality concerns economic efficiency, i.e. it ensures that tax does not create an advantage or disadvantage for a specific transaction. This position works in line with levelling the playing field as previously discussed. Furthermore, it is in line with arguments of some scholars who believe that tax policy has to be neutral and simple with low and preferably uniform tax rates.\(^\text{38}\)

Consequently, neutrality requires impartiality of treatment.\(^\text{39}\) The term differs from “equity” and “justice”, which include an interest in economic quality as well as in impartiality. Taxes are said to be equitable when they make for a more even distribution of economic reward. Neutrality has to do less with the standards applied to the overall distribution of the tax load and more to do with the even application of those standards once chosen.\(^\text{40}\)

Applying this to CIVs implies that taxing the collective fund should be neutral and equitable. Tax neutrality is based on the concept that an investor investing in an investment fund should be treated the same as if that same investor were directly investing in the funds’ underlying assets.\(^\text{41}\) As a result, the general policy objective of a country should be to ensure that investing through a domestic CIV should result in a burden that is equal to that which would apply in the case of a direct investment.\(^\text{42}\)

Accordingly, where states treat the CIV as a taxable entity with regard to its profits and losses, the tax neutrality of the investment via the CIV may be achieved. In this regard, states apply a material or personal tax exemption to the CIV. Such action would mean that the CIV is a taxable entity to which profits and losses are allocated, but that the income is subject to taxation only on the fulfilment of the requirements for the personal or material tax exemption. The profits are taxed only on distribution to the shareholders.

\(^{31}\) Id., at p. 3.  
\(^{33}\) Id., at p. 103.  
\(^{34}\) Fundamentals of Taxation: An Introduction to Tax Policy, Tax Law and Tax Administration (P. Pistone et al. eds., IBFD 2019), Books IBFD.  
\(^{35}\) Id., at Preface p. 1.  
\(^{36}\) Ability to pay, in Glossary – Tax Research Platform – IBFD.

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37. Pistone et al. eds., supra n. 34, at Preface p. 3.  
39. The partiality that the authors are concerned with may arise from: (i) unequal treatment of essentially similar taxpayers; or (ii) the same treatment of essentially different taxpayers. Discrimination may be deliberate or inept. The disadvantages are removed when it is supported by adequate public purpose and ample prospect of achieving such purpose.  
41. OECD, Granting of CIV Treaty Benefits, supra n. 4.  
42. UTIC, supra n. 8.
2.5.4. Fairness

Fairness as a concept elaborates on the ability to pay in taxation and is vital for the proper functioning of a tax system. In this context, fairness can be approached in the context of rule of law under the broader theme of equity discussed in the preceding subsection.

The equity implications of international taxation rules in applying the fairness criteria are used in domestic taxation. For instance, income tax, the most important criterion for spreading the income tax burden among individual taxpayers, places the onus on comparative economic well-being, often referred to as the ability to pay, which is given great consideration in the domestic tax process.

Internationally, there has been very little discussion surrounding this concept, and it may be because of the composition of international investment historically that it has been dominated in developing countries by direct foreign investments of multinational corporations (MNCs), which pose perplexing issues in evaluating fairness concerns. However, this situation is an inadequate reason to forego an analysis of fairness considerations in scrutinizing important international dimensions in modern tax.

3. Definitions of CIVs in Selected African Countries: Morocco, South Africa, Mauritius and Kenya

3.1. Introductory remarks

This section examines the regulatory framework in respect of CIVs in Morocco (see section 3.2.), South Africa (see section 3.3.), Mauritius (see section 3.4.) and Kenya (see section 3.5.). While the regulation of CIV in South Africa appears to be fairly well developed, it is not as developed in Morocco, Mauritius and Kenya, although there is a significant presence of CIVs in these countries. However, there is no specific definition of CIVs in the laws of any of these four African countries.

3.2. Morocco

Morocco is one of the hubs for investments in Africa and has a very robust system when it comes to investments. With regard to significant investments, Morocco has put in place an investment charter that is intended to develop and promote investments in Morocco by creating tax and customs incentives, except for agricultural investment, which is limited for foreigners. The use of incentives was confirmed through the investment convention entered into between the Moroccan government and foreign investors following the approval of the Moroccan Investment Commission.

However, CIVs as a specialized form of resource pooling appear not to have been properly understood in Morocco, despite the fact that its operations are undertaken in the country. Moreover, as CIVs invest the pooled resources of individuals and firms into a wide range of equity, debt or other promises, for example, to pay dividends or interest, the taxing of CIVs may be inevitable, but there is no definition of a CIV in the Moroccan legislation.

The principal actors in CIVs include those, i.e. institutional investors, who hold long-term resources and manage assets to grow these resources. They are financial institutions, such as banks, i.e. the Attijariwafa Bank, Banque Centrale, Banque Marocaine du Commerce Exterieur (BMCE), Natexis and Credit Industriel and Commercial CC.PA. The asset management companies include Caisse de Dépôt et de Gestion Capital and BMCE. The insurance companies involved are CNIA SAADA ASSURANCE (renamed Saham Assurance), Wafa Assurance and AXA Assurance Maroc, while the international development finance institutions encompass the European Investment Bank, PROPARCO, International Finance Corporation and the Dutch Development Bank. Private holding companies include, for example, Mutandis and Al Mada (formerly Société Nationale d’Investissement, a pan-African private equity fund). Asset managers involved are Caisse des Dépôt. There are other financial institutions, such as retirement funds (e.g. The Moroccan Inter-Professional Pension Fund and Moroccan Pension Fund), mutual insurance groups (e.g. Mutuelle Agricole Marocaine d’assurance, Mutuelle Centrale Marocaine d’assurance and Caisse Nationale des Organismes de Prévoyance Sociale), funds of funds and investment companies, which all engage in CIV activities.

The management companies perform intermediation. These institutions research target companies, prepare studies in relation to, and plan and invest where appropriate, the funds entrusted to them by investors. Their role is essential, as with regard to this type of financing, a high level of risks is involved. These tasks require extensive preliminary due diligence work as well as advanced skills and expertise. At the end of 2010, there were over 20 management companies in Morocco. The entrepreneurs involved are business leaders who are looking for funding to ensure the growth of their businesses. They may be industrial investors, the enterprise’s managers or financial market investors in the case of an initial public offer (IPO) or even one or more other specialized investment fund(s) in other private equity segments.

Overall, the legal structures adopted by investment funds in Morocco fall into the following two categories: (i) classic vehicles; and (ii) organismes de placement en capital risque (OPCRs). The classic legal forms under Moroccan law include: sociétés anonymes (SAs), the bodies established under Laws 17-95 and 20-05, which are broadly equivalent to limited companies; sociétés par actions sim-
Defining Collective Investment Vehicles for Tax Purposes in Developing Countries: Focus on Kenya, Mauritius, Morocco and South Africa

pliées (SAAs); entities created under articles 425 to 436 of Law 17-95, roughly equivalent to Delaware limited liability companies (LLCs); sociétés en commandite par actions (SCAs); and entities created under chapter II of part III of Law 5-96, in general the same as companies limited by shares.

Foreign legal forms include Limited Partnership and independent management companies, referred to as General Partners (GPs), which manage the fund. Foreign vehicles are formed under the laws of their country of origin.

According to Law 41-05, which was promulgated in 2006 on OPCRs, the OPCR regime established the two following vehicles specific to private equity: (i) sociétés de capital risque (venture capital corporations, SCRs) and fonds commun de placement à risque (mutual risk investment funds, FCPRs). OPCR mutual risk investment organizations are entities that are engaged in the venture capital business as defined by Law 41-05. OPCRs include SCRs and FCPRs.

SCRs are joint-stock companies, which are governed by the provisions of Law 17-95 concerning limited companies or by those of Law 5-96 on partnerships, i.e. limited partnerships, limited partnerships by shares, limited liability companies and joint ventures, that are subject to the special provisions of this Law. FCPRs are mutually owned assets, as referred to in article 4 of Law 41-05. They have no legal personality. Their shares are issued and sold under the conditions determined by management rules. The investments issued by FCPRs are treated as securities.

The foregoing demonstrates the significant presence of CIVs and their operations in Morocco. This situation reveals the need for a clear definition of CIVs in Morocco.

3.3. South Africa

In South Africa, CIVs, or CISs, are regulated and controlled vide the Collective Investment Schemes Control Act 45 of 2002. The Act defines a CIS as:

a scheme in whatever form, including an open-ended investment company, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio, and in terms of which:

(a) two or more investors contribute money or other assets to and hold a participatory interest in a portfolio of the scheme through shares, units or any other form of participation interest; and (b) the investors share the risk and benefit of investment in proportion to their participatory interest in a portfolio of a scheme. Striking for us is the wording “whatever form” within this definition, which accordingly denotes inclusivity.

The Act also provides principles for the administration of CISs, which should be carried out in an honest and fair manner. Among other requirements, information should also be disclosed.

Furthermore, the regulatory definitions in respect of various types of CIVs, in relation to securities, in immovable property, etc., apply for income tax purposes as well. Only certain types of CIVs, for example, comparable foreign CIVs in respect of securities, and local CIVs with regard to immovable property, are treated for income tax purposes as “companies”. This situation means that these CIVs are subject to the tax rules for companies. Specific taxes, such as the dividend tax, apply to their distributions, when these fall within the scope of the rules.

A special tax dispensation applies to CIVs investing in equities. In terms of the regulatory framework and practice, such bodies are usually obliged to distribute all income, i.e. dividends and interest, except for the portion needed to meet expenditure, for example, annual management fees. To the extent that these CIVs distribute their income, they are treated as fiscally transparent for income tax purposes.

Income tax on the returns of CIVS on investment is concentrated at the level of the investor, as is entitlement to tax reliefs, i.e. specified dividends are tax exempt income, while personal allowances for interest may apply to categories of individual taxpayers of a certain age. The effect is to better respond to the ability-to-pay principle, though distortions may still exist, as savings in property, other than equities, are not subject to this scheme. Regardless of the foregoing, all CIVs, i.e. local or foreign and regardless of investment type, are regarded for income tax purposes as separate "persons". This position means that CIVs must comply with all of the income tax requirements as a separate taxpaying unit with regard to its individual and institutional investors.

From the foregoing, it is evident that South Africa’s legal and regulatory regime on CIVs is fairly developed. The authors believe that this could be a starting point for the legal and regulatory regimes in respect of CIVs in developing countries. However, even South Africa, which is perhaps the only African country with a detailed legal and tax legislation for CIVs, can still be criticized, as its CIV tax regime has distortionary features, and does not always respond well to tax capacity, especially given high poverty and income inequality levels in the country, thereby ignoring some of the principles espoused in section 2. Accordingly, the authors recognize that it is not easy to balance the legal framework to account for local policy and circumstances, but that this situation should not be a reason for developing countries to not act.
3.4. Mauritius

There is no specific definition of CIVs within the Mauritian regulatory framework. However, CISs and closed-end funds that wish to operate in Mauritius must be registered with the Financial Services Commission under the Securities Act, 2005 as set out in the Securities (Collective Investment Schemes and Closed-end Funds) Regulations 2008. The authorization process for both open-end and closed-end funds is the same. Intermediaries, custodians, CIS managers and fund administrators undergo rigorous screening prior to being licensed by the Financial Services Commission, after which they are monitored for compliance with existing laws and regulations.

Typically, CISs are structured as sociétés, limited partnerships or trusts, such trusts generally taking the form of private and/or public limited companies, protected cell companies and, in rare circumstances, limited companies. Closed-end funds are structured as companies, trusts, limited partnerships, foundations or protected cell companies. Domestic funds operate as retail funds and global funds primarily target non-resident investors. The Financial Services Commission regulates these bodies.

3.5. Kenya

In Kenya, as in Morocco (see section 3.2.) and Mauritius (see section 3.4.), there is no specific definition of CISs within the legal framework, though there is a significant presence of such operations in the country. According to the quarterly report Capital Markets Authority (CMA) for the period ended 30 June 2019, there are 25 approved CISs made up of 88 funds (see Figure 2). The most popular fund is the Money Market Fund. Other funds include fixed income funds, equity funds, managed funds, balanced funds, income funds, growth funds, wealth funds, diversified funds, Iman funds and East Africa funds. Only investments in CISs that are approved by the CMA may be offered for sale to the Kenyan public. Such schemes must comply with the Capital Markets Act Cap 485 A and the Capital Markets (Collective Investment Schemes) Regulations, 2001. An approved fund can easily be identified by the cover of its prospectus, which contains a statement that a copy of the prospectus has been lodged and approved by the CMA.

However, while a definition is useful as a stop gap measure, countries, especially those without large numbers of CIVs, could instead focus on ensuring that the principles of taxation being followed are the bedrock for the process. The foregoing demonstrates that there is an urgent need to define CIVs as a first step, in the domestic laws of these countries, as they have a huge presence there.

4. Recommendations

The principles of realizing a level playing field for cross-border investments by CIVs (see section 2.5.2.), tax neutrality (see section 2.5.3.) and fairness (see section 2.5.4.) are extremely important for developing countries that lack a developed legal and tax framework. With globalization, more investments are moving to developing countries. The special nature and operations of CIVs demand appropriate legal and regulatory frameworks. These principles must be used and incorporated in developing country laws so as to help create a balance and support at the domestic and international investment industries.

The authors recommend that this issue be legislated for, and that the first step should be legislation of the taxable unit. However, an interim measure could be the implementation of guiding principles in taxation that could bolster attempts at arriving at the smooth administration of taxes, especially when it comes to taxing CIVs as states transition to their new legislation and policies.

Based on the analysis of the four African countries concerned – Kenya, Mauritius, Morocco and South Africa – the authors would propose first that a definition of CIVs for tax purposes is necessary. Such a definition should consider local circumstances and the formal or informal operation of CIVs in each country. A possible definition...
that could capture such features might be fashioned along the following lines:

A CIV is a fund in whatever form (whether formally or informally set up) that pools the investment of many investors (in this case two or more) and is therefore widely-held, holds a diversified portfolio of securities, other assets (i.e. cash, fixed property or government bonds) and is subject to investor-protection regulation in the country in which it is established. It can be described as including:

(a) two or more investors contributing money or other assets to a formal or informal fund in which they hold a participatory interest in a portfolio of the scheme through shares, units or any other form of participatory interest, and

(b) investors that share the risk and the benefit of investment in proportion to their participatory interest in a portfolio of a scheme or on any other basis determined by the law.

Second, as taxation can arise at both the fund level and the investor level ability to pay, fairness and equity should be taken into consideration. This position would involve some policy considerations. For instance, what is the tax burden on a CIV’s profits? How would the taxable income be determined? What would be the effect of the burden on the investment? Would there be a need for a flat (minimum) tax rate? These questions should be answered by each state as it determines the appropriate point(s) of taxation.

Third, the structure of a CIV is critical to the decision on how it is taxed. This is so important that it must be dealt with separately, as a state maps out the types of structures

71. It is important to set limits for obvious reasons of predictability and management. The authors, therefore, suggest up to 500 investors, to simplify management for regulators.

used in their specific country contexts. Such action would ensure that the tax decision taken would be suitable to the legislative and policy framework as well as its practical application in each country that is exploring how to implement the taxation of CIVs.

Fourth and finally, international cooperation between taxing authorities is paramount. States should show a willingness to engage in an open and transparent negotiation with a secretariat established to discuss at a regional level what would be the appropriate, context-specific definition of a CIV for Africa and how best countries could benefit from the operations of CIVs, while, at the same time, encouraging investors to continue investing. This position includes sharing of information and beneficial registry data. At all times, due regard should be given to international developments. There has always been a call worldwide for cooperation in taxation matters, and it is important that this is taken up at regional, continental and global levels.

5. Conclusions

There is currently an absence of the appropriate general and tax-specific laws for CIVs in the African countries reviewed, i.e. Kenya, Mauritius, Morocco and South Africa, despite the flourishing of the local CIV industry. Whether or not developing countries regulate CIVs, they are already well established as a form of collective investment. Consequently, this industry cannot, and must not, be ignored, especially as developing countries worldwide continue to suffer from low-tax collection.