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Effective Taxation in Africa: Confronting Systemic Vulnerability through Inclusive Global Tax Governance

Okanga Okanga and Lyla Latif

Abstract

Implicit within the African fiscal architecture are embedded vulnerabilities to exogenous factors which challenge their domestic revenue mobilization (DRM) strategies. These DRM challenges are attributable to asymmetrical power relationships that exist within the international tax regime (ITR). The rules governing international taxation have largely been devised by developed countries resonating their own economic purposes, resulting in a regressive relationship that overlooks African perspectives in the creation of tax norms. Consequently, policymaking, and scholarship have focused extensively on curbing these power asymmetries that have resulted in vulnerable African tax systems. Continental and domestic approaches are now aligned towards fostering reform of the international tax regime to be more inclusive and participatory. This chapter adds voice to advocacy for the development of the ITR based on a triangular foundation of true inclusivity and interactionalism. The paper advocates for effective participation in the tax rules making process; reform-oriented agenda setting; and a deliberate materialization of outcomes that aim to strengthen tax revenue mobilization in developing countries (participation–agenda–outcomes). As a continent that consistently derives the negative revenue-to-GDP ratios, countries on the continent would, no doubt, derive more from a global tax system that pivots towards inclusivity and development.

1. Introduction

Africa is the least developed continent in the world. Of the 47 countries classified by the United Nations (UN) as least developed countries (LDCs), 33 are African.[1] That is not to say that Africa is not rich. The continent boasts a young and vibrant population,[2] an abundance of natural resources, and various industries that are boosting economic growth and investment opportunities.[3] Regrettably, large portions of Africa's tax-based revenue are eroded because of both legal and illegal structures through which capital and untaxed profits flow.[4] Statistics published by Cobham and Jansky show that the distribution of global tax base erosion is disproportionately concentrated in Africa.[5] Recent statistics show that African countries derive an average of 16.5% taxes from gross domestic product (GDP).[6] This is markedly below the OECD average of 34.3%

and the Latin American and Caribbean average of 23.1%.[7] The most effective taxer on the continent in 2018 – the Seychelles (32.4 percent) – had a lower tax-to-GDP ratio than the OECD average.[8]

Such evident shortfall in tax revenue capturing in Africa shows tax as a remission that has no commensurate benefits or guarantees for African citizens. Shortfalls in domestic revenue mobilization undermine a country's ability to invest in the needs of its people and can increase overreliance on debt and foreign aid, with their attached conditions. Increased DRM is central to achieving structural transformation in Africa which is in turn essential to addressing social and economic challenges on the continent, such as poverty, inequality and unemployment.[9] The emergence of the COVID-19 pandemic is particularly troubling for African countries as it threatens to aggravate their revenue constraints and to widen the chasm of inequality that already exists between African countries and their developed counterparts[10] as well as cause a dramatic fall in foreign direct investment.[11] The pandemic is not only aggravating the financial challenges facing many African countries – revenue contraction, mounting debt obligations and skyrocketing reliance on government welfare packages[12] – it is also forcing countries to reevaluate their international tax commitments. An example is Zambia that canceled its (exploitative) tax treaty with Mauritius. Zambia's official statement records that: "the engagement of creditors that are owed money by Government is an essential strategy to address the country's prevailing debt sustainability and fiscal challenges, especially in view of the negative impacts of the COVID-19 pandemic which has further constrained the Treasury's resources envelope."[13]

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1 *Map of the Least Developed Countries*, United Nations Conference on Trade and Dev., https://unctad.org/topic/vulnerable-economies/least-developed-countries/map (last visited Nov. 19, 2021).

2 Joe Myers, *19 of the World's 20 Youngest Countries are in Africa*, World Economic Forum (Aug. 30, 2019), https://www.weforum.org/agenda/2019/08/youngest-populations-africa/.

3 Acha Leke & Landry Signé, "Spotlighting opportunities for business in Africa and strategies to succeed in the world's next big growth market", Brookings, (Jan. 11, 2019), https://www.brookings.edu/research/spotlighting-opportunities-for-business-in-africa-and-strategies-to-succeed-in-the-worlds-next-big-growth-market/.

4 Alex Cobham & Petr Jansky, *Estimating Illicit Financial Flows: A Critical Guide to the Data, Methodologies and Findings* (2020); Alex Cobham & Petr Janský, *Global Distribution of Revenue loss From Corporate Tax Avoidance: Re-Estimation and Country Results,* 30 J Intl. Dev. 206 (2018) ["our findings support a somewhat lower estimate of global revenue losses of around US$500 billion annually and indicate that the greatest intensity of losses occurs in low-income and lower middle-income countries and across sub-Saharan Africa, Latin America and the Caribbean and South Asia"].

5 *Id*.

6 Org. for Economic Co-operation and Dev.("OECD")/African Tax Admin. Forum ("ATAF")/African Union Commission ("AUD"), *Revenue Statistics in Africa: 1990-2018* (2020), https://doi.org/10.1787/14e1edb1-en-fr.

7 *Id*.

8 *Id*.

9 United Nations Economic Comm'n for Africa, *Base Erosion and Profit Shifting in Africa: Reforms to Facilitate Improved Taxation of Multinational Enterprises* (2018).

10 *See* Woodrajh Aroun, *Coronavirus Shows the Inequality Among Nations*, New Frame (Sept. 14, 2020), https://www.newframe.com/coronavirus-shows-the-inequality-among-nations/; Kunal Sen, *Five Ways Coronavirus is Deepening Global Inequality*, The Conversation (Aug. 18, 2020), https://theconversation.com/five-ways-coronavirus-is-deepening-global-inequality-144621.

Africa's tax revenue mobilization challenges have been attributed to factors that include inadequate rules, poor institutional coordination, capacity gaps, difficulties accessing taxpayer information, and political interference.[14] Some of these challenges can be viewed in the broader context of flaws in the international tax regime (ITR) that disproportionately undermine developing countries.[15] The structural design of the ITR itself undermines the capacity of developing countries to fulfill their tax revenue potentials.[16] Thus, an important way to ensure effective taxation in the developing world is to decolonize and reform the ITR itself. So, while there are significant avenues for domestic improvement in taxing capacity, it seems that African countries cannot on their own overcome the endemic tax loopholes that bedevil them. Systematic changes must be made to the ITR to unshackle the tax mobilization potential of African countries. African countries would benefit from an ITR that is retooled for inclusivity and/or development.

African countries inherited a tax design system already put in place by the old powers today assembled as the OECD. This old system, effectively at play today, based its entire tax philosophy around the mobilization of taxable income, regardless of where it was sourced, to the resident country.[17] This effectively embedded inequality within the international tax regime in which Africa states appeared as vulnerable entities open to the *'scramble for tax'*.[18] The vulnerability in the form of tax base erosion subsequently resulted in the removal of the provision of social services from the center of government's fiscal obligation to its taxpayers.[19] This implied social engineering of the development of the African states is the direct contribution of the ITR. Hence, a move towards making the regime more inclusive is of paramount importance not only toward the financing of SDGs but also controlling fiscal shocks emanating from stressors like the Covid-19 pandemic.

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11 United Nations Conference on Trade and Dev., *Word Investment Report 2020: International Production beyond the Pandemic* (2020).

12 Mickaël Sallent, *External Debt Complicates Africa's COVID-19 Recovery, Debt Relief Needed Calls made for Temporary Debt Standstill for all African Countries*, UN Africa Renewal (July 30, 2020), https://www.un.org/africarenewal/magazine/july-2020/external-debt-complicates-africas-post-covid-19-recovery-mitigating-efforts; OECD, *A "Debt Standstill" for the Poorest Countries: How much is at Stake?* (May 27, 2020), https://www.oecd.org/coronavirus/policy-responses/a-debt-standstill-for-the-poorest-countries-how-much-is-at-stake-462eabd8/.

13 Zambia, Office of the President, *Press Statement By Chief Government Spokesperson And Minister Of Information And Broadcasting Services Ms Dora Siliya On The Decisions Made By Cabinet At The 16th Cabinet Meeting Held At Mulungushi International Conference Centre On Monday, 22nd June, 2020,* https://www.sh.gov.zm/?wpfb_dl=250.

14 *See*, *e.g.*, Alexandra Readhead, *Preventing Tax Base Erosion in Africa: A Regional Study of Transfer Pricing Challenges in the Mining Sector,* Nat. Resource Governance Inst. (2016), https://resourcegovernance.org/sites/default/files/documents/nrgi_transfer-pricing-study.pdf.

15 *See*, *e.g.*, Tarcisio Diniz Magalhães, *What Is Really Wrong with Global Tax Governance and How to Properly Fix It,* 10 World Tax J. 499 (2018).

16 See Allison Christians & Tarcisio Diniz Magalhães, *A New Global Tax Deal for the Digital Age* 67 Canadian Tax J. 1153 (2019).

17 Lyla Latif, *The Lure of the Welfare State Following Decolonisation in Kenya*, Imperial Inequalities: States, Empires, Taxation (Gurminder K Bhambra & Julia McClure eds, forthcoming 2021).

18 *Id*.

19 *Id*.

20 *Id*.

The three pillars of inclusivity discussed in this paper – process, agenda, and outcomes – are earmarked to reflect the international tax governance dimensions of Africa's tax vulnerabilities. As such inclusivity is to be seen as a process that enables African countries to effectively participate in determining the rules of international taxation that apply to them. Inclusivity as to agenda entails that the global tax governance structure must consciously attend to issues that are of specific, if not peculiar, importance to African countries. Inclusivity will catapult African countries into 'negotiating a global fiscal relationship that treats the continent at par with the developed countries, thereby curbing the power asymmetries and inequalities'[20] that have exposed the continent to base erosion. However, beyond giving attention, international tax reform should aim to materialize important, sometimes predetermined, outcomes that would strengthen the revenue mobilization profile of African countries. If these vulnerabilities are effectively addressed, African countries stand a better chance to combat their tax challenges and assert greater control over their socioeconomic trajectories. The ensuing segments of this chapter discuss the three identified perspectives of inclusivity, drawing illustrations from OECD domination of global tax governance, international taxing rights distribution, tax base erosion, and global digital tax reform.

2. Inclusive Process

"Representation matters" is the modus operandi guiding discussions around diversity and inclusion. Their postmodern inclusion within the international tax system spearheaded by the United Nations revealed how the historic absence of the African voice from the formulation of international tax norms contributed to the continent's abysmal tax performance. An obvious plot in the evolution of modern international taxation is that African countries – still formative and gripped by the shackles of colonialism – did not have a voice or vote when the rules of international taxation were first formalized vide the League of Nations a century ago, effectively embedding vulnerability into Africa's fiscal law and policy negotiations.[21] With the emergence of BRICS, and ATAF, Africa has begun to play its part within this ITR but vulnerabilities in the form of reliance on foreign aid and its political fascination toward a race to the bottom in offering tax competition has catapulted Africa into a different form of vulnerability – arising from within instead of the previous exogenous forces. Relatedly, vulnerabilities from within, in the form of tax competition, is still framed around power asymmetries despite the post-colonial inclusion offered to African states to be part of the ITR's decision-making process. Despite this, African countries, have played a peripheral role in shaping international tax rules; and this is not necessarily of (their) choice.

21 *See* Lara Friedlander & Scott Wilkie, *Policy Forum: The History of Tax Treaty Provisions—And Why It Is Important to Know About It*, 54 CTJ 907 (2006) [discussing the history of tax treaties].

22 Magalhães, supra note 15.

For a century, the wealthiest and most powerful nations on the planet have systemically gathered in small groups of experts, scientific committees and working parties, to decide on the appropriate tax policy norms for global implementation.[22] The first of such gatherings took place under the auspices of the League of Nations, which in the 1920s, amidst early pressure from business interests on governments to coordinate their tax legislation to avoid double taxation, published a report authored by four economists that articulated an appropriate basis for delimiting the tax jurisdiction of nations.[23] That report concluded that nations are justified in taxing income where the taxpayer owes some "economic allegiance" to the country.[24] The conceptual basis of economic allegiance is that the tax base, as a product of economic activity, must be understood not in terms of a taxpayer's political or social connections to a country, but by their economic interaction with and within it.[25] Therefore, even where a taxpayer was not resident in a state, it was accepted that income with an economic attachment to that jurisdiction is justifiably taxed by that state.[26]

After reviewing different methods of allocating the tax base between a source and a residence state, the authors of the League of Nations Report ultimately leaned in favour of residence state taxation for income from personal property while recognizing the logic of greater source country taxing rights over income related to land and business property in the source country.[27] The principles articulated by the League of Nations have since become widely accepted and incorporated in domestic tax legislation and tax treaties.

The demise of the League of Nations, post-World War II left a gap in international tax governance that would not be filled by its successor – the most representative international organization – the United Nations (UN). Rather, the OECD emerged in 1948 and thereupon assumed the responsibility for strategically formulating the international tax governance structure, shaping the ITR, largely doing so to suit the needs of its members, sometimes to the exclusion of non-members.[28] According to Magalhães: "the immediate consequence was, and still is, the creation of an exclusionary architecture that deprives the majority of the world's countries from meaningfully influencing legal-institutional choices vis-à-vis what countries should tax cross-border transactions, a process that has clear global distributional implications."[29] Given that the OECD is accountable only to its members, who are mostly industrialized countries, it comes as no surprise that it is often described as

23 Kim Brooks & Richard Krever, *The Troubling Role of Tax Treaties*, Tax Design Issues Worldwide, Series On Int'l Tax'n 159, 162 (Geerten Michielse & Victor Thuronyi, eds, Vol 51, 2015).

24 Bruins, Einaudi, Seligman, Stamp, *Report on Double Taxation submitted to the Financial Committee, Economic and Financial Commission Report by the Experts on Double Taxation*, League of Nations, Doc. E.F.S. 73. F. 19, (1923) [League of Nations Report].

25 *See Id*. at 19

26 Brooks & Krever, *supra* note 23 at 162.

27 *Id*.

28 *See* Arthur J Cockfield, *The Rise of the OECD as Informal 'World Tax Organization' through National Responses to E-Commerce Tax Challenges*, 8 Yale J. L. & Tech. 136 (2006) [On the emergence of the OECD as a *de facto* world tax organization].22 Magalhães, *supra* note 15.

29 Magalhães, *supra* note 15.

a rich countries club looking after the interests of the "Global North".[30] The self-interested nature of the OECD's decision-making is confirmed by: "(i) the ITR's inbuilt distributive bias towards residence or capital-exporting countries; (ii) the resilience of outdated concepts and methods, such as the "permanent establishment" (PE) and separate entity taxation on the basis of the arm's length standard (ALS) for transfer pricing (despite this being ineffective and exceedingly difficult for poor countries to administer); and (iii) the difficulty of linking international tax with the development agenda.[31] These 4 categories also establish systemic hegemony in ensuring a single tax order within which a command model of law is developed. The 1948 OECD led international tax regime reflected power differentials in formulating these categories rather than ensuring an interactional process by which source countries would secure a portion of the tax base.[32]

Despite the copious flaws in the first "transnational legal order" that it created, the OECD maintains a hegemonic influence on the ITR, occasionally welcoming piecemeal changes rather than wholistic reform.[33] For these reasons, it may be more accurate to describe the current framework of international tax rules as a form of international fiscal imperialism[34] where countries have been pressured to conform to international standards fixed by the OECD.[35] Consequently, it is not surprising that a collective push for inclusivity led by developing countries is now at the core of OECD reform, bordering on arguments for the creation of a more representative global tax governance body.

In advocating for the establishment of an International Tax Organization (ITO), Horner argues that "a new global institution in taxation policy will make a significant, non-redundant contribution to global governance if – and only if – it gives a full and true voice to the fiscal concerns and needs of developing countries".[36] According to her, five conditions are essential for an international tax arrangement to be valuable: (1) "no gag rules: all issues must be eligible for discussion at the forum"; (2) "fair share: attention should be given to profit allocation rules"; (3) "link to official development assistance: development issues should be relevant in formulating tax policy"; (4) "tax administration efficiency: developed countries should assist developing countries in improving tax administration"; and (5) "governance: developing countries should

30 *Id.*

31 *Id*. at 510.

32 *Id*.

33 Philip Genschel & Thomas Rixen, *Settling and Unsettling the Transnational Legal Order of International Taxation*, Transnational Legal Orders, 154 (Terrence C Halliday & Gregory Shaffer eds, 2015), 169 cited in Magalhães *supra* note 15, at 511. (was this cited within the article? Is this a new cite?)

34 *See* Sergio Rocha, *International Fiscal Imperialism and the "Principle" of the Permanent Establishment,* 68 IBFD Bull. for Int'l Tax'n 83 (2014).

35 Magalhães, *supra* note 15, at 511. Note that the OECD used the template of the League of Nations drafters and their model treaties in drafting its influential model tax treaty in 1963 (OECD Model) which has been subsequently amended severally: 1977, 2010 and 2017. *See* OECD, *Draft Double Taxation Convention on Income and Capital* (1963); *See* Donald R. Whittaker, *An Examination of the O.E.C.D. and U.N. Model Tax Treaties: History, Provisions and Application to U.S. Foreign Policy,* 8 NC. J. Int'l. L. & Com. Reg. 39 (2016).

36 Frances M. Horner, *Do We Need an International Tax Organization?* 24 TAX NOTES INT'L 179 (2001).

37 *Id*. at 185-187.

have a meaningful voice in any world tax".[37] These conditions, in our view, if placed at the core of OECD reform process may have the potential to overturn the embedded inequalities within ITR and remove the power asymmetries.

Other institutional proposals have also discussed the need to make international tax governance more inclusive of the perspectives of developing countries.[38] Yet, despite various efforts to this end, the proposed ITO never took root and the OECD maintains a stranglehold on international tax policymaking.[39] The OECD, keen to protect its tax hegemony, successfully lobbied the G7 against the ITO.[40] The OECD has also managed to stave off the UN from taking a more central role in global tax policymaking despite the UN undertaking various tax policy initiatives of its own. During intense negotiating at the UN development finance summit in Addis Ababa, OECD countries foiled a push by the group of 77, representing low- and middle-income countries, for the creation of a UN tax body where all countries could participate on equal footing.[41] The UN Tax Committee since its establishment has focused on reducing the tax regressive relationship between the Global North and South countries. This is an example of institutional level facilitation of inclusivity and alleviation of vulnerability in global tax decision-making.

Intense criticism of the OECD's role and the gaping consequences of its tax policies, especially in the wake of the 2008 global financial crisis, spurred the OECD members, with the mandate of the G20, to launch an elaborate plan to fix the flaws of international taxation: the Base Erosion and Profit Shifting (BEPS) Action Plan.[42] However, despite expanding participation in the BEPS project from its narrow membership to an "Inclusive Framework" (IF) that comprises over 135 countries/territories (including 25 African countries), the BEPS project continues to attract skepticism and criticism about its inclusivity process. For instance, Michael Lennard observes that:

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38 *See*, *e.g.*, United Nations, Secretariat, Ad Hoc Group of Experts on International Cooperation in Tax Matters, *Institutional Framework for International Tax Cooperation*, ST/SG/AC.8/2003/L.6 (2003).

39 Magalhães, *supra* note 15.

40 Vito Tanzi, *Globalisation and Coordination of Fiscal Policies*, 11 (Proceedings of a Conference Organized by the School of International Studies, University of Trento, Working Paper 03/2004, University of Trento 2004) cited in Magalhães, *supra* note 15 at 514.

41 The UN has historically championed the cause of developing countries on international tax issues. The UN Committee of Experts on International Cooperation in Tax Matters (UN Tax Committee) was responsible for developing the UN Model Double Taxation Convention between Developed and Developing Countries (1980) and, more recently, the UN Practical Manual on Transfer Pricing for Developing Countries (2017). The UN Tax Committee has a sub-committee on BEPS issues for developing countries (2013), which monitors developments on BEPS, communicates them to officials in developing countries, and ensures that their views are fed into the OECD/G20 BEPS project and on-going UN tax cooperation work. *See* Annet Wanyana Oguttu, *Tax Base Erosion and Profit Shifting in Africa – part 1: What Should Africa's Response be to the OECD BEPS Action Plan?* 48 The Comp & Int'l LJ SA, 516 (2015). While only an expert body, the work of the UN Tax Committee has drawn intense interest from developing country governments and international civil society because of its more representativeness. *See* Manuel F. Montes Danish & Anna Bernardo, eds, *International Tax Cooperation: Perspectives from the Global South,* xiv, (2019).

42 OECD, *Action Plan on Base Erosion and Profit Shifting* (2013) [BEPS Action Plan].

> "Even in that body, non-OECD/G20 countries participate as "associates" on an "equal footing" (another undefined term). In determining to what extent the associates have truly become partners, an assessment would need to be done of the future drafting and interpreting roles of the OECD Secretariat (overwhelmingly, especially in policy development, from OECD country governments) and OECD Working Parties (such as WP 1 on treaties and WP 6 on transfer pricing), of which the non-OECD countries are only observers."[43]

Professor Christians, responding to a publication of the BEPS IF, remarks that "countries from outside a core group of key players have not really experienced inclusive participation." "If anything, what is unified in the OECD approach is its commitment to an exclusive process of consensus building that replicates that of the founders of the international tax order, apparently unchanged by developments like inclusive participation and equal footing."[44]

Directly responding to that criticism, the OECD's Ben Dickinson asserts that:

> "[t]he 135 countries in the Inclusive Framework are working together on the new rules in a participatory way."[45] Dickinson added that the OECD BEPS Inclusive Framework Steering Group "comprises 24 countries from the OECD, G-20, and developing countries including in Africa from Ivory Coast, Nigeria, Senegal, and South Africa. In this body, 'the great powers' include China (vice chair) and India."

Dickinson detailed some of the inner workings of the IF, concluding that "suggestions that there is no radical departure from the current rules on international taxation are therefore very wide of the mark." Relatedly, in our view, while the BEPS project aimed to introduce inclusivity within the process to reform international tax, this inclusivity is chained towards consensus building which flows from a vulnerable stand that most developing countries have in relation to OECD political power. It is an asymmetrical consensus building. This is expressive in the following ICTD statement:

> "[t]he IF's expansion has made little difference to the number of lower-income countries attending meetings at which the practical technical policy work is done, and that most members are fairly silent participants. This is partly because of well-documented structural obstacles not unique to the IF, but is exacerbated by some aspects of the OECD's decision-making processes, such as the pace and intensity of discussions, the culture of policymaking, the costs of attending regular meetings in Paris, and the absence of routine and timely translation of documents and meetings. This can make the OECD a daunting environment for member state delegates, but especially for those from lower-income countries.

43 Michael Lennard, *Act of Creation: The OECD/G20 test of "Value Creation" as a Basis for Taxing Rights and Its Relevance to Developing Countries,* 25 Transnat'l Corporations 55, 77 (2018).

44 Alisson Christians, *OECD Secretariat's Unified Approach: How to get things on a truly Equal Footing,* International Centre for Tax and Development (Nov. 5, 2019) https://www.ictd.ac/blog/oecd-secretariat-unified-approach-equal-footing/.

45 Ben Dickinson, *The Inclusive Framework is Considering Radical Proposals, but in the Real World*, ICTD (Nov.18, 2019), https://www.ictd.ac/blog/oecd-inclusive-framework-tax-proposals-negotiation/.

> In addition, many have joined with no intention of influencing standards, but rather in pursuit of technical assistance or prestige, or under coercion from the European Union."[46]

On specific issues, it is somewhat perceivable that the resolution inevitably comes down to the business and economics interests of the OECD members, in particular the U.S.[47] It is, after all, disagreements between the U.S. and its OECD allies that has long held up a global digital tax deal.[48] It seems unimaginable that an African country could hold up a global tax deal of any sort the way that the OECD countries have held up a global digital tax deal. This reiterates our position earlier emphasized on the fact that the ITR was based on conceptualizing only OECD countries as participants within the global economic order while others are curtailed from intervening. If African countries were to take a different course from a path set by the big players, they risk being blacklisted by the big powers, as some countries have experienced in the recent past.[49] Bottomline, it is how far the IF is willing to go to address "Afrocentric" issues that will validate the claims of genuine inclusivity. In any 'negotiations', the onus on African countries is to continue to forge alliances with willing partners in the common goal of building a global tax village where all voices matter.[50]

3. Inclusive Agenda

One way to approach the (tax) vulnerability discourse from an African perspective is to scrutinize whether the issues that international tax governance institutions prioritize for reform align with the priorities of African countries. An inclusive international tax reform endeavor is one that attempts to address issues that would also specifically matter to African countries, not just issues that seemingly matter to "all countries" but by implication, capital exporting countries.

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46 Rasmus Corlin Christensen, Martin Hearson & Tovony Randriamanalina, *At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations,* 8 (ICTD Working Paper 115, 2020).

47 Elizabeth Schulze, *US and France have Reached a Deal on Digital Tax, Macron Says*, CNBC (Aug. 26, 2019), https://www.cnbc.com/2019/08/27/france-and-us-reach-draft-compromise-on-french-digital-tax.html;

48 *Very clear' US is Blocking Digital Tax Talks, Says French Finance Minister*, France 24 (Sept. 9, 2020), https://www.france24.com/en/20200909-very-clear-us-is-blocking-digital-tax-talks-says-french-finance-minister

49 Pedro Goncalves, *EU to Roll out Sanctions against Blacklisted Jurisdictions*, International Investment (Sept.17, 2019),https://www.internationalinvestment.net/news/4008313/eu-roll-sanctions-blacklisted-jurisdictions#:~:text=The%20EU%20has%20approved%20a,by%20the%20end%20of%202020.

50 Various African countries Egypt, Kenya, Nigeria, and South Africa, inclusive are part of the G24, an intergovernmental group of non-OECD countries pushing for international tax reform that is more favorable to developing countries. *See*, *e.g.*, G-24 Working Group On Tax Policy And Int'l Tax Coop., *Proposal for Addressing Tax Challenges Arising from Digitalisation* (Jan. 17, 2019), https://www.g24.org/wp-content/uploads/2019/03/G-24_proposal_for_Taxation_of_Digital_Economy_Jan17_Special_Session_2.pdf. Also, African countries are working together through the African Tax Administration Forum (ATAF) to present a united front on tax issues of common concern and to develop customized solutions for African countries. One of ATAF's more recent contributions is in the area of digital taxation. *See* ATAF, *Suggested Approach to Drafting Digital Services Tax Legislation* (2020).

During the consultations on BEPS, developing countries pointed at some of their specific tax-related issues such as allocation of taxing rights between source and residence states, taxation of informal economy and the need of countries to attract investment by way of tax incentives. However, these problems have not been addressed by the BEPS Project.[51] Here we interrogate two pertinent policy issues that are important to African countries: base erosion and allocation of taxing rights. Addressing base erosion is important because African countries lose significant taxable revenue to BEPS by MNEs and through double tax treaties. Addressing tax allocation rights is important because the current ITR disproportionately favors residence states over source states, with most African countries falling only into the latter category. However, while BEPS has recently been the target of substantial international tax reform effort, the reallocation of taxing rights has not, except to the extent that it concerns taxation of the emergent digital economy.

3.1 BEPS Project Approach to Base Erosion and Profit Shifting

Base erosion and profit shifting refers to tax avoidance by MNEs, which exploit gaps in the interaction of different tax systems to artificially diminish taxable income or to shift profits to low-tax jurisdictions in which little or no economic activity is performed.[52] OECD partly attributes BEPS to the fact that the current international corporate taxation framework has not kept pace with the changing business environment.[53] The early 20th century saw an unprecedented easing of the ability of capital, goods and services to flow across international borders, accompanied by a proliferation of double taxation treaties, which allocated taxing rights among countries and provided them with specific jurisdiction to tax income or capital.[54] With globalization and the global operations of MNEs, taxation and its regulatory frameworks have gained intrinsically global dimensions. The rise in cross border e-commerce transactions is also bringing forth new issues, such as the shift towards a service-based digital economy and use of intangibles, with their associated fees and royalties. The adoption of platforms and advertisement driven business models, along with fundamental questions on value addition and characterization of income for tax purposes have disrupted entrenched rules and provided MNEs with new avenues to indulge in aggressive tax planning activities. MNEs are able to shift their profits to offshore jurisdictions where they would pay little to no taxes on their income.[55]

51 Irma Johanna Mosquera Valderrama, Dries Lesage & Wouter Lips, *Tax and Development: The Link between International Taxation, The Base Erosion Profit Shifting Project and the 2030 Sustainable Development Agenda*, (United Nations University ICRIS Working Paper Series W-2018/4, 2018).

52 *See* BEPS Action Plan, *supra* note 42.

53 OECD, *Addressing Base Erosion and Profit Shifting,* 7, (2013) [2013 BEPS report].

54 Manuel F. Montes Danish, Daniel Uribe & Monica Victor, *Introduction*, International Tax cooperation: Perspectives from the Global South, 2–3 (Manuel F. Montes, Danish & Anna Bernardo eds, 2019).

55 *Id.*

BEPS has been an endemic problem in the international tax system for decades, with MNEs and various countries (including OECD members) exploiting weaknesses in the ITR to erode the tax base of countries.[56] In the wake of the 2008 financial crisis, the OECD issued a 2013 report[57] which acknowledged the enormous detrimental impact of BEPS and subsequently, in July 2013, issued an Action Plan comprising 15 specific action items that intend to facilitate multilateral cooperation on the taxation of MNEs, with the overarching goal better aligning taxing rights with economic activity.[58] In August 2014, the OECD issued a two-part report where it acknowledged the peculiar challenges that more severely expose developing countries to BEPS.[59] The OECD identified "lack of necessary legislative measures"; "lack of information"; "difficulties in building the capacity needed to implement highly complex rules and to challenge well-advised and experienced MNEs; exposure to potentially more aggressive, tax avoidance practices as some of the peculiar challenges confronting developing countries.[60]

The fundamental premise of the BEPS project is that a coordination of national responses to BEPS can both eliminate double non-taxation and protect against material unrelieved double taxation.[61] The BEPS project is of great importance to African countries because of its overwhelming focus on corporate taxation. Unlike OECD countries that have diverse sources of tax revenue, such as personal income taxes and consumption taxes, many African countries rely heavily on the corporate tax as a source of domestic revenue mobilization.[62] The corporate tax is crucial for developing countries where it "frequently amounts to over twenty-five percent of total revenues"[63] In many African countries, most corporate tax is levied on corporate profits derived from rents for the exploitation of country-specific resources, which makes it an efficient tax for a country to impose.[64]

Beside causing critical under-funding of public investment that could help promote economic growth, BEPS undermines the integrity of the tax system. It discourages tax morality and encourages a perception that the tax system is unfair. This reduces voluntary compliance by all taxpayers. It also undermines competition, since

56 *See* Oguttu, *supra* note 41.

57 2013 BEPS report, *supra* note 53.

58 OECD BEPS Action Plan, *supra* note 41, at 11.

59 OECD, "Two-Part Report to G20 Developing Working Group on the Impact of BEPS in Low Income Countries" (2014) at 7–8, https://www.oecd.org/tax/tax-global/report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf.

60 Given these findings, especially as regards the implementation of highly complex rules, one would have expected the OECD to toe the path of the UN Tax Committee in prioritizing regime simplicity. However, this is not the impression that one gets when perusing various rules so far advanced. How much use is expertise if it does not produce workable outcomes?

61 Hugh J. Ault, Wolfgang Schoen & Stephen E. Shay, *Base Erosion and Profit Shifting: A Roadmap for Reform*, 68 Bull. for Int'l Tax'n 275 (2014).

62 *See* Reuven S. Avi-Yonah, *Hanging Together: A Multilateral Approach to Taxing Multinationals*, Mich. Bus. & Entrepreneurial L. Rev. 137, 139 (2016); Ernesto Crivelli, Ruud De Mooij & Michael Keen, *Base Erosion and Profit Shifting and Developing Countries* (International Monetary Fund Working Paper No. 15/118, 2015).

63 Avi-Yonah, *Id*.

64 *Id*.

MNEs have a competitive advantage over enterprises that operate at domestic level (especially small- and medium-size enterprises).[65] It is clear, therefore, that fixing the ITR that governs corporate taxation is an agenda that is crucial for African countries. Fixing the BEPS problem also gives African countries a clearer path to development, as envisaged by the UN sustainable development goals (SDGs).[66]
It is worth mentioning that the BEPS project has overseen the development of various new rules and processes that aim to combat BEPS. Notable progress can be identified in at least three areas: transfer pricing, information exchange and tax treaties, briefly discussed next.

Transfer pricing reform is an area where the OECD has significantly exerted its influence. 'Transfer mispricing' has long been identified as a major contributor to the BEPS problem in Africa.[67] TP emphasizes the independent entity principle while aiming to decide, through complex methods, an appropriate allocation of profit by allowing the adjustment of prices of transactions between related entities. The methods that are applied rest on a conceptual flaw in only assessing profits where economic activities occur, and value is created – both principles divesting tax out of Africa. The OECD IF has tried to address these challenges by developing various regulatory instruments that it recommends to countries for adoption.[68] It is hard to conclude that the many changes to transfer pricing rules have eradicated the criticisms that have trailed the arm's length principle (ALS) for years, especially about its complexity and susceptibility to base erosion practices.[69] It should be noted that MNEs possess significant resources which even the tax authorities of rich countries sometimes struggle to match.[70] Perhaps, there is a future where the ALS could be jettisoned for some

65 Oguttu, *supra* note 41, at 535–536.

66 *See* Irene Burgers & Irma Mosquera Valderrama, *Corporate Taxation and BEPS: A Fair Slice for Developing Countries*?, Erasmus L. Rev. 29, 33 (2017) ["In their Global Framework for Financing Development Post-2015 Program the Heads of State and Government and High Representatives gathered in Addis Abba from 13 to 16 July 2015 recognised 'that significant additional domestic public resources, supplemented by international assistance as appropriate, will be critical to realizing sustainable development and achieve the SDGs'. Further, they committed to 'enhance revenue administration through modernized, progressive tax systems, improved tax policy and more efficient tax collection'; and to 'work on improving the fairness, transparency, efficiency and effectiveness of their tax systems, including by broadening the tax base and continuing efforts to integrate the informal sector into the formal economy in line with country circumstances'…; At the United Nations Sustainable Development Summit on 25 September 2015, world leaders adopted the 2030 Agenda for Sustainable Development, which includes a set of 17 Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by 2030…"].

67 UNECA, *supra* note 9.

68 *See* OECD, *Guidance on Transfer Pricing Aspects of Intangibles, OECD/G20 Base Erosion and Profit Shifting Project* (2014); OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (2017); OECD, *Revised Guidance on the Application of the Transactional Profit Split Method: Inclusive Framework on BEPS: Action 10, OECD/G20 Base Erosion and Profit Shifting Project 2018* (2018).

69 *See, e.g.*, Action Aid, *Comments IMF 2019 Analysis of International Corporate Taxation*, IMF (2019), https://www.imf.org/external/np/exr/consult/2018/corptaxation/pdf/2018commentscorptaxation.pdf: ["the arm's length principle (ALP) has proven to be burdensome and ineffective, in particular in developing countries' context. The underlying problem – the incompatibility of the ALP with the reality of global economy – has not been addressed by the BEPS project, despite broad-based critiques of it from many sources, including the Independent Commission for the Reform of International Corporate Taxation (ICRICT)"].

70 Ajay Gupta, *Why has the IRS Outsourced Microsoft's Transfer Pricing Audit?*, 76 Tax Notes Int'l 847 (2014).

other approach to taxing MNEs, such as formulary apportionment.[71] This approach however, is politically unpopular. OECD countries have demonstrated an ambivalent disposition towards formulary apportionment since it interferes with their direct financial interests by increasing their resident MNEs tax burdens to source countries.[72] For the OECD's signature product on the information exchange, one would point to **Country-by-Country Reporting** (BEPS Action 13), a policy framework that aims to improve transparency and close the transfer pricing information asymmetry between MNEs and tax authorities by requiring the former to report their group business activities, income, taxes payable from all jurisdictions where they operate.[73] Tax transparency and exchange of information are at the heart of a global effort to tackle aggressive tax planning of MNEs.[74] The information disclosed can help tax authorities more effectively discharge their tax assessment functions and more readily detect when an MNE is being insincere or contradictory with its tax filings. Many African countries have joined their counterparts to incorporate the CbCR into their domestic *corpus juris,* amidst concerns that the CbCR regime discriminates against developing countries.[75]

Another notable achievement of the BEPS project is the **Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting** (MLI). The MLI is a mechanism devised to swiftly update the thousands of bilateral tax treaties in the international tax system. It aims to lessen opportunities for MNEs to engage in BEPS through exploitation of tax treaties. While the MLI was not designed primarily to address the priorities of developing countries in relation to the international tax system, it nevertheless offers a means to tackle practices such as "treaty shopping" and companies avoiding setting up taxable

The U.S. IRS retained a consultant in 2014 at a cost of over $2m to assist in the transfer pricing examination of Microsoft. The UK's HMRC expanded its transfer pricing specialists from 65 to 81 between 2012 and 2016; its 6-year investigation of Google involved about 30 specialists, eventually resulting in a settlement agreeing payment of an additional £130m covering a 10-year period (UK Parliament, Public Accounts Committee, Corporate Tax Settlements, HC 788, 2016: paras. 4-6). The challenge is, of course, steeper for developing countries. Which is why high priority should be to devise rules for allocation of income that are simple, clear and easy to administer. *See* Sol Picciotto and Daniel Bertossa, *Taxing Multinationals: A New Approach*, Publ'n Serv. Int'l, 12 (2019), https://pop-umbrella.s3.amazonaws.com/uploads/9dacd52a-6987-4dcb-a90c-4a1146f4a342_Taxing%20Multinationals.pdf.

71 Michael Hanlon, *Country-by-Country Reporting and the International Allocation of Taxing Rights* 72 Bull. for Int'l Tax'n (2018) [suggesting that the CbCR "may be a step (maybe one of many?) towards a different global tax regime - the abandonment of the arm's length principle in favor of source or destination-based taxation (or formulary apportionment)]; *See* Alexander Ezenagu, *Unitary Taxation of Multinationals: Implications for Sustainable Development* (CIGI Policy Brief No. 4, 2019) [arguing that taxing MNEs as separate entities, which the ALS attempts, is incompatible with economic reality, is incompatible and undermines implementation of the UN SDGs].

72 Richard Krever & Peter Mellor, *History and Theory of Formulary Apportionment*, The Allocation of Multinational Business Income: Reassessing the Formulary Apportionment Option, 9–39 (Richard Krever and François Vaillancourt, eds., 2020); Sol Picciotto, *Taxing Multinational Enterprises as Unitary Firms,* 27-40 (Institute of Development Studies, 2017).

73 *See* OECD, *Action 13: Country-by-Country Reporting Implementation Package* (2015).

74 Preetika Joshi, *Does Private Country-by-Country Reporting Deter Tax Avoidance and Income Shifting? Evidence from BEPS Action Item 13*, 58 J. Acc. Research 333, 334 (2020).

"permanent establishments."[76] In force since 1 July 2018, an ever-growing list of countries has signed up to the MLI.[77]

3.2 BEPS Project Approach to Allocation of International Taxing Rights

The allocation of taxing rights is a fundamental issue that remains largely ignored by the ongoing OECD-led reform of the ITR.[78] The current ITR vests the primary right to tax cross-border business income in the country of residence. In contrast, a source country can only tax if it demonstrates that a nonresident company (NRC) derived income from activities carried on there. The primary territorial nexus recognized under international tax law is the permanent establishment (PE). The implication of this rule is that to be able to exercise the power to tax, a source country must demonstrate that the income was derived from its territory through engagement with a PE. Disenchantment lies in the relative difficulty of establishing source vis-à-vis residence. From the beginning, the League of Nations' four economists did worry that it would be harder to determine in which countries income was sourced than to determine in which country the taxpayer was resident.[79] This explains why the residence-source dichotomy tilts heavily in favor of residence[80] and, by implication, capital-exporting countries, since most of the MNEs that export capital (and repatriate profits) are resident in the former.[81] In direct contrast with developed countries, African countries make up a large chunk of low-income, capital-importing category.

The distributive bias of the ITR is aggravated by double tax treaties that not only embody the lopsided rules but further transfer vested taxing rights from source countries to residence countries under the illusion of curbing double taxation.[82] The

75 No fewer than 13 African countries have introduced domestic legislation on CbCR. These include some of the continent's biggest economies: Cote D'Ivoire, Egypt, Kenya, Nigeria, Senegal, and South Africa. See OECD/G20, *CountrybyCountry Reporting – Compilation of Peer Review Reports (Phase 1)* (2018). Critics of the CbCR argue that the group income threshold (€750 million) recommended by the OECD is too high for developing countries and could lead to the income of most MNEs not getting reported. *See* Oladiwura Eyitayo, *The Global Fight against Base Erosion and Profit Shifting under the OECD's Country-by-Country Reporting Rules: A Possible Solution?* (Dalhousie University Master-of-Laws Thesis, 2017). Ideally, the threshold should be lowered, even if jurisdictionally, to improve the chances of developing countries deriving the benefits of the CbCR regime. A similar concern is discussed with regard to digital tax policy in paragraph 3.

76 Annet Wanyana Oguttu, *Should Developing Countries Sign the OECD Multilateral Instrument to Address Treaty-Related Base Erosion and Profit Shifting Measures*? (CGD Policy Paper 132, 2018).

77 *See* OECD, *Signatories and Parties to The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf

78 Christians & Magalhães, *supra* note 16.

79 Brooks & Krever, *supra* note 23, at 163.

80 Even the League of Nations Committee of Experts that designed these principles recognized then that the rules tilted in favour of capital exporting countries. They, however, reasoned that this tilt would not be a significant problem where two countries with similar economies are dealing with each other since the disparity could even out through cross-investment. *See Id.,* at 161.

81 *See*, *Fortune Global 500 for the list of top 500 MNEs and their countries of residence*, https://fortune.com/global500/search/

82 *See* Tsilly Dagan, *The Tax Treaties Myth* 32 NYU J. Int'l L. & Pol. 1 (2000).

83 Brooks & Krever, *supra* note 23. Tax treaties are often based on the OECD Model Double Tax Convention. However, the model retains the pro-residence distributional bias that was entrenched in the 1920s.

League of Nations' experts also recognized that a division of taxing rights, which shifted rights from the source country to the residence country was only appropriate where countries had similar economies.[83] In other words, the arrangement was likely to produce lopsided results between low-income and high-income countries.[84] Yet, for decades, African countries have contracted such tax treaties with developed countries with the anticipation – sometimes under pressure – of attracting investment. They often end up losing significant tax revenue to developed countries, without materializing the anticipated investment boom.[85] Tax treaties also facilitate BEPS through various forms of treaty abuse.[86]

Although the OECD has engaged in tax treaty reform to address the tax treaties aspects of BEPS, it is important to note that these efforts have focused on plugging tax avoidance loopholes, while the distributive lopsidedness of tax treaties remains unattended.[87] The OECD made clear from the onset that there was no intention to alter the taxing rights allocation arrangement when it stated that "[w]hile actions to address BEPS will restore both source and residence taxation in a number of cases where cross-border income would otherwise go untaxed or would be taxed at very low rates, these actions are not directly aimed at changing the existing international standards on the allocation of taxing rights on cross-border income."[88] History also records that past attempts by the UN Tax Committee to produce a tax treaty model that rebalances taxing rights by attributing greater relevance to taxation at source were thwarted by developed countries. The UN Model ended up very similar to the OECD Model and failed to achieve its objective of fairly distributing taxing rights between developed and developing countries.[89] African revenue authorities under the banner of ATAF then produced a double tax treaty model for the continent to use when negotiating the cross border international tax rules to prevent double taxation, but this model is scarcely used despite its Afrocentric origin. This is indicative of power asymmetries – in that even after having a continental model on tax treaty making, the continent still subordinates its cross-border tax imposition to the OECD/UN models. These two models have become the *modus operandi* for international tax – reiterating our claim to prevent African reorganization of the ITR.

84 History records that during the preoccupation of the world's big powers with World War II, developing countries from the Americas, at the 1940 Fiscal Committee Conference, worked to ensure replacement of the League of Nations' 1928 Model Convention with the 1943 Mexico Model Tax Treaty. This new model was intended to promote the use of tax treaties between developing and developed countries and was consistent with the general principle of taxing income at its source. However, the new treaty policy was widely unaccepted by developed countries, so, in response, the 1946 London Model Convention was drafted. The amended model reasserted the pro-residence country bias. *See* Doron Narotzki, *Tax Treaty Models - Past, Present, and a Suggested Future*, 50 Akron L. J. 383, 385 (2017).

85 Paul Baker, *An Analysis of Double Taxation Treaties and their Effect on Foreign Direct Investment*, 21 Int'l J. Econ. Bus. 341 (2014).

86 *See* Sebastian Beer & Jan Loeprick, *The Cost and Benefits of Tax Treaties with Investment Hubs: Findings from Sub-Saharan Africa,* (IMF Working Paper 18(227), 2018), https://www.elibrary.imf.org/view/IMF001/25495-9781484378007/25495-9781484378007/25495-9781484378007.xml.

87 *See* OECD, *Model Tax Convention on Income and on Capital* (2017), Article 7.

88 BEPS Action Plan, *supra* note 41, at 11.

89 Rocha, *supra* note 34.

It would, no doubt, further the fiscal interests of African countries to see a shift in emphasis in taxing rights to benefit source countries. Such a shift may be justified on the ground that the existing structure does not meet the standards contemplated of an equitable international tax sharing or, more ambitiously, on a need to marry international taxation with development, in alignment with the UN's recognition of taxation as a crucial source of domestic revenue mobilization for sustainable development.

Regrettably, perhaps, from an African perspective, development has never gained traction as a determinant factor for international tax policy. Even the various proposals that discussed the establishment of an ITO did not go as far as to advocate the need to include developmental and other interests of poor nations for serious consideration.[90] Horner observes that for the developing countries of the world, taxation policy and the development agenda are inseparable" and "rich countries make a serious mistake when they act globally to address either one of these issues on a stand-alone basis".[91] The ongoing OECD BEPS project does not demonstrate a broad shift in the willingness of developed countries to revisit the taxing rights allocation issue. On the contrary, OECD countries have pushed back on attempts by developing countries to use the project to revisit this fundamental issue. As far back as 2013, Robert Stack, a US Treasury Deputy Assistant Secretary for International Tax Affairs "expressed a concern that countries such as India and China are seeking to use the OECD's BEPS project to 'recalibrate the global paradigm' on source and residence-state taxation that has been in place since the 1920s.'"[92]

From the onset, critics of the OECD BEPS Action Plan have stressed the point that the OECD agenda was driven by the interests of developed countries and that the interests of developing countries are not being addressed, since they were not consulted to table their concerns before the OECD 15-Point Action agenda was drafted and closed.[93] Rocha argues that developed countries use taxation as a means of protecting their taxing rights in their commercial relations with developing countries and that the preservation of such rights has been the central principle underlying the OECD Model.[94] Oguttu asserts that the OECD's approach does not address basic fundamental international tax reform, or re-examining the basic principles of the international tax system that are pivotal in addressing BEPS – such as the allocation of tax income between residence and source countries. Instead, the OECD chose to focus on curtailing sophisticated tax avoidance schemes by strengthening existing anti-avoidance provisions, to ensure that they are more effective in curtailing BEPS under modern business models.[95] While curtailing sophisticated tax avoidance is not

90 Magalhães, *supra* note 15.
91 Horner, *supra* note 36, at 179.
92 *See* Jim Fuller & David Forst, *US Inbound: The US position on BEPS*, International. Tax Review (1 December 2013), https://www.internationaltaxreview.com/article/b1fbszrxzb2tzl/us-inbound-the-us-position-on-beps
93 Oguttu, *supra* note 41, at 540.
94 Rocha, *supra* note 34.
95 Oguttu, *supra* note 41, at 541.

an unwelcome agenda for African countries, there is no doubt that African countries would as well appreciate a global tax agenda that fairly redresses endemic taxing rights distribution. That does not look to be on the imminent agenda as current reform focuses on reallocation of taxing rights in the emergent digital economy, largely to addresses the aspirations of large market jurisdictions (most of which are OECD countries).[96]

While taxation of the digital economy is an issue of great importance to developed countries because of their stronger digital consumer markets, Africa's consumer markets lag very much behind. So, while African countries may derive some extra tax revenue from digital economy taxation, it has been argued that the narrow focus on digital markets appears to forestall a much-needed discussion on the broader distributive implications of the current global tax deal,[97] a situation that does not augur well for the revenue needs of African countries. There is also a risk that the reallocation of taxing rights towards "market jurisdictions" will further deplete tax revenue for a range of lower-income countries.[98]

It is, perhaps, apt to close this segment by asserting that the OECD's designation of a 15-point BEPS Action Plan without the input of non-OECD members epitomizes the power asymmetries in international tax governance. The fact that an institution that represents a minority of the world's countries (but its biggest economic players) drew up an elaborate global tax reform plan without global input quintessentially demonstrates the hegemonistic norm development posture that has characterized the ITR for a century. It also demonstrates a presumptive self-assurance that the BEPS issues that matter to OECD countries are the BEPS issues that matter to the rest of the world. Such presumption tends to be misguided since affected countries are at different levels of economic development, administrative capacity and vulnerability to BEPS.[99] That being said, the BEPS project, regardless of its timing, immediate triggers and scope, is a welcome venture for African countries because it contains some issues that resonate with African countries and provides some opportunities for countries to kick the international tax reform conversation forward.[100] A question that necessarily follows is whether, in addressing any given agenda, there is a pivot towards producing or sidestepping outcomes that appeal to the peculiar needs of African countries.

96 Christians & Magalhães, *supra* note 16, at 1155–1156.

97 *Id*. at 1156.

98 Alex Cobham, Tommaso Faccio & Valpy Fitzgerald, *Global Inequalities in Taxing Rights: An Early Evaluation of the OECD Tax Reform Proposals*, SocArXiv (Oct 4, 2019), https://osf.io/preprints/socarxiv/j3p48/.

99 *See* Oguttu *supra* note 41 at 552.

100 The importance of the 15 BEPS Action Plans varies. Citing responses to UN Subcommittee of BEPS to its questionnaire, Oguttu notes that the priorities of developing countries would be: Action 4: Limit base erosion via interest deductions and other financial payments; Action 6: Prevent treaty shopping; Action 8: transfer pricing of intangibles; Action 10: Assure that transfer pricing outcomes are in line with value creation with respect to other high-risk transactions; Action 12: Require taxpayers to disclose their aggressive tax planning arrangements; and Action 13: Re-examine transfer pricing documentation. *Id.*

4. Inclusive Outcomes

Beyond addressing issues that matter to African countries, an inclusive international tax reform process must aim to actualize specific outcomes that cater to the needs of African countries as a historically vulnerable group. This objective should be triggered even when the issues being addressed are not themselves peculiar to African countries. International tax engineering must always proceed with clear recognition of the nuanced nature of some international tax challenges. It is from this nuanced understanding that solutions can be fashioned to fit peculiar situations. When it comes to addressing vulnerabilities in international taxation, exceptional positions on taxing methods, taxability thresholds, reporting thresholds can make a telling difference for developing countries. We illustrate this point with the current issue of digital tax reform.

4.1 BEPS Project Approach to Taxing the Digital Economy[101]

One of the more intense issues in international taxation is contained in pillar 1 of the BEPS project which deals with taxation of the digital economy. The OECD has been the main institution coordinating the reform process, mainly by crafting, reviewing and facilitating global consensus on proposals that aim to adapt international tax rules to enable countries tax income from activities that digitally occur in their jurisdiction. The OECD aims to outline a new taxing right for these countries by revising profit allocation and nexus rules.[102] The new rules will make MNEs liable to tax on profits made in countries where they have significant sales (and possibly users) even without the physical presence that is currently required.[103] The three main groups of market countries in this round of tax coordination seem to be, roughly, the European Union (EU), the U.S., and a group of key emerging economies (especially Brazil, India, and China).[104] For various reasons, each of these groups has a preferred proposal: user participation for the EU, marketing intangibles for the US and significant economic presence (SEP) for the G24 countries.[105] African states have collectively under ATAF developed a common position to respond within these three features instead of forwarding their own unique proposal.[106]

101 While the challenges of digital taxation concern all countries, in crafting solutions for these challenges, it is important to give specific regard to what is practicable and beneficial to developing countries, considering both administrability and inter-nation equity.

102 *See* OECD Work Program 2019.

103 *See* Martin Hearson, *Africa Responds to the Inclusive Framework's Digital Tax Agenda*, ICTD (Aug. 7, 2019) https://www.ictd.ac/blog/africa-responds-to-the-inclusive-frameworks-digital-tax-agenda/; Latif, Lyla, *The Evolving 'Thunder': The Challenges Around Imposing the Digital Tax in Developing African Countries*, 4 Int'l J Digital Tech. & Econ. (2020).

104 Christians & Magalhães, *supra* note 16, at 1167–1168.

105 *Id.* at 168–170.

106 Latif, *supra* note 102.

In late 2019, the OECD secretariat released a public consultation document for a "Unified Approach" to digital taxation.[107] Interestingly, the proposed Unified Approach focused on the common ground between the user participation and marketing intangibles models but appears to have sidelined the SEP model that is preferred by largely non-OECD countries.[108] The proposal would allocate a share of digital income taxing rights to market jurisdictions but invites further discussions, noting, particularly, that "such discussion should also include consideration of size limitations, such as, for example, the €750 million revenue threshold used for country-by-country reporting requirements."[109]

The purpose of a minimum threshold (*de minimis* threshold) is to ensure that companies only become taxable if they have sufficient involvement in a country's economic life.[110] A €750 million or some other high taxability threshold can significantly limit the number of MNEs that are "in scope" of the digital tax rules. There is also the question of the profit attribution rules, which determines the threshold of an MNE's activities that must take place within a country for that country to be able to assert its tax jurisdiction. A high threshold of in-country activities can particularly disadvantage low-income countries since such countries are also small market jurisdictions and, therefore, far less likely to host enough activities as high market jurisdictions.[111] Such outcomes can reinforce the distributional bias that already exists in the ITR.[112]

While a high taxability threshold may serve MNEs in terms of limiting multijurisdictional compliance burdens, it is also imperative that the tax needs of low-income countries are not sacrificed on the altar of optimal global taxation. A more nuanced approach is, therefore, required to preserve the tax base of smaller market jurisdictions. One path to an equitable outcome is for low-income countries to maintain their own low in-country activity thresholds or, within the IF, to allow low-income countries to implement flexible thresholds based on the taxable MNE's importance to the countries' economy.[113]

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

108 *Id*.

109 *Id*. at para 20.

110 *See* Hearson, *supra* note 103.

111 Going by recent World Bank statistics, the world's big consumer markets remain the OECD members and emerging markets such as India, Brazil, and China. With a high taxability threshold, it is unlikely that African countries will fall into the category of marketing jurisdictions that can tax digital trade. *See* World Bank, "Final consumption expenditure (current US$)", https://data.worldbank.org/indicator/NE.CON.TOTL.CD; *See also*, Latif, Lyla, *The Evolving 'Thunder': The Challenges Around Imposing the Digital Tax in Developing African Countries*, Int'l J. of Digit. Tech. & Econ. (Vol. 4, Number 1, 2020), http://www.ijdte.com/index.php/ijdte/article/view/52.

112 Christians & Magalhães, at 1175–1176: **is this a supra cite?** ["[u]sing the term "market jurisdictions" instead allows a strategic narrowing of scope while maintaining a broad enough terrain to accommodate the residence and source interests of members and other key consumer market states. A focus on the OECD consumer base as the market is a metric that, by definition, tends to favour the biggest consumer markets in relation to small-market, low-income countries—for example, those that heavily rely on exports of natural resources—which stand to be apportioned the least. Given the disparate levels of consumption across the globe, a market-based system would mostly benefit relatively more affluent countries and, in the best-case scenario, some emerging ones. Accordingly, no matter which of the proposals prevails, the result will be the reinforcement of a new global consensus on tax allocation that seems destined to favour the companies and governments of relatively affluent states"]

An inclusive ITR that appreciates the longstanding vulnerabilities of low-income countries must go beyond outcomes that are merely consensual and general. It must recognize that such countries have peculiar challenges that may require substantive concessions to meaningfully address. It is not clear that the OECD is a platform that recognizes the need for such concessions. In defending the OECD Secretariat's commitment to inclusivity in tax policy formulation, in early 2020, the OECD's Ben Dickinson notes that: "the Secretariat's role is not to propose solutions that favor one group or another but rather to explore a potential consensus solution that will appeal to states, with the inevitable compromises such a process necessitates."[114] Whatever way one reads this statement, it does raise concerns about whether the OECD platform is committed to solutions that address the peculiar needs of non-members. The approach of the UN to the digital tax conundrum, which is more centred on developing countries, demands some consideration here.

Amidst a cloud of uncertainty surrounding the OECD's digital tax project at the time, the UN Tax Committee tried to step in to advance a digital tax proposal that seems more responsive to the needs of developing countries. On 5 August 2020, the UN Tax Committee published an amended draft proposal for taxation of "automated digital services".[115]

The proposal tries to introduce a small portion of formulary apportionment into the global system.[116] The proposal would give source countries the right to tax cross-border payments for automated digital services via a withholding tax on gross income or an apportionment formula on net income.[117] Companies providing cross-border, automated digital services decide which taxing approach they prefer under a new Article 12B of the UN Model Tax Convention. They can opt for a withholding tax on gross income, at a rate that will be negotiated between treaty partners or they can opt for a net income tax on a company's "qualified profits" from automated digital services, at a rate determined by the source country's domestic law.[118]

The main advantages of the UN proposal over the OECD proposal are its simplicity and greater preservation of the tax base of developing countries. The withholding tax system, in particular, is one that developing countries are conversant with.[119] The absence of an income threshold also means that individual countries have the prerogative to decide whether to insert one either in its domestic tax legislation

113 *See* Hearson, *supra* note 102. The revenue threshold argument can also be made in respect of the CbCR.

114 Ben Dickinson, *The Inclusive Framework is Considering Radical Proposals, but in the Real World…* (Nov. 18, 2019), https://www.ictd.ac/blog/oecd-inclusive-framework-tax-proposals-negotiation/.

115 United Nations Tax Comm., *New Article 12B on taxation of 'Income from Automated Digital Services* (2020).

116 Nana A. Sarfo, *Why the United Nations Digital Tax Proposal Deserves More Attention*, Tax Notes Int'l 995 (2020).

117 *Id*.

118 *Id*.

119 Oguttu notes earlier that "the BEPS project does not explore certain practical measures (such as withholding taxes) which may be more suitable for African countries in addressing BEPS." *See* Oguttu, *supra* note 41, at 551. The withholding tax option is retained in the ATAF Suggested Approach which buttresses the point that this system enjoys the support of African countries, perhaps far less so for the decision makers at the OECD.

120 *See* the Commentary on new Article 12B, para 7.

or in a tax treaty. As regards the simplicity of the proposal, the drafting committee explained that:

> "Many developing countries have limited administrative capacity and need a simple, reliable, and efficient method to enforce tax imposed on income from services derived non-residents. withholding tax imposed on the gross amount of payments made by residents of a country, or non-residents with a permanent establishment or fixed base in the country, is well established as an effective method of collecting tax imposed on non-residents. Such a method of taxation may also simplify compliance for enterprises providing services in another State since they would not be required to compute their net profits or file tax returns, unless they themselves opt for net income basis taxation."[120]

The favorable disposition of the UN proposal towards developing countries is not surprising considering that the members of the sub-committee that drafted the proposal were all drawn from developing countries. This should not be perceived as putting sentiment over expertise but rather as an approach that prioritizes solutions that do not appear to undermine the interest of weaker states. [121] African countries have had a rough ride with the complex ALS that applies to transfer pricing regulation. The last thing that they would want is another complex, alien body of rules that they have neither the tools nor the administrative capacity to apply.

The UN digital tax proposal illustrates how the peculiar interests of developing countries can be better articulated when developing countries have the platform to craft rules. However, despite the attractiveness of the UN draft, it is imprudent to assume that the proposal would make any real headway. The draft might well suffer the same fate as the UN Tax Committee's past attempt to reform taxing rights allocation. Regardless of what else may be out there, the OECD remains the platform of convergence and consensus. African countries may have to keep their patience and await a lingering OECD solution that may, in the end, do them no favors. Considering the power politics that has trailed the OECD's pillar 1 process it seems more likely than not that the "consensus" will come down to where the balance of power lies.[122] It is very much about power.

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121 The UN proposal is not without criticism. *See*, *e.g.*, Danish Mehboob, *UN Digital Tax Proposal Diverges from OECD Two-pillar Solution*, Int'l Tax Rev. (Aug. 17, 2020), https://www.internationaltaxreview.com/article/b1mzc71x7qqv2d/un-digital-tax-proposal-diverges-from-oecd-two-pillar-solution [A gross-based tax as the default option under the UN proposal veers away from the OECD pillar one approach, and may risk businesses passing the cost of the tax to consumers by raising prices on goods as Amazon has proposed to do in the UK with regard to its digital service tax (DST). However, other businesses, such as eBay, have chosen to avoid the same price hike to retain market share"].

122 Only a few of the many countries around the world that have enacted unilateral digital tax measures – including Nigeria and Kenya – have taken any steps to enforce them. To do so, especially for a low-income country, would be to incur the wrath of the rich and powerful, especially the U.S., which has put up the sternest opposition to unilateral digital tax measures. For a broader reflection on the politics of digital tax policy, especially as it impacts African countries, *see* Okanga O. Okanga, *The Political Economy of Nigeria's Digital Tax Experiment*, Afronomicslaw (June 30, 2020), https://www.afronomicslaw.org/2020/07/01/the-political-economy-of-nigerias-digital-tax-experiment/.

5. Conclusion

The international tax regime that previously had the effect of ensuring that the colonial legacy of expropriating resources in the form of tax extraction remained intact and buttressed from re-organisation has been undergoing a transitional shift. This historic hegemonic control of the global tax architecture subsequently eroded the confidence of developing countries in participating in developing the international tax rules that bind them. Tax base erosion was the subsequent result of the old tax order that has been the corpus setting the international tax agenda until the establishment of various UN led bodies and think tanks contributing to tax reform bringing in African inclusivity.

Inclusivity as part of the new tax order is a vital way to challenge the historic inequalities that have caused revenue to flow out of Africa untaxed. Inclusivity as a process and agenda setting phenomenon disentangles the bureaucratic structures of the OECD and the enduring inequalities of power asymmetries in negotiating tax policy at the international level. Inclusivity brings Africa to the table as an equal player and active decision maker. It ultimately gives African countries a better shot at advancing normative outcomes that meet the domestic revenue needs of its peoples.