

Leveraging Barbados

When Doing Business In China

Over the coming months, we intend to run a series of Offshore Practice articles on various jurisdictions with a focus on how they can best be used for corporate structuring of direct investment projects in China. In the first instalment in this series, Elizabeth Thomson outlines the advantages of using Barbados, with its network of key double taxation treaties, as a domicile for holding China investments

Introduction

Barbados, the most easterly of the Caribbean islands, is known more as a tourist destination than as an offshore financial centre. Indeed, unlike many of its neighbouring islands, Barbados is not a pure tax haven, levying taxes on all companies, even international business companies (IBCs). However, the combination of low tax rates and an attractive set of double taxation treaties with China and a variety of investor countries, including Canada, the United States and the United Kingdom, makes Barbados an excellent jurisdiction for structuring corporate investments in China.

Barbados IBCs

To establish a Barbados IBC, an investor would first incorporate a

company under the Companies Act (Cap 308), and then seek a licence from the Minister of Industry to carry on an international business under the International Business Companies Act (Cap 77). To qualify as an IBC, a company must be resident in Barbados; carry on a trade of goods and services that exist outside of, and do not originate in, Barbados; carry on a trade of selling services to non-Barbados residents; or carry on a trade of manufacturing products exclusively for export outside of Barbados.

These companies enjoy a number of the benefits of IBCs in a number of other Caribbean jurisdictions: exemption from withholding taxes on payments to persons not resident in Barbados, no capital gains tax or estate duty, no exchange controls,

records can be kept in a foreign currency, no minimum capital requirement, provisions for inward and outward re-domiciliation, and a familiar, flexible legal framework based on British common law.

However, IBCs are subject to income tax, from a maximum of 2.5% to a minimum of 1% (the rate decreases as income increases, reaching 1% for income above about US\$15,000). Taxes paid in another country can be credited against tax owing in Barbados, but this may not reduce the tax paid below 1% of income. As a result, IBCs must file corporate tax returns every year; audited statements, when required, must be filed with the Ministry of Industry. Full details of the shareholders and directors, including resumes of the directors, must be ►

supplied to the Ministry during the licensing process.

On their own merits, Barbados IBCs are not particularly competitive with those of other jurisdictions, as the additional disclosure requirements and tax liabilities represent costs to the beneficial owners that do not exist in many neighbouring countries and territories. However, the unique advantage of Barbados IBCs is that they provide access to the country's extensive tax treaty network.

Barbados-Canada Treaty for China Structuring

Perhaps the best-known of these treaties is the Barbados-Canada treaty, which came into effect in January 1980. In the strictest terms, this treaty has restrictive clauses that make its provisions unavailable to companies that are entitled to special tax benefits in Barbados, such as IBCs. However, the Canadian domestic foreign affiliate rules permit

these companies, if they are tax residents in Barbados, to take advantage of special benefits under Canada's domestic tax legislation.

Since Barbados is a 'designated treaty country', if a Canadian corporation has an IBC subsidiary that earns 'active' income, it can remit dividends to Canada out of its exempt surplus, and these dividends are not subject to corporate tax in Canada.

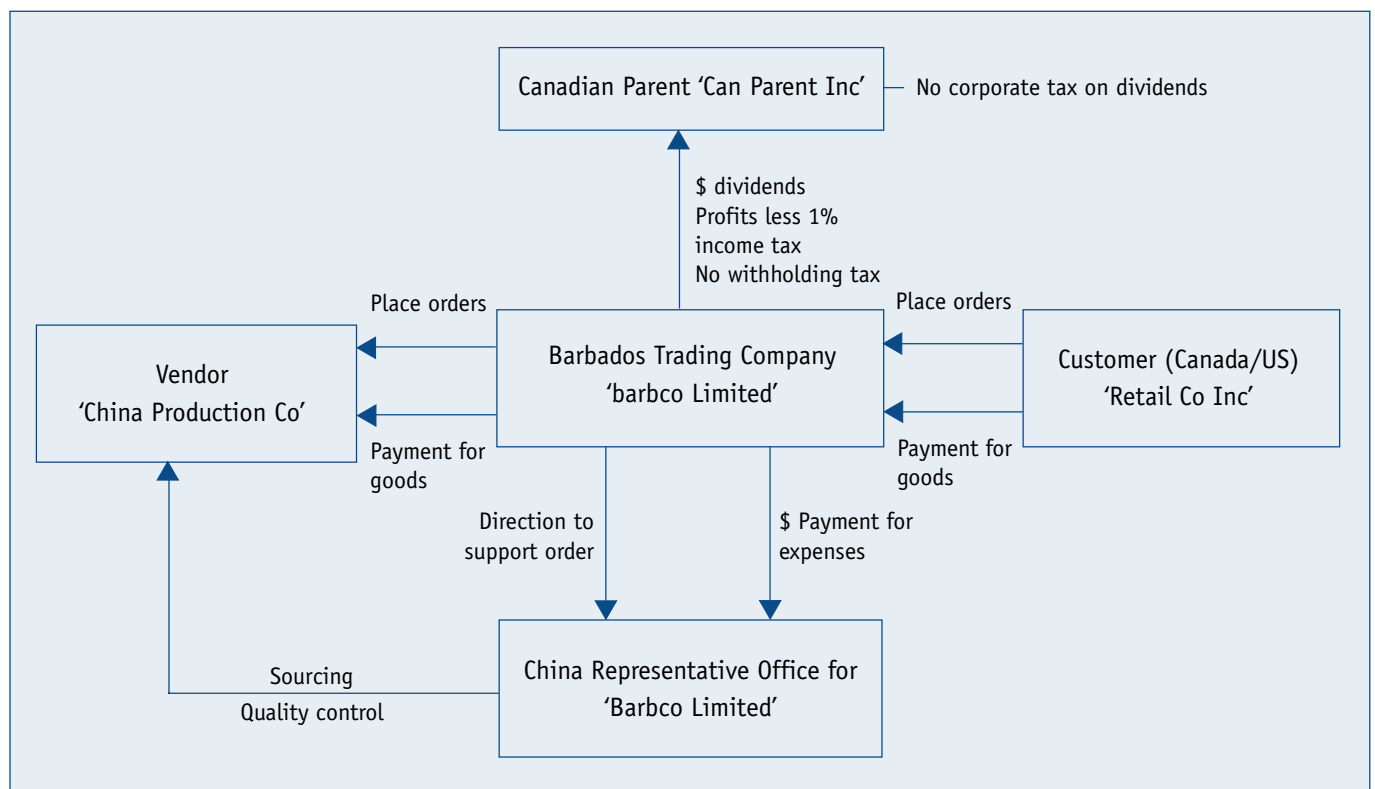
The following two examples show how these provisions can be helpful for structuring in China:

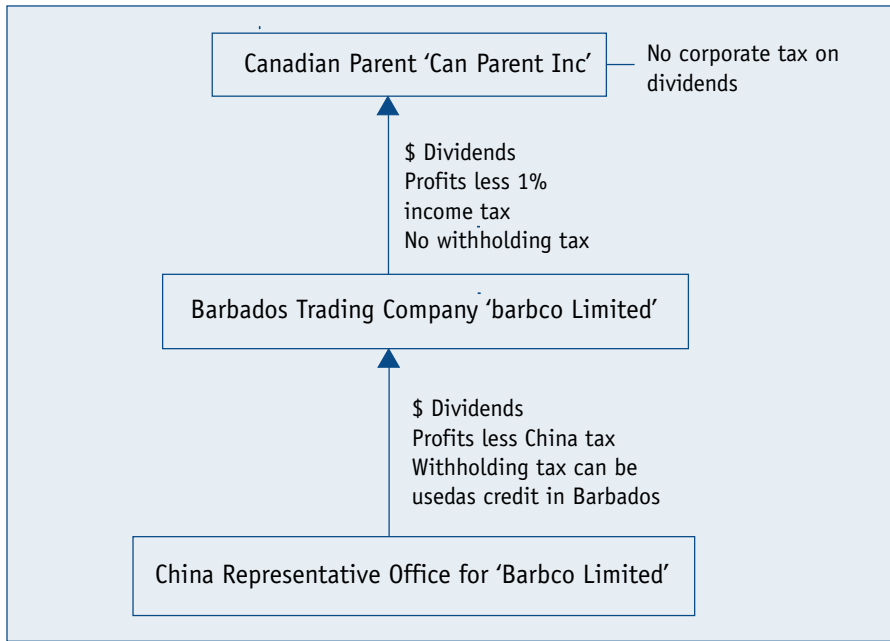
The first scenario involves a Canadian company that sources consumer goods from China and sells to large retail chains in Canada and the US. The parent company establishes a Barbados IBC subsidiary to handle its international sourcing and quality control, which it achieves by opening, in turn, a representative office in China and hiring staff locally or seconding an employee from the parent. The

company's customers would place orders to the IBC, which would be the filter for all communications with vendors.

All trading profits would accrue to the Barbados company, where they would be subject to an effective corporate tax of 1% for a company with trading income of more than about US\$25,000. Dividends can then be remitted to the parent out of exempt surplus (Barbados does not levy withholding tax on dividends paid by IBCs), saving the company considerable corporate tax in Canada. For a company based in the Canadian province of Ontario with income of less than US\$250,000, combined federal and provincial taxes would be 18.6%, resulting in savings of 17.6%. For a larger company, the combined tax rate would be 36.1%, resulting in savings of more than 35%.

The second scenario involves a Canadian company that wants to manufacture and/or sell goods in





China. The company establishes a Barbados IBC as the holding vehicle for its joint venture or wholly foreign-owned enterprise (WFOE) in China. Any profits from its operations on the Mainland can be remitted to Barbados under the terms of the Barbados-China agreement, which will be discussed below, where they will effectively be 'trapped' offshore for the Canadian parent company. The related tax savings would be as outlined above.

For these structures to work, however, special care must be taken in the planning for the Barbados subsidiary's operations to ensure that it will qualify under Canadian tax rules as resident in Barbados. This may include a variety of considerations regarding the establishment of 'mind and management' in Barbados - local signatories and/or directors, directors' meetings in the jurisdiction, etc.

Other Treaties: UK, US

Other Barbados double tax treaties have unique provisions that can be

an advantage to investors in certain areas of business. For instance, the Barbados-UK agreement, which dates back to 1970, has tax sparing provisions that allow companies with subsidiaries operating in Barbados under special acts such as the Fiscal Incentive Act or the Tourism Development Act to claim a credit for the Barbados tax that they would have paid had they not been subject to these incentives.

In general, however, the treaties have some limitation of benefits provisions, which prohibit non-residents of the treaty countries from deriving treaty benefits. Under the Barbados-US treaty, which was first signed in 1984 but has recently been renegotiated, the limitation of benefits prohibits IBCs from taking advantage of provisions applicable to dividends, interest and royalties, though these companies can still qualify for benefits under the Business Profits article.

Barbados-China Treaty

Perhaps the most interesting recent development in Barbados is the

Barbados-China double taxation treaty, which was concluded in 2000, which makes the island a strategic, low-tax entry point for companies looking to invest in China. One of the key competitive points related to working in China through a tax treaty country is that Mainland laws often differ significantly from those in investing countries, and can sometimes seem vague in terms of implementation and interpretation.

In the tax sphere, this means that many companies investing in China have difficulty projecting their specific tax liability, and this uncertainty raises another source of risk for investors in a developing market. However, Chinese law specifies that the provisions of an international treaty to which China is a party will always prevail over the domestic law in case of inconsistency or discrepancy. As a result, using a jurisdiction such as Barbados to channel investment into the Mainland allows a company to transact its business with a greater degree of certainty regarding its tax obligations.

According to Chinese law, dividend payments made to a non-resident by a Chinese resident of China are subject to a withholding tax of 10%. Under the Barbados-China tax treaty, that withholding rate is reduced to 5%. In many cases, new foreign investments in China receive a variety of tax incentives, often including an exemption from withholding tax for all dividend distributions to the foreign parent. However, domestic private companies have been pressuring the government for several years to end preferential tax treatment for foreign companies and create a truly level playing field with similar tax rates. ►

Beijing has stated its intention to harmonize the tax regimes. It is just a question of when the change takes place and how existing concessions will be treated when that occurs. If the investment goes through a Barbados company, it will either continue to receive an exemption from withholding tax if such concessions are grandfathered; if not, it will be eligible for the lower rate applicable under the treaty.

Either way, such dividends paid to a Barbados IBC would be taxed at the normal rates of 2.5% down to 1% upon receipt. However, the company could claim a tax credit against the Barbados tax otherwise payable for the 5% withholding tax paid on the dividends, and for the underlying taxes in China on profits out of which the dividends are paid. To qualify for such a credit, the Barbados

recipient needs to own only 10% of the capital of the paying Chinese company. As in the cases stated above, these credits can only be applied in so far as they reduce the tax payable in Barbados to a minimum of 1%.

The Barbados-China treaty also includes a favourable article on capital gains. Under the treaty, capital gains arising from the sale of property, other than immovable property situated in China (which would include shares), are taxable only in the state in which the taxpayer is resident. As a result, a Barbados IBC that owns shares in a Chinese company would not be subject to the normal Chinese 10% withholding tax on capital gains from the sale of those shares. The right to tax such capital gains would rest solely with the Barbados government,

and Barbados IBCs are not subject to capital gains tax. So, by structuring China investments through a Barbados IBC holding vehicle, the company can establish a tax-free exit strategy for its venture.

Barbados is not widely recognized as an offshore structuring jurisdiction outside of Canada, where the long-standing tax treaty has been used successfully by many companies over the years. However, a combination of low taxes, familiar legal and corporate structures, and an excellent network of tax treaties make Barbados a very advantageous jurisdiction for China structuring.

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利用巴巴多斯開展中國業務



Photo: Alexandre Caron

我們擬在未來數月登載一系列不同司法區域的離岸實務文章，專門討論如何充份利用這些司法區域為中國的直接投資項目組建企業架構。在該系列的第一篇文章中，Elizabeth Thomson 概述利用巴巴多斯的避免雙重徵稅主要條約網絡，發揮作為持有中國投資的地點的優勢

前言

巴巴多斯位於加勒比群島最東端，是一個離岸金融中心，但更以旅遊勝地著稱。事實上，巴巴多斯與眾多鄰島不同，它不是一個真正避稅地，而是對所有公司均徵稅，甚至包括國際業務公司（IBC）。然而，由於巴巴多斯稅率低，而且與中國及多個投資國家（包括加拿大、美國和英國）簽署避免雙重徵稅條約，使巴巴多斯成為組建中國境內企業投資的極佳司法區域。

巴巴多斯 IBC

為建立巴巴多斯 IBC，投資者首先須根據《公司法》（第 308 章）註冊成立一家公司，然後向工業部長申請根據《國際業務公司法》（第 77

章）開展國際業務的牌照。為符合 IBC 資格，一家公司必須設在巴巴多斯；從事來源於巴巴多斯境外而非境內的貨品及服務的貿易；從事提供服務予非巴巴多斯居民的業務；或製造僅供出口至巴巴多斯境外的產品。

這些公司在多個其他加勒比司法區域享有 IBC 的多項好處：支付予非巴巴多斯居民的款項免預扣稅，無資本增益稅或遺產稅，無外匯管制，賬目可以外幣為記賬單位，無最低資本要求，訂下了有關公司遷入及遷出的條文，以及以英國普通法為基礎的為人熟悉的富靈活性法律框架。

然而，IBC 必須繳付所得稅，最高為 2.5%，最低為 1%（稅率隨收入增加而降低，收入約為 15,000 美元以上者可低至 1%）。在另一個國家

支付的稅項可抵扣巴巴多斯的應付稅項，但不可令支付的稅減至收入的 1% 以下。因此，IBC 每年須提交公司稅申報單；並須應要求向工業部提交經審核報表。在牌照申請過程中，須提交有關股東及董事的詳情，包括董事簡歷。

就自身的優點而言，由於額外披露要求及稅務責任令實益擁有人承擔其他相鄰國家及地區沒有的費用，因此巴巴多斯 IBC 並不比其他司法區域的 IBC 更具競爭力。然而，巴巴多斯 IBC 的獨特優勢在於可利用該國廣泛的稅務條約網絡。

巴巴多斯－加拿大有關組建中國企業架構的條約

這些條約中最廣為人知的是 1980 年 ▶

1 月生效的巴巴多斯加拿大條約。從最嚴格的方面而言，該條約訂有限制性條款，使其條文不適用於有權享受巴巴多斯特殊稅務利益的公司（例如 IBC）。然而，根據加拿大的本土外國聯屬公司規則，若一家公司為巴巴多斯納稅居民，該公司被允許取得加拿大國內稅務法規下的特殊利益。

由於巴巴多斯是「指定條約國」，若加拿大公司有一家賺取「活動」收入的 IBC 附屬公司，則可從其豁免溢利中將股息匯至加拿大，該等股息無需在加拿大繳納公司稅。

以下兩個例子說明這些條文如何有利於組建中國企業的架構：

第一個情景是關於自中國採購消費品並出售予加拿大及美國的大型連鎖零售店的加拿大公司。母公司建立一家巴巴多斯 IBC 附屬公司以處理其國際採購及質量控制，該附屬公司透過在中國營運一個代表辦事處及聘用本地員工或自母公司派遣僱員而成立。該公司的客戶將向 IBC 發出訂

單，而 IBC 將過濾所有與供應商進行的通訊。

所有貿易溢利應歸巴巴多斯所有，他們須就超過約 25,000 美元的貿易收入支付 1% 的實際公司稅。股息可從豁免盈餘中匯至母公司（巴巴多斯不會就 IBC 支付的股息徵收預扣稅），為公司節省可觀的公司稅。對於設在加拿大安大略省的公司，若收入低於 25,000 美元，合併的聯邦及省稅為 18.6%，從而可節省 17.6%。對於規模較大的公司，合併稅率為 36.1%，從而可節省逾 35%。

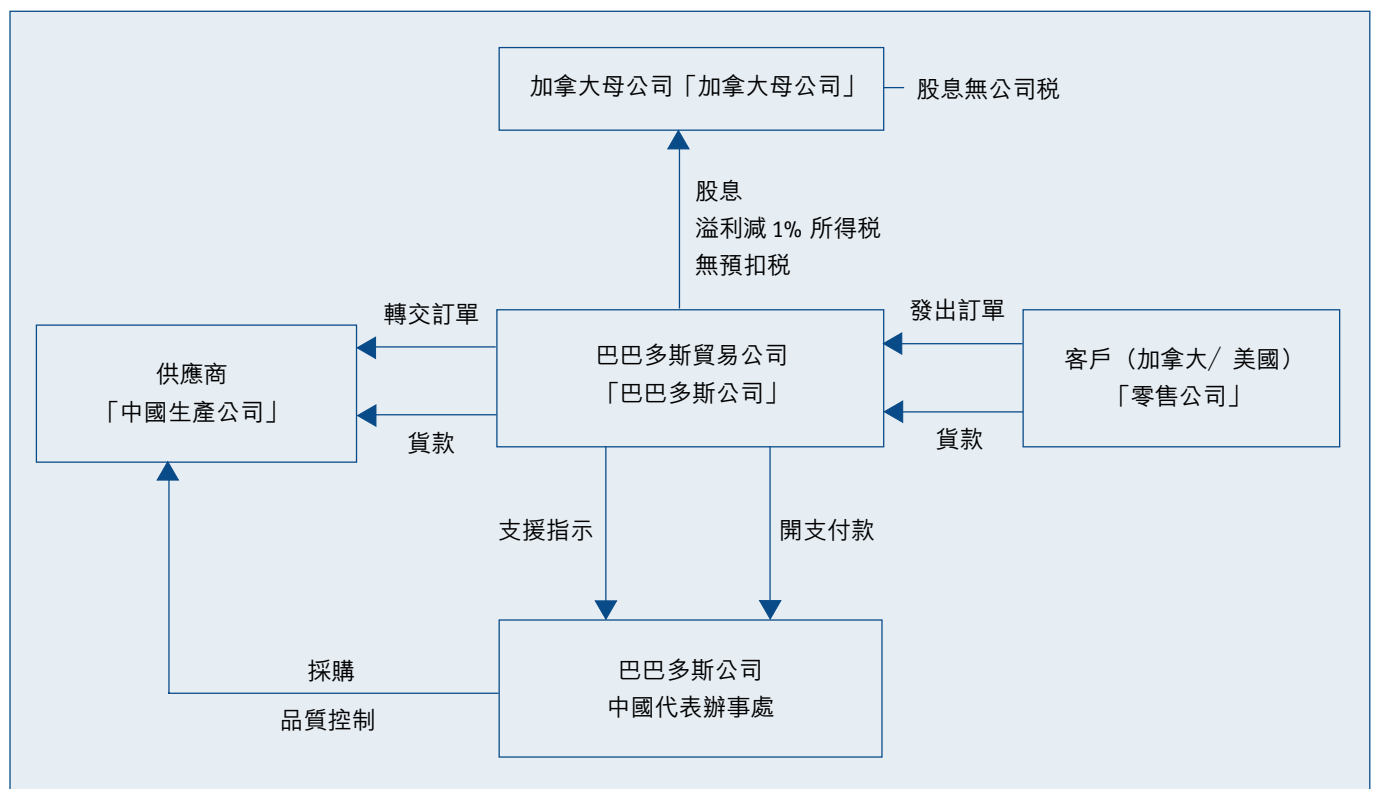
第二個情景是關於一家希望在中國製造及／或出售貨品的加拿大公司。該公司成立一家巴巴多斯 IBC，作為其在中國的合營企業或外資企業的控股公司。根據巴巴多斯－中國協議，在內地開展業務獲取的任何溢利均可匯至巴巴多斯（將於下文討論）。在巴巴多斯，可為加拿大公司達成有效的離岸營運。有關稅務方面的節省，如以上所描述的一般。

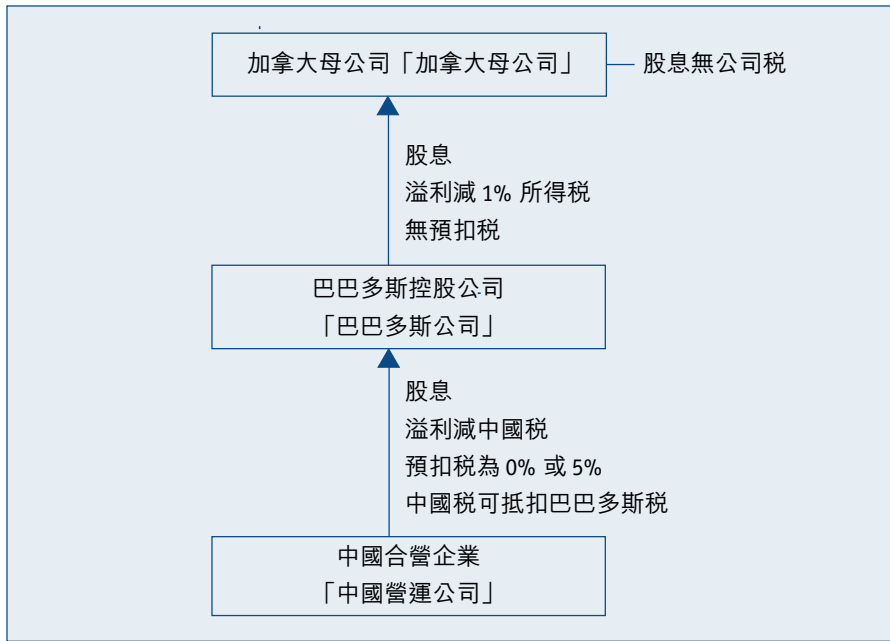
然而，為使這些結構生效，須特別謹慎規劃巴巴多斯附屬公司的營運，以確保其根據加拿大稅務規則屬於巴巴多斯居民。這可能包括考慮在巴巴多斯建立「策劃及管理」——當地簽署人及／或董事、董事會等。

其他條約：英國、美國

巴巴多斯其他避免雙重徵稅條約作出獨特規定，對若干領域業務的投資者有利。例如，早在 1970 年生效的巴巴多斯－英國協議含有免稅條文，允許根據財務獎勵法（Fiscal Incentive Act）或旅遊發展法（Tourism Development Act）在巴巴多斯設有附屬公司的公司申請扣減在不享受該等獎勵的情況下須繳納的稅額。

然而，一般而言，這些條約對所提供的優惠有一些限制，禁止非條約國的居民獲得條約的優惠。根據 1984 年首次簽署而近期重新商議的巴巴多斯－美國條約，儘管 IBC 仍





有資格享受業務溢利條款規定的優惠，但對優惠的限制禁止 IBC 利用適用於股息、利息及專利費的條文。

巴巴多斯－中國條約

巴巴多斯最令人關注的發展是 2000 年簽署的巴巴多斯－中國避免雙重徵稅條約。對於尋求在中國投資的公司而言，該條約使巴巴多斯成為戰略性及低課稅的進駐點。透過一個條約國在中國開展業務的一個主要優勢是內地法律通常與投資國有重大差異，而且有時在實施及解釋方面模糊不清。

在稅務方面，這意味著在中國投資的公司難以預測他們的具體稅務責任，這個不明朗因素成為在一個發展中市場投資的另一個風險來源。不過，中國法律規定，若中國與其他國家簽署的國際條約的條文與國內法律不一致或有衝突時，須以國際條約為準。因此，若一家公司利用巴巴多斯等司法區域向內地進行投資，有關稅務責任的明朗性較高。

根據中國法律，中國居民向非居民支付的股息須繳納 10% 預扣稅。根據巴巴多斯－中國稅務條約，該預扣稅率減至 5%。在很多情況下，在中國的新外國投資可獲得各種稅收獎勵，通常包括豁免支付予外國母公司的所有股息的預扣稅。然而，數年來，國內私營公司一直敦促政府結束向外國公司提供的稅務優惠待遇，以類似的稅率營造真正公平競爭的市場。中國當局已表明其協調稅制的意向。這些改變只是時間問題以及屆時現有優惠將如何處理的問題。透過巴巴多斯公司進行投資，若保留優惠，則可繼續獲得豁免；否則可根據條約獲得較低適用稅率。

不論如何，支付予巴巴多斯 IBC 的股息於收到時將按 2.5% 的正常稅率繳稅，最低可達至 1%。然而，公司可申請扣抵巴巴多斯稅，否則股息須支付 5% 預扣稅及就股息的相關溢利在中國支付有關稅項。為符合扣抵資格，巴巴多斯的收款人只需持有該派息的中國公司的百分之十股本。與上述情況一樣，這些扣抵的適用不會

使在巴巴多斯應付的稅率減至 1% 以下。

巴巴多斯－中國條約亦包括對資本增益有利的條款。根據該條約，出售位於中國的物業（不動產除外）所得的資本增益只需在納稅人居住的國家繳稅。因此，擁有中國公司股份的巴巴多斯 IBC 無需就出售該等股份的資本增益繳納中國正常的 10% 預扣稅。徵收該等資本增益稅的權利僅屬於巴巴多斯政府，巴巴多斯 IBC 無需繳納資本增益稅。因此，透過巴巴多斯控股工具組建中國投資的架構，公司可為其投資訂立免稅的撤出策略。

除加拿大外，巴巴多斯並不獲廣泛承認為離岸架構司法區域。多年來，不少公司已在加拿大成功利用長期存在的稅務條約。然而，由於巴巴多斯具有低稅率、為人熟悉的法律及企業架構，以及優良的稅務條約網絡，因此它成為最有利於組建中國投資架構的司法區域。

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