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Tax Incentives and Sub-Saharan Africa

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Abstract

The OECD's Base Erosion Profit Shifting (BEPS) project has taken a powerful and welcome look at many of the tax avoidance strategies that proliferate in a world where multinational enterprises are in the business of exploiting gaps in the tax laws of different countries to minimize their ultimate tax bills. The focus on international consensus and prescriptions for reform has not been an unqualified good for the nations in Sub-Saharan Africa, which find themselves in the position of reacting to standards and taking on compliance burdens set without sufficient consideration of their special circumstances. Because the path for the BEPS project was chosen before receiving meaningful input from these nations, the initiatives offer little support for revenue-raising strategies for Sub-Saharan Africa and require an administrative infrastructure currently beyond the capacity of many nations in the region. With an eye toward integrating achievement of the United Nations Sustainable Development Goals (2030) (SDGs) with the BEPS project, this article urges three reforms: implementation of treaty-based regional tax incentives mindful of the SDGs in the OECD's Multilateral Instrument to Implement Tax Treaty Related Matters to Prevent BEPS; development of a fund by high-income countries to assist Sub-Saharan African nations in building tax administrative capacity; and reconsideration of some of the BEPS reform proposals, particularly the Digital Economy two-pillar proposals, with the aim of according agency to Sub-Saharan Africa as

* Theodore Rinehart, Professor of Business Law, George Washington University. This article is dedicated with much love to my mother, Marion B. Brown, who is responsible for any good thing I have done or achieved. I would like to thank Ms. Lori Fossum, Reference Librarian at the George Washington University Law School, for awesome research assistance, and the organizers and participants at the Duke Tax Policy Seminar for very helpful comments and feedback. I would also like to thank the members of the Pepperdine Caruso School of Law for amazing support, especially Ms. Mariana Orbay and Mr. Zachary Carstens. Any errors found are solely those of the author.

it constructs a blueprint for solid emergence from economic hardship heightened by the pandemic.

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I. INTRODUCTION

The economic viability of the poor economies of the developing world,[1] particularly sub-Saharan Africa, continues to be a secondary focus of the high-income countries of the developed world as they move forward with projects to ensure international cooperation to combat tax avoidance and to harmonize the standards for evaluating the substantive integrity of national regimes.[2] The 2013 Base Erosion Profit Shifting (BEPS) project of the G20, coordinated and managed by the Organisation for Economic Cooperation and Development (OECD), has achieved an overhaul of tax standards, but that process did not place a sufficient emphasis on the particular concerns of the developing world.[3] The OECD expressed concern and took action to include input from these nations, but this was near the end of the process of consensus formation.[4] By providing an opportunity for consultation, but only after the paradigms, dictates, and core principles were adopted in final reports issued in 2015, the developed world undermined meaningful input from Africa regarding the foundational principles of international tax reform.

Almost in tandem with the OECD project, the United Nations (U.N.) was renewing, expanding, and strengthening sustainable development goals (SDGs) to be achieved by 2030.[5] These SDGs address a range of issues deemed critical to the survival of populations residing in low-income countries.[6] These include elimination of poverty and hunger, climate action,

1. The focus of this article is on sub-Saharan Africa, a region in which a majority of the member countries are ranked poor based on World Bank human development measures. *Global Economic Indicators – Statistics & Facts*, STATISTA (2020).

2. Press Release, Economic and Social Council, *International Cooperation to End Tax Crimes Crucial for Achieving Sustainable Growth Agenda, Speakers Say as Development Financing Forum Concludes*, U.N. Press Release ECOSOC/6840 (May 25, 2017).

3. *See International Collaboration to End Tax Avoidance*, OECD, https://www.oecd.org/tax/beps/ (last visited Feb. 21, 2021).

4. *See, e.g.*, Carmel Peters, *Developing Countries' Reactions to the G20/OECD Action Plan on Base Erosion and Profit Shifting*, BULL. FOR INT'L TAX'N 375, 375, 375 n.1 (2015), https://www.un.org/esa/ffd/wp-content/uploads/2015/10/11STM_G20OecdBeps.pdf.

5. *See Transforming Our World: The 2030 Agenda for Sustainable Development*, G.A. Res. 70/1, UNITED NATIONS 13–27 (Oct. 21, 2015), https://sdgs.un.org/2030agenda (last visited Feb. 12, 2021).

6. *Id.* The initial set of goals, issued in 2012, were revisited in 2017. Sha-Zukang (Under-Secretary-General for Economic and Social Affairs), *The Millennium Development Goals Report 2012*, 4–5 UNITED NATIONS (2012), https://www.un.org/millenniumgoals/pdf/MDG%20Report%202012.pdf. The 2017 report launched 17 goals to "transform the world." Liu Zhenmin (Under-Secretary-General for Economic and Social Affairs), *The Sustainable Development Goals Report 2020*, 6–22 UNITED NATIONS (2020), https://unstats.un.org/sdgs/report/2020/The-Sustainable-

reduction of economic inequality, and private-governmental partnerships to achieve these ends.[7] A consortium of private actors and not-for-profit institutions has committed to incorporating the SDGs into their corporate practices.[8] The World Bank, the nongovernmental representative of the world's richest countries, launched an initiative to advance the SDGs through its Human-Centered Business Model (HCBM), of which the OECD Development Centre became a sponsor. The HCBM is supported by five pillars, including a Fiscal Pillar.[9] The Fiscal Pillar Work Group has offered "taxation initiatives that will provide ways in which governments can use taxation policy to achieve a set of human-centered performance goals" which are informed by the SDGs.[10] Key to the ability of low-income countries to attract investment essential to fund infrastructure needs of constituent populations is an international tax regime constructed with the aim of equipping them with the capacity to collect adequate revenue in a sustainable manner.

From the initial stages, the BEPS project proceeded with a focus on the special concerns of high-income countries. This is understandable given the membership of the OECD and the source of the mandate for reform (the G20).[11] The existence of the separate tax regimes of developed nations, including the United States and most OECD members, has led multinationals to attempt to exploit gaps that allow minimization of tax liability in their resident countries or to shift profits to low-tax jurisdictions to escape or substantially reduce taxation. The G20 initiated the BEPS project to avoid

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DevelopmentGoals-Report-2020.pdf [hereinafter *SDGR 2020 Report*].

7. *SDGR 2020 Report*, *supra* note 6, at 6–7, 15, 18, 22.

8. *See Our Strategic Priorities*, B TEAM, https://bteam.org/strategy (last visited Feb. 21, 2021). The B Team, consisting of twenty-nine leaders of industry and the non-profit sector, has signed on to implementing the SDGs in the areas of climate change, gender equality, and governance. *See Leaders*, B TEAM, https://bteam.org/who-we-are/leaders (last visited Feb. 21, 2021). The Team's commitment is to "encourage adoption of responsible corporate tax practice and advocacy for fair and effective tax systems that contribute to society and sustainable development." *Governance*, B TEAM, https://bteam.org/our-work/causes/governance (last visited Feb. 21, 2021); *Tax and the United Nations Sustainable Development Goals*, INT'L CHAMBER OF COMMERCE, iccwbo.org/content/uploads/sites/3/2018/02/icc-position-paper-on-tax-and-the-un-sdgs.pdf (last visited Feb. 21, 2021).

9. *See The Human-Centered Business Model*, OECD, http://www.oecd.org/dev/human-centred-business-model-hcbm.htm (last visited Feb. 12, 2021).

10. Karen B. Brown, *Tax Policy: A Tool to Support Sustainable Growth* (Pillar 4: Fiscal Matters) (World Bank) (2019).

11. *See* OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 11 (2013) [hereinafter AP ON BASE EROSION] ("The G20 finance ministers called on the OECD to develop an action plan to address BEPS issues in a co-ordinated and comprehensive manner.").

revenue shortfalls caused by a wide variety of tax avoidance techniques that threaten to result in inadequate public funding to sustain infrastructure and a social safety network for residents. The process resulted in fifteen primary recommendations for reform that invoked and continue to invoke controversy even among the instigators.[12]

The emphasis on solutions tailored to the existing separate tax systems of high-income countries has resulted in prescriptions for reform that are sophisticated, complex, and costly to implement. Solutions to the serious challenges posed by international tax avoidance, while welcome, are often not easily adapted to the circumstances of sub-Saharan nations. BEPS solutions are not readily achieved by countries in that region.

The advent of the 2019 pandemic places even greater pressure on high-income countries to support a version of tax reform within the capacity of the developing world that addresses its needs.[13] The U.N. has acknowledged that, even before COVID-19, efforts to meet the SDGs by 2030 were not on track.[14] Food insecurity, degradation of the environment, and high levels of inequality persisted throughout the world. The pandemic has brought a challenge to the capacity of health systems, threatened the livelihood of half the global workforce, and returned tens of millions of people to poverty and hunger.[15] As a result, the need for revenue mobilization in the sub-Saharan region has become even more pronounced.

A particular focus on sub-Saharan Africa is imperative. According to the World Bank Group, because of the pandemic, sub-Saharan Africa is expected to enter its first recession in a quarter of a century.[16] Economic activity there is expected to contract by 3.3%, with real gross domestic product returning to 2007 levels.[17] The Group suspects that COVID-19 could push 40 million

12. Mindy Herzfeld, *The Case Against BEPS: Lessons for Tax Coordination*, 21 FLA. TAX REV. 1, 5 (2017).

13. *See, e.g.*, *The Impact of the Coronavirus (COVID-19) Crisis on Development Finance*, OECD 1, 11 (June 24, 2020), http://www.oecd.org/coronavirus/policy-responses/theimpact-of-the-coronavirus-covid-19-crisis-on-development-finance-9de00b3b/.

14. *See* Amy Lieberman, *SDGs Show Slow Progress, Not on Track to Reach 2030 Targets*, *UN Reports*, DEVEX (June 22, 2018), https://www.devex.com/news/sdgs-show-slowprogress-not-on-track-to-reach-2030-targets-un-reports-92971.

15. *See SDGR Report 2020*, *supra* note 6, at 2.

16. *See World Bank Confirms Economic Downturn in Sub-Saharan Africa, Outlines Key Policies Needed for Recovery*, WORLD BANK (Oct. 8, 2020), https://www.worldbank.org/en/news/press-release/2020/10/08/world-bank-confirms-economic-downturn-in-sub-saharan-africa-outlines-key-polices-needed-for-recovery [hereinafter *World Bank Confirms Economic Downturn*].

17. *Id.*

people in the region into extreme poverty, erasing nearly five years of progress.[18] Spillovers from the global recession brought on by the pandemic and the effects of domestic lockdowns have lowered growth levels, specifically by 6.1% in Nigeria and 17.1% in South Africa.[19] Greatest declines are expected in East and Southern Africa, based on declines in output in South African and Angola.[20] Most countries in the region are expected to emerge from the pandemic with historically large budget deficits, leaving severe debt challenges.[21]

This article considers the origins of the BEPS project, which provides a significant and detailed look at a range of complex problems confronting the international tax system. Modern ways of doing business (through e-commerce and other mechanisms) gave rise to sophisticated tax avoidance devices that exploited an antiquated set of tax rules.[22] The BEPS initiatives are defensive measures taken to prevent aggressive tax planning that exploits unanticipated advantages gained through manipulation of the differences in the laws of the separate countries in which multinational enterprises operate. BEPS and related projects have presented standards and imposed obligations, but they have addressed issues facing the sub-Saharan region primarily on the margins. Tangential focus on sub-Saharan Africa came not out of animus, but out of initial choices about the direction of reform. Subsequent efforts to address Africa hold promise, but more can be done. This requires partnership with the countries in this region to develop tax incentives that create a path for investment in a manner that advances the important goals of the U.N.'s SDGs.

II. STANDARDS AND BURDENS

One of the major initiatives designed to promulgate common standards affecting substantive tax rules was the OECD's Harmful Tax Competition

18. *Id.*

19. *Id.*

20. *Id.*

21. OFFICE OF THE CHIEF ECON. FOR THE AFRICAN REGION, AFRICA'S PULSE: AN ANALYSIS OF ISSUES SHAPING AFRICA'S ECONOMIC FUTURE 29–30 (2020).

22. *See, e.g.*, Sony Kassam, *E-Commerce Tax Avoidance Leads to Banks Being Tapped As Collectors*, BLOOMBERG TAX (Sept. 4, 2019, 12:01 AM), https://news.bloombergtax.com/daily-tax-report/e-commerce-tax-avoidance-leads-to-banks-being-tapped-as-collectors (stating how tax authorities enlisted help from banks to collect untaxed revenue going through e-commerce platforms).

Report (HTCR), issued in 1998.[23] The HTCR criticized two types of tax regimes: 1) tax havens generally imposing no or nominal tax on income, and 2) harmful tax regimes in which a country collects significant income tax revenue but its system has preferential features that subjects specified income to no or low taxation.[24] The OECD deemed these regimes harmful for several reasons. These included: distortion of investment flows, undermining integrity and fairness of tax systems, re-shaping desired level and mix of taxes and public spending, shift of tax burden to less mobile bases, and increase in administrative and compliance costs on tax authorities.[25] Failure of the HTCR to condemn tax strategies, which developed countries were using in their own regimes to compete,[26] signaled that the OECD's real concern was on regime-design that allowed offending countries to attract investment from its members.

Developing countries appeared on the original so-called "black-list," published by the OECD presumably to bring notoriety, signaling that these countries failed to comply with generally accepted standards.[27] Noting the absence of a role for developing countries in constructing international standards, the list was decried by those outside the OECD as a patriarchal move to portray those listed in a bad light and as in need of policing.

The opprobrium resulting from assessment of country regimes as harmful (or not) led to complaints concerning the lack of participation by developing and other outsider countries in the initial construction of the standards. Some argued for a focus on transparency through exchange of information in lieu of stigma-creating blacklisting.[28] In numerous meetings post launch of the

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23. OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE (1998) [hereinafter OECD, HTC]; *see also* Asa Johansson et al., *Anti-Avoidance Rules Against International Tax Planning: A Classification* (OECD Econ. Dep't, Working Paper, Paper No. 1356, 2016).

24. OECD, HTC, *supra* note 23, at 16, 19.

25. *Id.* at 16.

26. *Id.* at 8–9. Ireland, for example, a member of the OECD and the European Union, shifted to a 12.5% corporate income tax rate in a move designed to attract multinational businesses. Jonathan Keane, *Ireland Stands by Its Iconic 12.5% Tax Rate as OECD Races for Reforms*, CNBC (Nov. 3, 2020, 1:16 AM), https://www.cnbc.com/2020/11/03/ireland-stands-by-its-corporate-tax-rate-as-oecd-races-for-reforms-.html?&qsearchterm=ireland%20stands. In a compromise intended to appease members, the OECD blessed low tax-rate-type competition when built into the general tax scheme (i.e., the low-rate applied generally and was not limited to certain limited types of income (known as "ring-fencing"). OECD, HTC, *supra* note 23, at 26.

27. *See The OECD Issues The List of Unco-operative Tax Havens*, OECD (Apr. 18, 2002), http://www.oecd.org/ctp/harmful/theoecdissuesthelistofunco-operativetaxhavens.htm.

28. *See, e.g.*, *International Tax Standards*, OECD http://www.oecd.org/tax/transparency/what-we-

Report, representatives of developing nations rejected classification resulting from a process into which they had no input.[29] This led to the formation in 2000 of the Global Forum on Transparency and Exchange of Information in Tax Matters (Global Forum, or Forum), now comprising 161 member-nations, including sub-Saharan countries, which focuses on assessment of transparency in tax administration and effective exchange of information in civil and criminal tax matters instead of on shaming and judgment.[30] The standards used to review these tax systems is largely reflected in the OECD's Convention on Mutual Administrative Assistance in Tax Matters.[31] There is peer examination of the tax systems of Forum members, which accords a role to all member nations expanded beyond the smaller OECD membership.[32]

Along with the HTCR, the OECD issued its Tax Sparing Report,[33] which condemned a practice by which many countries provided incentives for investment by their resident multinationals in developing countries. One version of tax sparing allowed residents a credit against home country liability for fictional taxes on income derived in the developing country, which was exempt in the source country because of a tax holiday offered to certain classes of investors.[34] The OECD recommended an end to the practice of granting tax-sparing credits for several reasons. Primarily, it felt that the grant of a tax-sparing credit might unfairly compete with industries in the residence

do/ (last visited Feb. 22, 2021) ("The Global Forum supports its members in tackling offshore tax evasion by monitoring, reviewing and assisting jurisdictions to implement the international standards on transparency and exchange of information for tax purposes.").

29. *See, e.g.*, Alexander Townsend, Jr., *The Global Schoolyard Bully: The Organisation for Economic Co-operation and Development's Coercive Efforts to Control Tax Competition*, 25 FORDHAM INT'L L.J. 215, 217–18 (2001).

30. *See Putting an End to Offshore Tax Evasion*, OECD, http://www.oecd.org/tax/transparency/ (last visited Feb. 22, 2021); *see also Overview,* OECD, http://www.oecd.org/tax/transparency/who-we-are/ (last visited Feb. 22, 2021) ("The Global Forum is a group of over 160 jurisdictions that includes all G20 countries, financial centres, and the majority of its members are developing countries. Together they work on an equal footing to put an end to offshore tax evasion.").

31. *See Convention on Mutual Administrative Assistance in Tax Matters*, OECD, http://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm [hereinafter *Convention on Mutual Administrative Assistance in Tax Matters Website*] (last updated Sept. 2020). This is based on a 2002 predecessor, the OECD Model Agreement on Exchange of Information in Tax Matters. *See* OECD, THE MULTILATERAL CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS 31 (2011).

32. *See OECD Tax Policy Studies*, *Taxation of Household Savings*, OECD, https://doi.org/10.1787/9789264289536-en (last visited Feb. 22, 2021).

33. OECD, TAX SPARING: A RECONSIDERATION (1998) [hereinafter TAX SPARING REPORT].

34. *Id.* at 21–22.

country (because moving operations to a host country with a zero rate of tax and allowing a credit for the income derived against residence country tax would disadvantage residence country businesses subject to tax without the benefit of a deemed foreign tax credit). It also contended that there was a likelihood that profits from operations might be repatriated to a residence country that features a regime exempting foreign source income, rather than re-invested in the host country.

An important reason to question tax sparing, not offered by the OECD, was the imbalance of power in the negotiation between the host country offering the tax holiday and the multinational corporation resident in a developed country. The dangers posed by acceding to tax-rate-lowering demands and other concessions could harm the ability of the host developing country to protect an adequate revenue base or shore up other factors in the economy that could support achievement of sustainability goals.[35] Moreover, the OECD's contention that tax sparing was no longer needed because developing countries had become "economically much more sophisticated" and had "reached an economic level which [was] equivalent or even superior to that of some [OECD] Member countries" failed to justify such a move concerning sub-Saharan African countries that quite obviously did not hold such a position of economic strength.[36]

When the Tax Sparing Report was issued, all but five OECD member countries had tax-sparing treaties with non-members.[37] This number gradually eroded after the OECD's recommendation that members abrogate treaties allowing the practice.[38] Today, only a handful of countries, including

35. *See, e.g.*, Karen B. Brown, *Missing Africa: Should U.S. International Tax Rules Accommodate Investment in Developing Countries?*, 23 U. PA. J. INT'L ECON. LAW 45, 68–76 (2002) (recommending a treaty-based exemption system in lieu of a tax sparing credit for income derived from increased investment in sub-Saharan Africa with provisions for environmental sustainability, worker rights, and sustainable tax rates).

36. TAX SPARING REPORT, *supra* note 33, at 21.

37. *Id.* at 68–69. Only Iceland, Ireland, Portugal, Turkey, and the United States had no tax-sparing treaties. *Id.* at 68–69. The U.S. has firmly opposed grant of the credit. *See id.* at 68–69.

38. *Id.* at 41–43. The OECD advised that the practice of granting tax sparing credits should be re-examined, with the Committee on Fiscal Affairs recommending that they should be granted only to "countries the economic level of which is considerably below that of . . . member countries." *Id.* at 42–43. The Report, however, caused countries to reconsider the practice even for needy countries. *See, e.g.*, Kim Brooks, *Tax Sparing: A Needed Incentive for Foreign Investment in Low-Income Countries or an Unnecessary Revenue Sacrifice?*, 34 QUEENS L.J. 505, 538 (2009) (noting that any benefits from attracting foreign investment are outweighed by the costs to the low-income country); Deborah Toaze, *Tax Sparing: Good Intentions, Unintended Results*, 49 CANADIAN TAX J. 879, 880

France, Germany, the Netherlands, and the United Kingdom, continue the practice.[39]

The Tax Sparing Report recommendations placed developing countries in a tough spot. They were forced to fit their own regimes into conformity with a template into which they had very little, if any, input. Consequently, some of these countries found themselves in the position of signaling acceptance of a developed-world standard in an effort to be viewed as cooperative, while surreptitiously doing what was necessary to attract investment even if those measures deviated from the enunciated norms.[40]

Since the HTCR, the most extensive push to develop international standards governing emerging issues in international taxation has been the BEPS initiative directed by the OECD. This initiative gained momentum after meetings in 2012 led G20 nations to recommend measures that would target a number of areas in which multinationals gained unintended tax advantages simply by exploiting differences in countries' tax laws.[41] Areas of concern are wide-ranging and include targeting schemes that use hybrid entities[42] to achieve double non-taxation of income, strengthening controlled foreign corporation (CFC) provisions to limit tax avoidance effected through off-shore subsidiaries, restricting rules allowing excessive interest deductions that erode the tax bases of residence countries of both the payer and payee, cracking down on treaty and transfer pricing abuses, and eliminating harmful

(2001) ("[T]ax sparing has produced only marginal economic benefits while providing opportunities for tax avoidance.").

39. *See* Celine Azemar & Dhammika Dharmapala, *Tax Sparing Agreements, Territorial Tax Reforms, and Foreign Direct Investment*, J. PUB. ECON. 1, 20 (2018), http://pubdocs.worldbank.org/en/281751559591312068/celine-Azmar.pdf.

40. *See, e.g.*, Jalia Kangave, *International Taxation: The Case of Uganda*, *in* TAXATION & DEVELOPMENT—A COMPARATIVE STUDY 280, 283 (2017) (Karen B. Brown ed., 2017) (noting Uganda's deference to OECD guidelines in documents and its commitment to taking steps to conform with internationally accepted tax practices, but acknowledging that "[w]hile there is no legal framework backing tax holidays, the government continues to provide them on an ad hoc basis").

41. OECD, BEPS PROJECT EXPLANATORY STATEMENT: 2015 FINAL REPORTS 4 (2015) [hereinafter 2015 FINAL REPORTS]. In particular, the OECD maintained that "[t]he current rules have . . . revealed weaknesses that create opportunities for Base Erosion and Profit Shifting (BEPS), thus requiring a bold move by policy makers to restore confidence in the system and ensure that profits are taxed where economic activities take place and value is created." *Id.*

42. *See* PEI Staff, *Hybrid Entities and Tax Treaties*, PRIV. EQUITY INT'L (July 8, 2004), https://www.privateequityinternational.com/hybrid-entities-and-tax-treaties/. Hybrid entities are those classified differently by two or more countries (e.g., an entity treated as a partnership by one and a corporation by another) with the result that the entity may pay no tax in any jurisdiction, often because of tax treaty advantages. *Id.*

tax practices.[43] The BEPS project resulted in a final report issued in 2015.[44] Connected with implementing these standards, in December 2016, the OECD adopted a model Multilateral Instrument intended to modify existing bilateral tax treaties in order to permit incorporation of many of the BEPS standards.[45] The BEPS Inclusive Framework, finalized in 2017, invited non-member countries, including developing countries, to work with the OECD and G20 members on issues related to standards and attendant issues, and to review and monitor implementation of the entire BEPS package.[46] As noted by prominent scholars, however, neither the BEPS Project nor the Inclusive Framework was "designed to deal with the issues faced by developing countries."[47] Several subsequent reports have detailed implementation of the prescribed measures.[48]

The BEPS initiatives were a first step in an effort to ultimately establish universal standards, designed with the intention of engaging so-called "third countries" (non-OECD and non-G20 nations).[49] Input by these third parties was delayed, however, until after finalization of key components.[50] Launch of the Project in 2013 and issuance of final reports at the end of 2015 without full third-party participation ensured that the resulting standards could not fully address developing country needs. There was limited consultation with developing countries before 2015 in the form of working groups, but this was

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43. AP ON BASE EROSION, *supra* note 11, at 29–40. There are fifteen action areas. *Id.* at 14–24. In its action plan, the G20 directed the OECD to develop items addressing "instances where the interaction of different tax rules [led] to double non-taxation or less than single taxation" and "arrangements that achieve[d] no or low taxation by shifting profits away from jurisdictions where the activities creating those profits [took] place." *Id.* at 10.

44. *BEPS 2015 Final Reports*, OECD, https://www.oecd.org/ctp/beps-2015-final-reports.htm (last visited Feb. 23, 2021).

45. *See* OECD, INCLUSIVE FRAMEWORK ON BEPS 1–44 (2017); OECD, BACKGROUND BRIEF: INCLUSIVE FRAMEWORK ON BEPS 5–23 (2017).

46. *See BEPS 2015 Final Reports*, *supra* note 44.

47. Irma Johanna Mosquera Valderrama et al., *Tax and Development: The Link Between International Taxation, The Base Erosion Profit Shifting Project and the 2030 Sustainable Development Agend*a 8 (United Nations Univ., Working Paper No. W-2018/4, 2018).

48. *See BEPS Reports*, OECD, https://www.oecd.org/tax/beps-reports.htm (last visited Feb. 23, 2021).

49. *See* OECD, COUNTERING HARMFUL TAX PRACTICES MORE EFFECTIVELY, TAKING INTO ACCOUNT TRANSPARENCY AND SUBSTANCE, ACTION 5: 2015 FINAL REPORT 68 (2015) [hereinafter ACTION 5 FINAL REPORT].

50. *See id.* ("Action 5 of the BEPS Action Plan (OECD, 2013) explicitly recognised the need to involve third countries and requested the [Forum on Harmful Tax Practices] to develop a strategy to engage non-OECD/ non-G20 countries into the work on harmful tax practices.").

after the organizing principles of reform were in place.[51]

The developing world's enthusiasm for an active role in shaping the BEPS prescriptions was evident in its demand that the U.N. Committee of Experts on International Cooperation in Tax Matters (U.N. Tax Committee) take the leadership role in charting the path to tax reform.[52] The goal was to construct a process open to worldwide approaches to taxation, such as those embodied in formulary apportionment and other proposals, that seeks to bridge the jurisdictional boundaries of the separate country regimes. This was the approach developing countries had in mind when they advocated for institution of a World Tax Organization.[53]

For years, developing countries, lacking a membership role in the OECD, have urged the establishment of a World Tax Organization that would allow a broader-than-high-income country view and seek solutions to cross-border tax avoidance that consider their needs.[54] This work would have been taken up by the U.N. Tax Committee, upgraded to the status of an intergovernmental body. As an intergovernmental body, the U.N. Tax Committee, with expanded governmental representation and an adequate budget, would have been in a position to convene a "World Tax Organization," a significant counter-weight to membership of the OECD.[55] Under a World Tax Organization, the direction of tax reform could have questioned building the BEPS project to protect choices made by OECD members about their own tax bases.[56]

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51. *See generally* OECD, PART 1 OF A REPORT TO G20 DEVELOPMENT WORKING GROUP ON THE IMPACT OF BEPS IN LOW INCOME COUNTRIES (2014) [hereinafter DEVELOPMENT WORKING GROUP PART 1]; OECD, PART 2 OF A REPORT TO G20 DEVELOPMENT WORKING GROUP ON THE IMPACT OF BEPS IN LOW INCOME COUNTRIES (2014); *see also* Irma Johanna Mosquera Valderrama, *The OECD-BEPS Measures to Deal with Aggressive Tax Planning in South America and Sub-Saharan Africa: The Challenges Ahead*, 43 INTERTAX 615, 616, 619 (2015) (detailing U.N.-sponsored workshops in 2014 addressing BEPS on Tax Base Protection for Developing Countries, an IMF policy paper addressing spillovers (the impact on developed country tax practices on developing countries), and questionnaires solicited by the U.N. from developing countries to obtain information to be addressed at a second conference on protecting the developing countries' tax base).

52. U.N. Dep't of Econ. & Soc. Affairs, *Countries Reach Historic Agreement to Generate Financing for New Sustainable Development Agenda*, https://www.un.org/africarenewal/news/countries-reach-historic-agreement-generate-financing-new-sustainable-development-agenda (last visited Feb. 23, 2021).

53. *See* David Spencer, *U.N. Tax Committee, Developing Countries, and Civil Society Organizations*, 26 J. INT'L TAX'N 42, 44 (2015).

54. *Id.*

55. *Id.*

56. *Id.* (citing Mindy Herzfeld's observation that "[a]t the core, the concern by Western nations

This proposal to expand the U.N. Tax Committee into a World Tax Organization was rejected at the United Nations Third International Conference on Financing and Development, held in Addis Ababa in July 2015, a decision said to make sense in large part because the OECD's BEPS project was already underway.[57] Although the conference concluded that the OECD-led process would adequately account for the concerns of developing nations, a few months later, in October 2015, the OECD issued its final BEPS reports on the fifteen covered initiatives.[58] The underlying premise of the final proposals for a response to targeted types of tax avoidance (namely, exploitation of gaps in different countries' tax systems that lead to non-taxation of income by any country and use of various vehicles to shift income to low or no tax jurisdictions) was protection of the tax bases of OECD members and the G20. The final reports reflect an intention to involve developing nations in the implementation of the initiatives, but this came after fundamental steps to shape the project had been taken.[59]

One of the critical issues concerning the direction of the BEPS Project, but foreclosed from consideration at an early stage, was whether tax avoidance could be better addressed by a global approach in the design of different countries' regimes. Harmonization or coordination of countries' substantive tax rules could occur in any number of ways, including one of the dominant proposals—formulary apportionment. To describe it simply, formulary apportionment would require all countries to agree to allocate rights to tax income of multinational enterprises under an agreed formula. This method

about upgrading the status of the U.N. Tax Committee may reflect the broader fear of the United States and the countries of the EU that as the agenda of international tax reform—and ultimately international tax rules more broadly—tilts from the West to the East, the historical system that generally favored residence or capital-exporting countries will also tilt to favor source countries"); *see also* Mindy Herzfeld, *New Analysis: Who Will Control the Future of International Tax Policy,* TAXNOTES (May 4, 2015), https://www.taxnotes.com/tax-notes-today-international/tax-policy/news-analysis-who-will-control-future-international-tax-policy/2015/05/04/h1jw?highlight=core%2C%20the%20concern%20by%20Western%20nations.

57. U.N. Dep't of Econ. & Soc. Affairs, *Countries Reach Historic Agreement to Generate Financing for New Sustainable Development Agenda* (July 15, 2015), https://www.un.org/en/development/desa/news/financing/historic-agreement-sustainable-development-agenda.html (noting how the newly adopted Addis Ababa Action Agenda "calls for strengthening support for the work of the U.N. Committee of Experts on International Cooperation in Tax Matters to improve its effectiveness and operational capacity").

58. *See* 2015 FINAL REPORTS, *supra* note 41, at 13–18.

59. *Id.* at 4 (commenting that the report "represents the results of a major and unparalleled effort by OECD and G20 countries working together on an equal footing with the participation of an increasing number of developing countries").

allocates income on a worldwide basis and is designed to eliminate the ability of businesses to shift income across countries through legal and accounting techniques.[60]

Under one proposal advocated by Professor Reuven Avi-Yonah, the worldwide income derived by each business activity of a multinational group (based on the functions performed by related parties) would be determined by subtracting worldwide expenses and allocating the net result based on a global accounting system among all countries in which the activity was conducted.[61] An estimated market return on tax-deductible expenses ("routine" income) would be allocated to the country in which the expenses were incurred, and the remainder of the income ("residual" income) would be allocated based on the group's relative sales into each country—a destination sales-based formulary apportionment method.[62] A variant of this method was embraced by the BEPS Action Eleven on transfer pricing, but it was rejected as an overarching theory that could have led to an entirely different set of reform prescriptions. The Avi-Yonah proposal held promise because it aimed to address the ability of multinationals to artificially shift income and ownership of intangible property.[63] This type of income manipulation occurs between multinational residents of high-income countries in transactions involving developing countries—a problem with no ready solution.[64]

While formulary apportionment may not be the final answer to the problem of international tax avoidance through income shifting,[65] it provides an example of a worldwide approach that could have involved developing countries in the tax regime design process at the outset. Nevertheless, as early as 2013 when it formulated its action plan, the OECD noted that "there [was] consensus among governments that moving to a system of formulary [or other

60. Reuven S. Avi-Yonah et al.,, *Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split*, 9 FLA. TAX REV. 497, 507–509 (2009).

61. *Id.* at 508.

62. *Id.* at 508–09.

63. *See* C. Annalise Musselman, *The Best of Both Methods: A Proposal for a Hybrid International Transfer Pricing Method*, 16 S.C. J. INT'L L. & BUS. 57, 72 (2020) (asserting that the possible benefit of formulary apportionment is the method's ability to "diminish[] multinational companies' incentives to shift income from one country to another").

64. *Id.* at 73 (stating that, while the "current system allows for corporations to shift income primarily through the relocation of intangibles to lower-tax jurisdictions," the formulary apportionment method does not let this artificial shifting of income and intangible assets "have much effect on their end tax liability").

65. *See, e.g.*, Susan C. Morse, *Revisiting Global Formulary Apportionment*, 29 VA. TAX REV. 593 (2010).

worldwide] apportionment of profits [was] not a viable way forward."[66] Devising the proposal and later seeking developing country buy-in seems coercive and unilateral.[67]

With only a peripheral role in tax design, developing countries are nonetheless expected to take on significant burdens to achieve a label of "compliant" with an increasing burden of standards to be met.[68] Implementation of the BEPS proposals will require developing countries to shoulder a substantial compliance burden, including revision of internal statutory law and treaty rules.[69]

The past two decades have also witnessed a deluge of standard-making in the administrative arena, supplementing or even standing apart from the initiatives seeking to harmonize substantive law. In addition to the Mutual Administrative Assistance Convention arising out of the HTC project and the Multilateral Instrument, both described above, the United States, the European Union, and the OECD have heightened requirements for record-keeping, information exchange, data collection, and administrative assistance.[70] Among the most important of these are the Foreign Account Tax Compliance Act (FATCA) rules and the European Union-led Common Reporting Standards.[71]

The FATCA rules, of primary focus in this article, require financial institutions to disclose account information, obtain reliable documentation on the identity and whereabouts of the account holder, and withhold tax on payments received on behalf of U.S. taxpayers in the event appropriate documentation is not obtained.[72] Countries and their financial institutions

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66. AP ON BASE EROSION, *supra* note 11, at 14.

67. David E. Spencer, *The EOCD Work Program: Digitalization of the Economy, Part 10*, 31 J. INT'L TAX'N 62, 62 (2020) (citing Lucas De Lima Carvalho, *The Trouble with 'Pillars' in International Tax Policy*, TAXNOTES (July 2, 2020), https://www.taxnotes.com/special-reports/digital-economy/trouble-pillars-international-tax-policy/2020/07/02/2cnhm).

68. *See* Reuven S. Avi-Yonah & Haiyan Xu, *Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight*, 6 HARV. BUS. L. REV. 185, 211 (2016) (stating that developing countries "might be hurt due to the effect of negative spill-over arising from the implementation of the BEPS project . . . because of their limited influence in the renovation of the current rules").

69. *See* Eric M. Zolt, *Tax Treaties and Developing Countries*, 72 N.Y.U. TAX L. REV. 111, 120 (2018).

70. *See Convention on Mutual Administrative Assistance in Tax Matters Website*, *supra* note 31.

71. *See* Richard Levine et al., *FATCA and the Common Reporting Standard: A Comparison*, 27 J. INT'L TAX'N 43, 43–44 (2016).

72. *See* Arthur J. Cockfield, *Big Data and Tax Haven Secrecy*, 18 FLA. TAX REV. 483, 494–95

were forced, as of the end of 2016,[73] to become "FATCA-compliant" in order to avoid the most serious consequence, which is the inability to receive payments from U.S. banks and other non-bank financial institutions or entities (including those in which a U.S. person has an equity or debt interest),[74] free of the imposition of the U.S. withholding tax.[75] Compliance with FATCA also requires the automatic exchange of information regarding offshore financial accounts and assets of U.S. citizens and residents.

The FATCA accords did not occur without significant objection by other countries and their financial institutions. The particular concern was the unilateral "extraterritorial enforcement" of the U.S. tax law aimed at uncovering hidden assets of U.S. citizens and residents.[76] FATCA compliance was assured nonetheless because no foreign bank or non-bank financial institution could afford to lose a U.S. customer base—a result almost guaranteed if they did not comply with FATCA requirements, because U.S. banks would be forced to withhold payments to these entities on behalf of U.S. customers or interest-holders. As of November 2020, 113 countries were FATCA-compliant through entry into complex agreements with the United States. Some of these agreements require the country in question to provide specified information directly to the IRS.[77] Others involve reporting by the foreign financial institution resident in these countries directly to the IRS.[78] These agreements have resulted from lengthy negotiations and place considerable burden on the signatories. To be a player in the global

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(2016) (outlining the FATCA requirements).

73. *See* DUN & BRADSTREET, THE FATCA REPORT 2 (2016) ("In most jurisdictions 30th June 2016 was set as the deadline for compliance.").

74. Levine et al., *supra* note 71, at 46.

75. *See, e.g.*, Michael L. Buenger, *The EU's ETS and Global Aviation: Why "Local Rules" Still Matter and May Matter Even More in the Future*, 41 DENV. J. INT'L L. & POL'Y 417, 428 n.50 (2013) (stating that, under FATCA, foreign banks must "locate American account holders and disclose their balances, receipts, and withdrawals to the Internal Revenue Service or be subject to a thirty percent withholding tax on income from U.S. financial assets held by the banks") (citing Foreign Account Tax Compliance Act, 26 U.S.C. §§ 1471–74 (2012)).

76. Levine et al., *supra* note 71, at 46.

77. *See* Nirav Dhanawade, *I Got 99 Problems and They're All FATCA*, 35 NW. J. INT'L L. & BUS. 139, 159 (2014) (noting that these agreements, known as Model 1 Intergovernmental Agreements, require a "dual exchange of information between the United States and a foreign government regarding their respective resident account holders" and require foreign financial institutions "to report specified information about accounts held by U.S. citizens").

78. *Id.* at 161 (stating that these agreements, known as Model 2 Intergovernmental Agreements, "cut out the middleman by requiring [foreign financial institutions] to directly report information to the IRS").

marketplace, low-income countries must become FATCA-compliant.[79]

The OECD has developed a parallel information reporting regime, known as the Common Reporting Standard (CRS). CRS will eventually require the signatory nations to automatically exchange prescribed financial asset information. CRS signatories enter into Competent Authority Agreements (CAAs) like FATCA Intergovernmental Agreements (IGAs), but the CRS enforcement mechanism is different. With the absence of penalty measures like the ones available to the United States in the event of noncompliance, enforcement of the CAAs will depend upon the internal laws of the respective parties to the agreement. As of December 2020, 110 countries had committed to become, or had become, CRS signatories.[80] Of these, nine developing countries had committed to agreements implementing CRS.[81] Absent from the group is the United States, which has indicated that it will not sign.[82]

The burden of conformity is considerable.[83] Reform was constructed initially without regard for the special circumstances of low-income countries. As a result, some solutions interfere with revenue-raising strategies of these countries.[84] Others are a challenge to the capacity of their tax administrations.

79. *See, e.g.*, Chi Tran, *International Transfer Pricing and the Elusive Arm's Length Standard: A Proposal for Disclosure of Advance Pricing Agreements as a Tool for Taxpayer Equality*, 25 SW. J. INT'L L. 207, 209 (2019) (noting how developing countries also need to be FATCA compliant to improve their education, healthcare, and infrastructure). Currently, the signatories from the Caribbean region are The Bahamas, Barbados, Bermuda, Cayman Islands, Dominica, Guyana, St. Kitts and Nevis, St. Vincent and Grenadines, Trinidad and Tobago, and Turks and Caicos.

80. *Signatories of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information and Intended First Information Exchange Date*, OECD (Dec. 10, 2020), http://oecd.org/tax/automatic-exchange/international-framework-for-the-crs/crs-mcaa-signatories.pdf [hereinafter *Signatories of the CRS*].

81. *Id.* (showing that the developing country signatories include Antiqua and Barbuda, Aruba, The Bahamas, Barbados, Dominica, Ghana, St. Kitts and Nevis, Saint Martin, and Trinidad and Tobago).

82. Perhaps because it was the first mover, the United States is the one nonparticipant in CRS exempted from hardships resulting from non-signatory status. *See* Levine et al., *supra* note 71, at 50.

83. *See* Ivan O. Ozai, *Tax Competition and the Ethics of Burden Sharing*, 42 FORDHAM INT'L L.J. 61, 71 (2018) (noting the larger burden for collecting taxes and compliance costs in the developing world than the developed world).

84. *See* Zolt, *supra* note 69, at 114 (suggesting that "developing countries should hesitate before . . . entering into tax treaties with developed countries" because of (a) "doubts about the general utility of tax treaties"; (b) "a belief that the lost revenue from yielding tax rights exceeds the benefits of these treaties"; and (c) "concerns that tax treaties facilitate aggressive tax-avoidance strategies").

III. INCENTIVES AND SDGS

Consultation to determine the issues facing developing countries in the implementation of BEPS revealed the following challenges:

- The BEPS focus on sophisticated tax planning techniques is of limited interest to developing countries because they typically face simpler tax avoidance techniques not captured by BEPS proposals.[85]
- Legislation in developing countries may be insufficiently complete to target areas of greatest risk because multinationals may be able to shift profits by means that avoid focus.[86]
- Developing countries are often unable to obtain information necessary to enable adequate risk assessment.[87]
- Developing countries lack administrative capacity (structure and staff) to enforce complex anti-avoidance rules or to apply effective dispute resolution mechanisms.[88]
- Regional mechanisms that support political awareness of the challenges of base erosion and profit shifting or buy-in to the need for change and resource commitment are lacking.[89]
- Developing countries are relegated to providing tax incentives for investment from high-income multinationals that ultimately may undermine revenue goals (a so-called "race to the bottom" that may worsen the economic position of these countries).[90]

Many of the challenges arise from the initial development and design of the BEPS project without addressing the burden of implementation by developing countries. The BEPS project not only failed to acknowledge tensions between the OECD member countries and the developing world, but it also failed to conceive of its goal as one to question the accepted roots of the international tax system as one based on self-interest and re-tool it as one based on global welfare maximization.[91] As Professor Mindy Herzfeld noted:

85. DEVELOPMENT WORKING GROUP PART 1, *supra* note 51, at 12.
86. *Id.* at 12.
87. *Id.* at 12.
88. *Id.* at 13.
89. *Id.* at 14.
90. *Id.* at 14.
91. Herzfeld, *supra* note 12, at 6–7.

> The project also failed to address another set of broader, more philosophical questions, rooted in economics but also in concerns over fairness in the context of global economic development. The tools that public finance economists have developed for analyzing what constitutes sound policy in a domestic setting are not easily transportable when the questions morph from those having to do with maximizing economic welfare within a particular set of borders to maximizing welfare globally. No country has signed on to such a concept as the basis for international tax rules that may lead to the diminishing of its own revenue intake. In a coordination setting, larger countries can and likely will act to negotiate and implement rules that may work to their best advantage, potentially to the disadvantage of smaller and less powerful countries, and the BEPS project largely failed to assuage such concerns.[92]

The imperfect design of the BEPS project has led to a project of international reform that has left developing countries on the sidelines. The marginalization of those countries, particularly those in the sub-Saharan Africa region, is of particular concern. This region consistently falls at the bottom of most lists of economic indicators with a large component of residents living in extreme poverty. The COVID-19 pandemic has only pressed the region into further destitution.

According to the World Bank Group, recovery in the region will depend on job creation and economic transformation.[93] This will require digital transformation (expansion of the digital infrastructure),[94] sectoral reallocation (a shift from raw exports to maximizing regional value chains),[95] and spatial integration.[96] Advances have been observed even as the pandemic has played out.[97] Strengthening of the public health system and social protection systems has been achieved by the leveraging of the region's digital economies.[98]

92. *Id.* at 7 (citations omitted).

93. OFFICE OF THE CHIEF ECON. FOR THE AFRICAN REGION, AFRICA'S PULSE: AN ANALYSIS OF ISSUES SHAPING AFRICA'S ECONOMIC FUTURE 68–69 (2020).

94. *Id.*

95. *Id.* at 70.

96. *Id.* at 117–20.

97. *Id.* at 51–53.

98. *Id.* at 4, 51–53 ("Evidence shows that at the height of the lockdown, 25 percent of the firms in Sub-Saharan Africa accelerated the use of digital technologies and increased investments in digital solutions in response to COVID-19.").

Participation of the international community will be vital to the realization of these goals.[99] This presents the occasion to consider three ways in which the BEPS project can be reimagined to provide support to the region through tax reform.

A. Treaty-Based Support of Regional Tax Incentives

Action Five of the BEPS Project[100] relates to harmful tax practices and builds upon the work the OECD initiated when it issued the HTCR described above.[101] It targets all harmful tax regimes and is not limited, as in the case of the HTCR, solely to geographically mobile activities, such as financial and other service activities, and it covers the provision of intangibles.[102] Action Five indicates a resolve not to consider global tax design in the introduction, when the preamble notes that the initiative is "not intended to promote the harmonisation of income taxes or tax structures generally within or outisde the OECD."[103] While the report does not purport to "dictat[e] to any country what should be the appropriate level of tax rates,"[104] it has the effect of countenancing the competitive moves of many developed countries (including, most recently, the United States) to compete by lowering tax rates in their separate regimes to attract foreign investment.[105]

A trend among developed countries strapped for revenue after the 2008 recession was the lowering of corporate income tax rates to attract multinationals.[106] While Ireland was the first mover in the 1990s to a 12.5% maximum corporate income tax rate when most others were at 30% or higher, other countries have countered with their own rate reductions.[107] The United Kingdom, Japan, Canada, and others have reduced their top statutory tax rates

99. *Id.* at 6.
100. *See* ACTION 5 FINAL REPORT, *supra* note 49, at 15–16.
101. *See id.* at 11–12.
102. *See id.* at 11.
103. *See id.* at 11.
104. *See id.* at 11.
105. *See id.* at 12 ("Countries have long recognised that a 'race to the bottom' would ultimately drive applicable tax rates on certain sources of income to zero for all countries, whether or not this is the tax policy a country wishes to pursue . . . .").
106. Karen B. Brown, *Taxation and Development: Overview*, *in* TAXATION & DEVELOPMENT—A COMPARATIVE STUDY 3–16 (Karen B. Brown ed., 2017).
107. CONG. BUDGET OFFICE, INTERNATIONAL COMPARISONS OF CORPORATE INCOME TAX RATES 2 (2017).

in recent years and the United States moved at the end of 2017 to a 21% flat tax rate, down from the 35% maximum rate.[108] This type of competition for investment does not violate Action Five principles because it classifies a tax regime as "harmful preferential" only if the rate reduction applies only to particular activities, often known as "ring-fenced" regimes. A rate much lower than that existing in other countries is not harmful under BEPS, so long as it applies generally to all corporate income.[109]

This definition of harmful tax regime sanctioned the competitive strategies of developed countries, but it does not address one of the major issues facing developing countries—the ability to offer tax incentives to foreign investors. The G20 Development Working Group, the OECD component charged with engaging with developing country issues, noted that while the topic was outside of the BEPS mandate, the use of tax incentives was a top concern for these nations.[110]

Rate competition by the developed world forecloses any chance that developing countries can set corporate income tax rates high (or high enough) because multinational companies, committed to reducing the tax cost of doing business, will force rates downward as the price for investment.[111] A developing country may respond to this pressure by offering a "tax holiday" to attract a given business activity of a multinational.[112] Recognition of this effect of the "spillover" from the tax regimes of developed countries led authors of a recent study to recommend allocation of taxing rights to developing countries through source or other rules.[113] Yet the Action Five Report condemns a practice of ring-fencing, of which a tax holiday is an example, as unfairly competitive, but provides little alternative for developing countries.

108. *See id.* at 1, 18, 21, 37.

109. UK's Patent Box is a ring-fenced regime, but it was recently blessed by the OECD.

110. *See* DEVELOPMENT WORKING GROUP PART 1, *supra* note 51, at 14.

111. *See id.*

112. *See, e.g.*, *id.*; Kangave, *supra* note 40, at 283.

113. INT'L MONETARY FUND, IMF POLICY PAPER: SPILLOVERS IN INTERNATIONAL CORPORATE TAXATION 11–12 (2014), https://www.imf.org/external/np/pp/eng/2014/050914.pdf [hereinafter IMF POLICY PAPER]. The IMF defines a spillover as "the impact that one jurisdiction's tax rules or practices has on others." *Id.* at 12. It notes the special importance of allocation of the rights to tax income to low-income countries as source countries and the "recipients of capital inflows," but not investors in business activities outside their borders. *Id.* Because developed countries, as capital exporters, maintain the right to tax their resident multinationals, this may operate to the detriment of developing countries because developed countries are not concerned with the "fair" international allocation of tax revenue and powers across countries. *Id.* at 11.

The move of many high-income countries to a territorial tax regime (featuring tax exemption for specified income from foreign business operations) offers an incentive to their resident multinationals to seek tax holidays. If a multinational enterprise's country of residence allows a participation exemption, resulting in nontaxation or very light taxation of earnings derived from operations abroad through a wholly-owned subsidiary, lower rates in the developing country will be attractive. The United States, for example, enacted a dividends-received deduction (allowing a deduction for 100% of dividends received from a controlled foreign corporation), an effective exemption of U.S. taxation on certain foreign source business income.[114] That exemption is allowed independently of any governing standards. Consequently, a U.S. multinational could negotiate rock-bottom tax rates for income from investments in sub-Saharan Africa without little requirement to provide significant benefits to the country of investment. A new U.S. tax, known as global intangible low-tax income (GILTI) is designed to offset the incentive to go offshore for low-tax income, but it may be subverted, and only works to the benefit of the U.S. Treasury. It provides no incentive to invest in sub-Saharan Africa.[115]

Without standards, the investment may be free of local taxation and fail to connect the benefits of tax-free operations with attainment of sustainability goals by the host location. While the OECD drafted a set of policies and objectives concerning tax incentives, these have not been made an official part of Action Five.[116] To support the ability of developing countries to attract much-needed foreign investment through carefully tailored tax incentives, this article proposes that the Multilateral Instrument to Implement Tax Treaty Related Matters to Prevent BEPS be amended to incorporate guidelines for these investments as informed by the SDGs.

These would include best practices as to the design of the incentives as well as requirements for standards such as job creation, gender equity in the workplace, partnerships for infrastructure projects concerning roads, utilities, and housing, as well as for environmental protections. These guidelines could also serve as a template for members of the OECD, as well as other countries

114. 26 U.S.C. § 245A (2018).

115. 26 U.S.C. § 250 (2017). An incentive would exist if the dividends received deduction were available only for investment in sub-Saharan Africa. *See* 26 U.S.C. § 243 (2018). In its present form, the exemption works as an incentive to invest elsewhere if the rate is low and other non-tax incentives exist. *See* IMF POLICY PAPER, *supra* note 113, at 20–21.

116. *Id.*

that enter into tax incentive agreements with sub-Saharan African nations. Negotiation of agreements in accordance with the guidelines either through the Multilateral Treaty or through one-on-one or regional treaties could be rewarded and publicized by maintenance of a publicly available list. Unlike the black-lists that were used to characterize the developing country as a bad actor when the HTCR was launched, this list would commend the country incorporating the standards into their treaties as well as the multinationals that partner with the developing country as good actors that are advancing the path toward achievement of these important goals.

B. Assist in Capacity Building

As mentioned in Part I, developing countries may lack the capacity to implement many of the complex BEPS proposals. An example is the enactment and enforcement of the transfer pricing proposals that span four reports. Transfer pricing in a multinational group of companies offers the possibility that income is shifting among members to minimize tax liability. Developing countries may fall victim to pricing tax avoidance schemes if they lack the tools to detect them and the ability to bring audits to conclusion.[117] The BEPS reports detail a range of methodologies that require application and implementation by a tax administration that has the statutory support as well as the manpower to audit and assess complicated corporate transactions. Simplification of the standards will allow sub-Saharan countries to employ these standards to raise revenue. The proposal is twofold.

First, the recommendation is that the OECD devote resources to developing alternatives that may be readily applied by developing nations. The goal is to achieve a workable methodology readily instituted by the low-income, resource-strapped country.[118] Second, the recommendation is that the high-income countries develop a fund to assist in sub-Saharan nations to train, recruit, and effectively employ a solid tax administration.[119] This would

117. *See generally World Bank Confirms Economic Downturn*, *supra* note 16.

118. *See* Afton Titus, *Domestic Revenue Mobilization Through Corporate Income Tax in an African Developing Country Context*, DALHOUSIE L.J. (forthcoming 2021).

119. *See* Ben Dickinson, *Building Tax Systems in Developing Countries Is Vital to Overcoming COVID-19 and Achieving the SDGs*, OECD (July 9, 2020), https://oecd-development-matters.org/2020/7/09/building-tax-systems-in-developing-countries-is-vital-to-overcoming-covid-19-and-achieving-the-sdgs/; *Building Capacity to Prevent Profit Shifting by Large Companies in Zambia*, OECD TAX & DEVELOPMENT CASE STUDY (2020), https://www.oecd.org/countries/zambia/building-capacity-to-prevent-profit-shifting-by-large-companies-in-zambia.pdf.

enable the countries to collect the income needed to build infrastructure and a social safety network in support of SDGs. An environmentally friendly way to build a fund would be to devote a small portion of an existing carbon tax or to enact one. In the alternative, each OECD member could commit to contributing an annual amount to a tax administration fund. Each member could partner with resident multinationals that are committed to assisting the developing world to increase administrative capacity, such as the members of the B-Team described in the Introduction that are committed to transparency in tax practices and to supporting effective tax administration. These companies could undertake to provide technical expertise to tax offices in developing countries with which they are not involved in a controversy.

C. Re-envision the BEPS Digital Economy Tax Proposals

A cornerstone development in the BEPS project addresses the twenty-first century challenges presented by the ever-evolving digital economy. Action One of the fifteen BEPS initiatives detailed a blueprint for targeting a type of tax-avoidance made possible by the failure of traditional tax doctrine to capture unique aspects of the profit-making capacity of online sales and services.[120] In particular, longstanding treaty rules concerning jurisdictional limitations left governments unable to tax where the online business lacked a physical presence, termed a "fixed place of business," within a State's confines. The OECD response is a two-pillar approach.

Pillar One addresses the case of a digital business with no physical presence in a country (or only a distribution or marketing function) in a country.[121] The impetus for the proposal is the recent enactment by countries, like France, of a digital services tax and is aimed at reaching an international consensus. The resulting formulaic approach deemed necessary to establish a new taxing right over residual profits allocated to market jurisdictions is incredibly hard to implement (introducing three separate tax amounts determined under super-challenging transfer pricing rules) and may involve overlapping jurisdiction or multiple taxation of profits requiring a robust dispute resolution mechanism. Finding the Pillar One "Unified Approach" a

120. *See Addressing the Tax Challenges of the Digital Economy*, Action 1: 2015 Final Report, OECD (2015), http://dx.doi.org/10.1787/9789264241046-en.

121. *Secretariat Proposal for a "Unified Approach" under Pillar One*, OECD (2019), https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf.

challenge to the administrative capacity of developing countries, a drafting group of developing country members of the U.N. Tax Committee has proposed an alternative, known as Article 12A, that permits withholding of automated digital services income on a gross basis, or an option for a simpler mechanism for net basis taxation, known as Article 12B.[122]

This article's third reform proposal is that the OECD pause its work to seriously consider and, possibly, redirect its path to take into account the U.N. Tax Committee's drafting group alternative approach. The BEPS project will fail to achieve legitimacy if it does not take into account the important obstacles to adoption and implementation of the proposals, particularly the digital services initiatives, in sub-Saharan Africa. Many countries in that region are considering a digital services tax, not because it will raise significant revenue, but because they feel they must be participants in the global reform conversation launched by the OECD.[123] While the revenue gains will inure to the benefit of high-income countries, sub-Saharan nations are pressured to play along if only to provide a measure of legitimacy to their own systems.[124] Failure to re-envision the digital services proposals means that sub-Saharan Africa will not derive benefit from current tax reform.

Pillar Two, which continues to be developed, advances the case for the imposition of a Global Anti-Base Erosion tax, or "GloBE" to reach certain profits from digital access to consumer markets.[125] This proposal is designed to insure that large multinational enterprises pay a minimum level of tax regardless of where they are headquartered or operated. A main feature is an income inclusion rule to apply whenever a multinational corporation is taxed

122. David E. Spencer, *Taxation of the Digital Economy: Proposal by the UN Tax Committee*, 31 J. INT'L TAXATION 30 (Nov. 2020) (noting the work of the Drafting Group of Developing Country Members of the U.N. Tax Committee, a significant minority of the members of the Committee, to counter the OECD's "Unified Approach" under Pillar One, and their particular concerns, including the complexity of the proposal, problems of implementation, administration, and coherence with developing country legal systems, and ability to obtain information necessary to enforce the proposed allocation of taxing rights).

123. *See* Nana Ama Sarfo, *Digital Taxation in Africa: Safety in Numbers?*, TAX NOTES INT'L (Sept. 4, 2020), https://www.taxnotes.com/featured-analysis/digital-taxation-africa-safety-numbers/2020/09/04/2cxds.

124. *Id.* (noting the view of the African Tax Administration Forum that "[w]hile the revenue raised would not be large for most African countries . . . a [digital services tax] could improve public confidence in the fairness of the tax system").

125. *Global Anti-Base Erosion Proposal ("GloBE")—Pillar Two*, OECD (2019), https://www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf.
pdf.

below a minimum effective tax rate. The rule would result in an income inclusion at the controlled foreign corporation's parent level in order to top up the rate.

The Biden administration's endorsement of the GloBE proposal provides a separate opportunity to shape tax reform in a direction that is meaningful for sub-Saharan Africa.[126] Proper tailoring of a global minimum tax, adopted with an international consensus that includes this region, holds promise for worldwide coordination of tax rates and harmonization of tax bases in a way that will accord agency to sub-Saharan Africa as it constructs revenue-raising strategies that will support a blueprint for emergence from the pandemic.

III. CONCLUSION

The ability of sub-Saharan countries to mobilize sufficient revenue to sustain infrastructure and a social network and to achieve economic growth is critical to the achievement of the 2030 sustainable development goals to which all U.N. members committed in 2015.[127] Reconfiguration of the BEPS Project to consider the structural problems underlying the international tax system by questioning the fundamental principles built into existing regimes of high-income countries could have assisted in uncovering impediments to achieving these goals. A multilateral approach to reform, involving developing countries in conceiving the project, would have brought developing country issues to the forefront.

A global tax system administered by some form of a World Tax Organization held the promise to bring all players to the table in a bid to equitably allocate taxing rights among all jurisdictions. A common corporate tax base, like that proposed but not adopted by the European Union, would have diminished national borders and afforded the prospect of a cooperative approach to international taxation. The lack of political will for such an approach set up the BEPS Project for controversy and, perhaps, ultimate rejection of some components. It ensured that the significant problems faced by sub-Saharan Africa and other developing nations in their bid to mobilize adequate revenue to support a sustainable future would not be adequately addressed. Yet, it is not too late to accord a major role to sub-Saharan Africa

126. *The Made in America Tax Plan*, US DEP'T TREASURY 10–12 (Apr. 2021), https://home.treasury.gov/system/files/136/MadeInAmericaTaxPlan_Report.pdf.
127. Valderrama et al., *supra* note 47, at 4–5.

in the direction of further BEPS reforms. Recent proposals involving digital services tax reforms, particularly the GloBE, if re-envisioned with input from that region, hold promise to restore legitimacy to the OECD/G-20-led tax reform effort. Implementation of a number of the other supports recommended above may operate to secure the position of sub-Saharan Africa, as well as to maximize worldwide welfare.