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Developing Countries in an Age of Transparency and Disclosure

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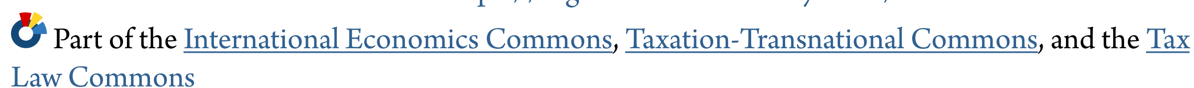
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Developing Countries in an Age of Transparency and Disclosure

Diane Ring[*]

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[*] Professor of Law & The Dr. Thomas F. Carney Distinguished Scholar, Boston College Law School. I would like to thank the participants of the 2016 BYU Law Review Symposium, *A Scholarly Conversation at the Cutting Edge of International Tax Reform* (including Allison Christians, Kimberly Clausing, Cliff Flemming, Omri Marian, Julie Roin, and Brett Wells) for their observations and suggestions. I also extend my thanks to Hugh Ault and Shu-Yi Oei for their extensive comments, and to the Dr. Thomas F. Carney '47 Gift Fund at Boston College Law School for its generous support.

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INTRODUCTION

Two important topics have been the subject of continuing debate in contemporary international tax policy circles. The first is the recent trend towards increased transparency and disclosure in tax enforcement and the prevention of tax base erosion. The second is the question of how developing countries should be treated in the design and implementation of international tax policy. These topics have, by and large, evolved on parallel but separate tracks.[1] This Article argues, however, that they have become necessarily intertwined as countries—including developing countries—begin to implement new and revised measures for transparency and disclosure in international tax. This Article explores the impact of the contemporary transparency and disclosure trends from the perspective of developing countries, highlights the distinctive benefits and risks that confront these countries, and identifies the key factors that will determine whether participating in transparency and disclosure initiatives will ultimately be helpful or harmful to developing countries.

1. The United Nations has directed attention to the application of various transparency and disclosure policies to developing countries in the context of its broader work "aimed at strengthening the capacity of developing countries to increase their potential for domestic revenue mobilization through enhancing their ability to effectively protect and broaden their tax base." UNITED NATIONS, UNITED NATIONS HANDBOOK ON SELECTED ISSUES IN PROTECTING THE TAX BASE OF DEVELOPING COUNTRIES, at viii (Alexander Trepelkov et al. eds., 2015), http://www.un.org/esa/ffd/wp-content/uploads/2015/07/handbook-tb.pdf. This Article, building on such prior work, seeks to examine in more detail how the transparency and disclosure trend has expanded in recent years, what assumptions underlie its structure, and what features of developing countries render them both potential beneficiaries of the trend but also potential losers.

As between the two topics, the trend towards increased transparency and disclosure in the tax arena is the more recent. This issue has gained increasing prominence through global work on tax-base erosion, which culminated in the Base Erosion and Profit Shifting Project (BEPS Project) sponsored by the Organisation for Economic Cooperation and Development (OECD) with the support of the G20.[2] Most of the BEPS Project addressed substantive law—the tax rules and practices that can cause a country's tax base to be eroded and profits to be shifted out of the country. But recognizing that improved substantive rules alone would be inadequate to protect a country's tax base, the Project also explored the role of transparency and disclosure in designing an effective tax system. Specifically, BEPS Project Action 13 examined options for enhanced transparency and disclosure by multinational businesses (with attention to transfer pricing). The Final Report for BEPS Action 13 included a recommendation, together with a commitment by participating jurisdictions, that the following three items be prepared by each large multinational: (1) a country-by-country report, (2) a master file, and (3) a local file.[3] The package of these three different types of disclosure materials was expected to improve countries' ability to effectively enforce their tax rules.

Yet, attention to the function of transparency and disclosure in reinforcing the tax system extends beyond the BEPS Project. Another major transparency and disclosure initiative, the introduction of automatic exchange of financial account information, has been the subject of recent reform efforts in the European Union (EU) and the OECD.[4] Further examples of transparency in tax and related fields

2. *See* OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 11 (2013), https://www.oecd.org/ctp/BEPSActionPlan.pdf [hereinafter ACTION PLAN] ("The G20 finance ministers called on the OECD to develop an action plan to address BEPS issues in a co-ordinated and comprehensive manner."); *see also* Hugh J. Ault, Wolfgang Schoen & Stephen E. Shay, *Base Erosion and Profit Shifting: A Roadmap for Reform*, 68 BULLETIN FOR INT'L TAX'N 275, 275–77 (2014) (explaining the context and motiviation for the BEPS project and its emphasis on coordinated national responses to problems of tax base erosion).

3. OECD, TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTRY REPORTING, ACTION 13—2015 FINAL REPORT 20–21 (2015) [hereinafter ACTION 13 FINAL REPORT], http://www.oecd-ilibrary.org/deliver/2315381e.pdf.

4. *See infra* Section I.A.2.

include steps to promote industry specific reporting,[5] Tax Information Exchange Agreements (TIEAs), the Global Forum on Transparency and Exchange of Information for Tax Purposes, the rise of Intergovernmental Agreements (IGAs), and the Foreign Account Tax Compliance Act (FATCA) in the United States.[6]

The second strand in contemporary international tax policy discussions, a concern for the treatment of developing countries, is more long standing, but has continued to generate interest in recent years. Several critical questions arise in analyzing the application of

5. Industry specific country-by-country reporting (some of which is tax related) has evolved in other arenas. For example, securities law in the United States requires businesses engaged in extractive industries, such as the "exploration, extraction, processing, [and] export" of "oil, natural gas, or minerals, or the acquisition of a license for any such activity," Securities Exchange Act of 1934, 15 U.S.C. § 78m(q)(1)(A) (2012), to report payments made to foreign governments, *id.* § 78m(q)(2)(A). The types of payments that must be reported by these businesses (on a country-by-country basis) "includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits." *Id.* § 78m(q)(1)(C)(ii). Implementing regulations were issued in July 2016. Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,359, 49,360 (July 27, 2016) (to be codified at 17 C.F.R. pts. 240 & 249b); *see also* Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rules for Resource Extraction Issuers Under Dodd-Frank Act (June 27, 2016), https://www.sec.gov/news/pressrelease/2016-132.html (announcing, in June 2016, that the SEC adopted the implementing regulations). Another example of industry-related reporting requirements can be found in the Extractive Industries Transparency Initiative (EITI), which seeks to encourage a two-pronged strategy for transparency in extractive industries. *See* EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, EITI FACT SHEET (2014), https://eiti.org/sites/default/files/documents/2014-07-30_EITI_Factsheet_English.pdf [hereinafter EITI FACT SHEET]. This approach would require businesses to report what they pay to each jurisdiction, and require the governments to report what they receive. *See id.* But work on industry-based disclosure has not been limited to extractive industries. The European Union's Capital Requirements Directive IV (CRD IV) seeks disclosure by covered financial institutions of certain information on a country-by-country basis, including: "profit or loss before tax," tax paid, "subsidies received," and average number of employees. Council Directive 2013/36, 2013 O.J. (L 176) 338, 384–85 (EU). EU Members states must domestically enact rules to require the reporting. Press Release, European Commission, Memo: Capital Requirements-CRDIV/CRR–Frequently Asked Questions 6–7 (July 16, 2013), http://europa.eu/rapid/press-release_MEMO-13-690_en.pdf (noting that EU Directives must be implemented by each member state through its domestic law). For example, United Kingdom reporting rules came into effect in January 2014, with the first reporting period ending on July 1, 2014. *See* The Capital Requirements (Country-by-Country Reporting) Regulations 2013, SI 2013/3118, art. 1, ¶ 1, art. 3, ¶¶ 1–2 (Eng.); HM TREASURY, CAPITAL REQUIREMENTS (COUNTRY-BY-COUNTRY REPORTING) REGULATIONS 2013: GUIDANCE §§ 1.2, 3 (2013), https://www.gov.uk/government/publications/capital-requirements-country-by-country-reporting-regulations-2013-guidance/capital-requirements-country-by-country-reporting-regulations-2013-guidance.

6. *See infra* Section I.A.2.c.

international tax policy to developing countries, including whether tax treaties are good for such countries,[7] whether and which international organizations adequately represent and consider their needs,[8] and whether the dominant concerns of current global tax discussions reflect their primary concerns.[9]

This Article argues that the intersection between these two topics needs to be more closely analyzed because, as the serious work of transparency and disclosure gets underway, the question of how and where developing countries fit into the picture has become more pressing. Can increased transparency and disclosure meaningfully assist developing countries in bolstering their tax systems? Will they be able to participate in this world of information exchange? If they can participate, on what terms and with what realistic degree of success? Should developing countries advocate for specific reforms to the emerging transparency and disclosure regimes, and if so, what reforms? This Article examines the current landscape of international tax transparency and disclosure practices that have been put in place or are in process, and explores the intended goals of such enhanced

7. *See, e.g.*, Tsilly Dagan, *The Tax Treaties Myth*, 32 NYU J. INT'L L. & POL. 939, 942–47 (2000); Antonio Hugo Figueroa, *¿Tratados Tributarios para Evitar la Doble Imposición Internacional o para Transferir Recursos de Países en Desarrollo a Países Desarrollados?* [*Tax Treaties to Avoid International Double Taxation or to Transfer Resources from Developing Countries to Developed Ones?*], 2:14 VOCES EN EL FENIX 128, 130–31 (2012); Allison D. Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study*, 71 BROOK. L. REV. 639, 643–44 (2005).

8. *See e.g.*, Press Release, Christian Aid, Rich Have More Influence than Poor over Tax Reform (Nov. 13, 2014), http://www.christianaid.org.uk/pressoffice/pressreleases/november-2014/rich-have-more-influence-than-poor-over-tax-reform.aspx (quoting Christian Aid's Principal Economic Justice Adviser, Toby Quantrill, when it says that "[t]he results of the OECD's project so far suggest that rich countries and multinationals may have had more influence over it than many poor countries"); *New Reports on OECD and Developing Countries: Progress, But Far to Go*, TAXJUSTICE.NET (Nov. 14, 2014), http://www.taxjustice.net/?s=OECD+and+developing+countries (positing that "[t]he lingering worry, of course, is always that the OECD is a club of rich countries and is still merely offering a veneer of representation while getting on with the business of looking after its core member states' interests").

9. *See, e.g.*, Hugh J. Ault & Brian J. Arnold, *Protecting the Tax Base of Developing Countries: An Overview*, *in* UNITED NATIONS HANDBOOK ON SELECTED ISSUES IN PROTECTING THE TAX BASE OF DEVELOPING COUNTRIES, *supra* note 1, at 1, 6–8; Richard Vann, *Current Trends in Balancing Residence and Source Taxation*, *in* BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION 367, 387–92 (Yariv Brauner & Pasquale Pistone eds., 2015).

information exchange. The Article then considers what this trend means for developing countries, both in the short and long term.

One important point should be noted at the outset: developing countries are not a single, monolithic block in terms of their needs, goals, and capacities. Even those countries that are frequently grouped together as sharing common interests, such as the "BRICS,"[10] can look quite different in terms of their current international tax position, their needs, and their viable options.[11] Therefore, the analysis and solutions may vary depending on the specific situation of the developing country in question.

Part I describes the emergence of new transparency and disclosure practices in international tax. The most significant innovations in recent years are (1) the BEPS Project's three-part reporting package and (2) the implementation of automatic exchange of information (both the EU program and the OECD's Common Reporting Standard (CRS) for exchange of financial account information). Additionally, TIEAs, IGAs, and industry specific reporting requirements further reflect this trend. Part I then introduces the second strand in contemporary international tax policy—a focus on developing countries in international tax. Among the issues identified are the current status of developing countries in international tax, the impact of tax treaties and international organizations on developing countries, and these countries' primary tax concerns. Part II explores the application of the two major transparency and disclosure regimes (the BEPS Action Item 13 transparency and disclosure package and the automatic exchange of information) in the context of developing countries. Part III considers the implications of global trends in tax transparency and disclosure for developing countries and their potential courses of action, arguing that the very features of developing countries that may make transparency and disclosure distinctly valuable may also be the same features that curtail their full participation in this emerging trend and prove prejudicial to some taxpayers. The conclusion identifies key emerging issues and avenues

10. Brand South Africa, *New Era as South Africa Joins BRICS*, SOUTHAFRICA.INFO (Apr. 11, 2011), http://www.southafrica.info/global/brics/brics-080411.htm. The BRICS includes Brazil, Russia, India, China, and South Africa. *Id.*

11. *See, e.g.*, Jeffrey Owens, *The BRICS: An Overall Perspective* (detailing the similarities and differences among the BRICS nations, including GDP, GDP growth rates, revenue sources, and corporate tax rates), *in* BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION, *supra* note 9, at 353, 353–63.

for further research as the various transparency and disclosure programs commence.

I. TWO INTERSECTING STRANDS OF INTERNATIONAL TAX POLICY

Before considering the intersection of developing countries and the trend towards tax transparency and disclosure, this Part provides a brief overview of the two strands. This overview is necessarily abbreviated. Extensive literature exists on developing countries and taxation, and the literature on international tax transparency and disclosure continues to grow. This Article's goal is to identify the primary features and concerns with regard to each and then explore their intersection and the resulting implications.

A. Transparency and Disclosure in International Tax

Alongside global reform efforts focused on substantive tax issues, there has been a steady push for increased transparency, disclosure, and exchange of information. This trend is not entirely new. However, as countries and international organizations have begun to appreciate the importance of information in the enforcement of substantive tax rules, the level of interest in transparency has increased in a way that constitutes a notable break from the past. This Section provides an overview of the recent transparency and disclosure practices and reforms, including information exchange between governments, information provision by third parties, and enhanced taxpayer reporting.

1. Treaties and agreements

Concern over access to tax information emerged in the 1920s[12] as the League of Nations sponsored work on tax treaties through an appointed Committee of Technical Experts.[13] Ultimately, in 1927, the Committee produced a draft titled *Bilateral Convention on*

12. Prior to this work in the 1900s, Belgium negotiated two treaties that included exchange of information language—the first with France in 1843 and the second with the Netherlands in 1845. *See* XAVIER OBERSON, INTERNATIONAL EXCHANGE OF INFORMATION IN TAX MATTERS: TOWARDS GLOBAL TRANSPARENCY 4 (2015).

13. *See* Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L.J. 1021, 1066, 1080–81 (1997).

Administrative Assistance in Matters of Taxation.[14] Under this draft, information would be exchanged between two jurisdictions (1) upon request and (2) automatically for certain types of information (immovable property, mortgages, industrial, agricultural and commercial activities, earned income and director's fees, transferable securities, and estates).[15] The draft model further stated that (1) a country could refuse to provide information on public policy grounds, (2) assistance under the agreement would be without payment, and (3) provided information would include the taxpayer's name, residence and "family responsibilit[y]."[16] Although this draft was not finalized, the League of Nations did publish a model double tax treaty[17] which built on this earlier work and which served as the starting point for future double tax treaties.[18]

a. Treaty exchange of information provisions. By the 1930s, there was a shift towards inclusion of exchange of information provisions in the standard double tax treaty.[19] However, the provisions included in these bilateral treaties were generally less robust than those found in the model administrative assistance treaties, which were designed to serve as a stand-alone agreement for mutual assistance between nations in implementing their tax laws.[20] Though the inclusion of exchange of information in double tax treaties resulted in diluted language, it nonetheless made the provisions ubiquitous.[21] Moving to the present, the OECD *Model Tax Convention on Income and on Capital* (OECD Model) and the *United Nations Model Double*

14. UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS, UNITED NATIONS MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, at xv (2001), http://www.un.org/esa/ffd/documents/DoubleTaxation.pdf.

15. OBERSON, *supra* note 12, at 15.

16. *Id.*

17. *Report Presented by the General Meeting of Gov't Experts on Double Taxation and Tax Evasion*, League of Nations Doc. C.562.M.178 1928 II (1928).

18. *See* OBERSON, *supra* note 12, at 4.

19. *See* Steven A. Dean, *The Incomplete Global Market for Tax Information*, 49 B.C. L. REV. 605, 644–45 nn.261–62 (2008) (referencing the U.S.-Sweden 1939 Treaty and the U.S.-France 1939 Treaty).

20. *See id.* at 645–48.

21. *See id.*; *see also* OBERSON, *supra* note 12, at 4 ("[T]he [League of Nation's] committee and experts published the 1928 model double taxation treaty that would form the basis of bilateral treaties, which under the following works of the OECD, would form the basic structure of the international tax regime.").

Taxation Convention Between Developed and Developing Countries (UN Model) both include an Article 26, which requires exchange of information upon request and which specifies the prerequisites for requesting information (e.g., the information must be foreseeably relevant to implementing tax laws), the conditions of use (e.g., privacy limits on public access),[22] and the appropriate and inappropriate grounds for refusing to comply.[23]

b. OECD initiatives and the 2002 model TIEA. The late 1990s saw work done by OECD countries on the troubling question of harmful tax competition, as OECD countries with higher tax rates became concerned that countries with lower tax rates or special tax regimes were using their tax systems to attract mobile capital and activities.[24] The OECD—whose membership in 1998 comprised almost exclusively of developed countries[25]—ultimately produced a report on

22. *See* OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL 2014 (FULL VERSION), at M-62 to M-63 (2015) [hereinafter 2014 OECD MODEL], http://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2015-full-version_978 9264239081-en; UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS, UNITED NATIONS MODEL DOUBLE TAXATION CONVENTION 32–33 (2011) [hereinafter UN MODEL (2011)], http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf.

23. For example, "fishing expeditions" for information are not permitted. 2014 OECD MODEL, *supra* note 22, at C(26)-3 (giving commentary on Article 26 of the OECD Model).

> Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. A request may therefore not be declined in cases where a definite assessment of the pertinence of the information to an ongoing investigation can only be made following the receipt of the information.

Id.; *see also* UN MODEL (2011), *supra* note 22, at 439 ("Contracting States are not at liberty to request information about a particular taxpayer that is highly unlikely to be relevant to the tax affairs of that taxpayer."). However, countries are no longer permitted to rely on domestic bank secrecy rules as grounds for not exchanging information under a bilateral treaty. *See, e.g.*, 2014 OECD MODEL, *supra* note 22, at M-63; UN MODEL (2011), *supra* note 22, at 33.

24. *See* Hugh J. Ault, *Reflections on the Role of the OECD in Developing International Tax Norms*, 34 BROOK. J. INT'L L. 757, 763–72 (2009) (placing the emergence of the TIEAs and the Global Forum in the broader context of preceding work on harmful tax competition).

25. The original OECD member countries are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *Convention on the Organisation for Economic Co-operation and Development*, OECD.ORG, http://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddev

harmful tax competition that identified its key features and recommended steps to curb this conduct.[26] The harmful tax competition project eventually led to some changes by member and nonmember states, such as the elimination of harmful features of some tax regimes.[27] Ultimately, though, the broader project stalled out and further formal work on tax competition per se did not continue.[28] However, this initial project on harmful tax competition led to a marked shift towards transparency and disclosure as a way to regulate global tax compliance, and ultimately evolved into a more collaborative engagement with developing countries and other nonmember states on transparency and disclosure issues.[29]

The momentum created by the OECD harmful tax competition project culminated in the introduction of a Model Tax Information Exchange Agreement (Model TIEA) in 2002.[30] In the first decade of

elopment.htm (last visited Oct. 31, 2016). Member countries that have subsequently joined, in chronological order through 1998 (i.e. the time of the Harmful Tax Competition Report), are Japan, Finland, Australia, New Zealand, Mexico, the Czech Republic, Hungary, Poland, and Korea. *List of OECD Member Countries–Ratification of the Convention on the OECD*, OECD.ORG, http://www.oecd.org/about/membersandpartners/list-oecd-member-countries .htm (last visited Oct. 31, 2016).

26. *See* OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 3, 26–30, 67–71 (1998), http://www.oecd.org/tax/transparency/44430243.pdf. Although some of the steps recommended to limit harmful tax competition were internal (e.g., improving rules for the taxation of controlled foreign corporations), others directly targeted other countries (e.g., recommendation to produce a list of tax havens), many of which were not OECD members. *See id.* at 10, 37–59, 67–71. The United States, which initially supported the harmful tax competition project, withdrew its support during a change in administration contending that the project "stifle[d]" competition. Ault, *supra* note 24, at 769–70 (quoting the incoming U.S. Secretary of the Treasury).

27. *See* OECD, THE OECD'S PROJECT ON HARMFUL TAX PRACTICES: 2006 UPDATE ON PROGRESS IN MEMBER COUNTRIES 2, 5–6 (2006), https://www.oecd.org/ctp/harmful/37446434.pdf.

28. Ault, *supra* note 24, at 770–72 (describing the historical events that led the formal project to stall).

29. *Id.*

30. *Tax Information Exchange Agreements (TIEAs)*, OECD.ORG, http://www.oecd.org/tax/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm (last visited Oct. 31, 2016). For a copy of the Model TIEA, see OECD, AGREEMENT ON EXCHANGE OF INFORMATION ON TAX MATTERS (2002) [hereinafter MODEL TIEA], https://www.oecd.org/ctp/harmful/2082215. pdf. During the 1990s, the OECD began to study the issue of harmful tax competition. *See* OECD, *supra* note 26, at 7–9. Although the specific project experienced some backlash, it ultimately led to the OECD's focus on exchange of information and to the related OECD Model TIEA in 2002. *See* Diane Ring, *Article 26: Exchange of Information*, *in* GLOBAL TAX TREATY COMMENTARIES, at 1.2.5.2, 3.1 (2016)

the twenty-first century, many traditional "tax haven" jurisdictions, as well as others, did not have an extensive network of bilateral tax treaties.[31] The Model TIEA sought to bridge this gap in treaty coverage by furthering tax transparency and disclosure, even in the absence of a full treaty.[32] The content of the Model TIEA essentially tracks that of Article 26, although there are some notable differences. Unlike treaties, TIEAs can be multilateral.[33] They focus on exchange of information on request, "cover specific taxes," and include greater detail than tax treaties regarding the type of information that a state must provide to initiate a request under the agreement.[34]

c. The global forum on transparency and exchange of information for tax purposes. Also during the early 2000s, the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) was established under the leadership of the OECD.[35] Initially, the Global Forum focused on tax compliance challenges fueled by the existence of tax havens and helped create the Model TIEA.[36] In 2009, the Global Forum was re-envisioned by the OECD as the G20 urged more extensive implementation of transparency and exchange of information standards.[37] By mid-2016, the Global Forum had 137

[hereinafter Ring, *Article 26*]; Diane M. Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State*, 49 VA. J. INT'L L. 155, 182–201 (2008).

31. *See, e.g.*, Robert T. Kudrle, *Tax Havens and the Transparency Wave of International Tax Legalization,* 37 U. PA. J. INT'L L. 1153, 1158–59 (2016) (noting tax havens have few bilateral tax treaties). Bilateral tax treaties would include not only information exchange provisions but also those directed at allocation of taxing rights between source and residence.

32. *See, e.g.*, AFRICAN TAX ADMINISTRATION FORUM & OECD, A PRACTICAL GUIDE ON EXCHANGE OF INFORMATION FOR DEVELOPING COUNTRIES 2–3 (2013), https://www.oecd.org/ctp/tax-global/practical_guide_exchange_of_information.pdf.

33. MODEL TIEA, *supra* note 30, at introduction para. 5.

34. *See* Diane Ring, *Transparency and Disclosure* [hereinafter Ring, *Transparency and Disclosure*], *in* UNITED NATIONS HANDBOOK ON SELECTED ISSUES IN PROTECTING THE TAX BASE OF DEVELOPING COUNTRIES, *supra* note 1, at 497, 560.

35. *See* Ault, *supra* note 24, at 771–72; OECD, THE GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES: INFORMATION BRIEF 2 (2013) [hereinafter OECD, INFORMATION BRIEF], http://www.oecd.org/tax/transparency/global_forum_background%20brief.pdf.

36. *See id*. ("The original members of the Global Forum consisted of OECD countries and jurisdictions that had agreed to implement the international standard for transparency and exchange of information on request for tax purposes.").

37. *Id.*; *see also* Ring, *Article 26*, *supra* note 30, at 1.2.5.2, 1.2.5.3 (describing the evolution of TIEAs and the Global Forum).

members (both OECD and non-OECD countries), all participating as equals.[38] The new major task of the Global Forum was the development and implementation of a peer review process to assess whether a country's legal and regulatory structure was adequate to handle the international expectations and standards of tax transparency and exchange of information.[39] The benchmark in this assessment process is the degree to which a jurisdiction is compliant with standards consistent with the OECD and UN Models' Article 26 and the Model TIEA.[40]

d. The 1988 multilateral convention. Finally, the OECD and the Council of Europe developed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters in 1988 (Multilateral Convention or Convention) and in 2011 opened it up to all countries as participants.[41] Over 100 countries have signed on,[42] including some developing countries (although countries can make individual reservations to the basic terms of the Convention).[43] The multilateral nature of the Convention has allowed it to serve as an efficient mechanism for multilateral agreement among jurisdictions on administrative issues. As discussed below, this has allowed the Multilateral Convention to play an important role in furthering automatic exchange of information.

38. *Global Forum on Transparency and Exchange of Information for Tax Purposes: About the Global Forum*, OECD.ORG, http://www.oecd.org/tax/transparency/about-the-global-forum/ (last visited Nov. 1, 2016).

39. *Peer Review Group*, OECD.ORG, http://www.oecd.org/tax/transparency/about-the-global-forum/peerreviewgroup.htm (last visited Nov. 1, 2016).

40. OECD, INFORMATION BRIEF, *supra* note 35; *see also* Ring, *Article 26*, *supra* note 30, at 1.2.5.3, 4.5.2 (describing the Global Forum's peer review process for evaluating a country's compliance with expected standards).

41. *See* Thorbjorn Jagland & Angel Gurria, *Preface* to OECD & COUNCIL OF EUROPE, THE MULTILATERAL CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS: AMENDED BY THE 2010 PROTOCOL 3–4 (2011) [hereinafter OECD, MUTUAL ADMINISTRATIVE ASSISTANCE], http://www.oecd-ilibrary.org/taxation/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters_9789264115606-en.

42. *See Jurisdictions Participating in the Convention on Mutual Administrative Assistance in Tax Matters, Status–21 November 2016*, OECD.ORG https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf (last visited Nov. 28, 2016).

43. *See* Ring, *Transparency and Disclosure*, *supra* note 34, at 560. For a more detailed comparison of the Multilateral Convention and Article 26 of both the OECD Model and UN Model, see Ring, *Article 26*, *supra* note 30, at 4.3.1.

2. Automatic exchange of information

The growing focus on information exchange and transparency in recent years has led to stronger calls for automatic exchange of information, which represents a more substantial and complete mechanism for securing data on cross-border transactions than that provided under treaties and other agreements.[44] As noted earlier, neither the OECD Model nor the UN Model requires automatic exchange of information; only exchange on request.[45] However, both models contemplate the possibility of automatic exchange of information in their respective commentaries.[46] Similarly, the Multilateral Convention envisions the possibility of automatic exchange of information between signatories on terms to which they mutually consent.[47]

a. The OECD plan for automatic information exchange. By 2013, the G20[48] was advocating a shift toward automatic exchange and

44. *See, e.g.*, G20, G20 DEVELOPMENT WORKING GROUP DOMESTIC RESOURCE MOBILISATION: G20 RESPONSE TO 2014 REPORTS ON BASE EROSION AND PROFIT SHIFTING AND AUOTOMATIC EXCHANGE OF TAX INFORMATION FOR DEVELOPING ECONOMIES 4 (2014), http://www.g20australia.org/sites/default/files/g20_resources/library/16%20G20%20response%20to%202014%20reports%20on%20BEPS%20and%20AEOI%20for%20developing%20economies.pdf (noting, for example, that implementation of automatic exchange "could potentially lead to increased tax revenues for developing economies, by detecting tax evasion and offshore wealth, and strengthening compliance with domestic tax rules"); OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION: COMMON REPORTING STANDARD 5–6 (2014) [hereinafter OECD, COMMON REPORTING STANDARD], http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf (noting the interest in automatic exchange at the EU level, the OECD, and within both the G8 and the G20). "Automatic exchange of information" constitutes the exchange of specified categories of information between treaty partners on an automatic basis, i.e. without request from the country to whom the information is sent. OECD, COMMON REPORTING STANDARD, *supra*, at 14 (delineating, in section two of the Model Competent Authority Agreement, the terms of automatic information exchange). By obviating the need for a formal request, the process for securing the information is streamlined, and the recipient jurisdiction can obtain information before knowing that there may be a tax evasion or avoidance problem.

45. *See supra* notes 22–23 and accompanying text.

46. *See* UN MODEL (2011), *supra* note 22, at 456; 2014 OECD MODEL, *supra* note 22, at C(26)-9 to -10.

47. OECD, MUTUAL ADMINISTRATIVE ASSISTANCE, *supra* note 41, at 14–15 (articles 6 & 7).

48. Although not exclusively developing countries, the G20 members list does not represent the bulk of developed countries. As of 2016, the members include "Argentina,

"urge[d] all jurisdictions to move towards exchanging information automatically with their treaty partners, as appropriate."[49] To further this goal, the G20 issued a mandate to the OECD to prepare standards and guidance for automatic information exchange.[50] The OECD completed and released the first part of its automatic exchange project in February 2014, the *Standard for Automatic Exchange of Financial Account Information: Common Reporting Standard*.[51] Several months later, the OECD released the second part of the project: *Standard for Automatic Exchange of Financial Account Information in Tax Matters*.[52] This more extensive report included (1) the Model Competent Authority Agreement (Model CAA) that states could sign to implement automatic exchange with a treaty partner, (2) the Common Reporting Standard (CRS) (providing details on the exchange process including definitions, reporting requirements, and due diligence expectations), and (3) commentary to offer guidance on implementing the Model CAA and the CRS itself.[53]

Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Republic of Korea, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States and the European Union (EU)." G20, *About G20*, G20.ORG (Nov. 27, 2015, 10:13 AM), http://www.g20.org/English/aboutg20/AboutG20/201511/t20151127_1609.html.

49. Communiqué, G20, Meeting of G20 Finance Ministers and Central Bank Governors: Washington 4 (April 18–19, 2013), http://www.g20.org/English/Documents/Past Presidency/201512/t20151228_2072.html.

50. *Id*. The OECD itself has characterized the G20 statements as a "mandate": "The G20 has mandated the Global Forum on Transparency and Exchange of Information for Tax Purposes to establish a mechanism to monitor and review the implementation of the new global standard on automatic exchange of information. The Global Forum's automatic exchange of Information Group is in the process of designing the review process." OECD, AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION: BACKGROUND INFORMATION BRIEF 8 (2016) [hereinafter OECD, BACKGROUND INFORMATION BRIEF], http://www.oecd.org/tax/exchange-of-tax-information/Automatic-Exchange-Financial-Account-Information-Brief. pdf.

51. OECD, COMMON REPORTING STANDARD, *supra* note 44. The G20 noted its approval for the common reporting standard established by the OECD: "We endorse the Common Reporting Standard for automatic exchange of tax information on a reciprocal basis and will work with all relevant parties, including our financial institutions, to detail our implementation plan at our September meeting." Communiqué, G20, Meeting of G20 Finance Ministers and Central Bank Governors: Sydney 2 (Feb. 22-23, 2014), http://www.g20.org/English/Documents/PastPresidency/201512/t20151225_1835.html.

52. OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS (2014) [hereinafter OECD, STANDARD FOR AUTOMATIC EXCHANGE], http://www.oecd-ilibrary.org/docserver/download/2314131e.pdf? expires=1478126122&id=id&accname=guest&checksum=B8C67A5E8257C9A2846067B8B7ADF82B.

53. *Id*. at 14–17.

To implement the OECD's automatic exchange plan, interested jurisdictions would need to take two steps. First, they would need to review their domestic law and make any changes necessary to meet their obligations under the automatic exchange standard.[54] Areas of domestic law likely to need reform include laws requiring financial entities to gather and report certain data and laws to ensure the appropriate protection and privacy of taxpayer data.[55] Second, jurisdictions would need to formally agree to exchange information on an automatic basis.[56] This step would be required because existing agreements (including bilateral tax treaties based on the OECD Model or the UN Model, or the Multilateral Convention) lack self-executing automatic exchange provisions and therefore would require an affirmative commitment and articulation of terms. Due to the potential burden of trying to negotiate many bilateral competent authority agreements for automatic information exchange, the Multilateral Convention has played a central role in the planned roll-out of the OECD automatic exchange package. The OECD has recommended that the Model CAA for committing to automatic exchange be signed under the framework of the Multilateral Convention because the Convention would facilitate multiple countries entering into a competent authority agreement (CAA), thereby streamlining the process.[57]

By October 2014, fifty-one countries had signed a multilateral CAA under the Multilateral Convention;[58] and by November 2016, the number increased to eighty-seven countries.[59] Some signatories agreed to participate as "early adopters," each of whom would begin exchanging information by September 2017.[60] Others committed to

54. *Id.* at 10, 16, 72–73.

55. *Id.* at 72–73, 82, 87, 108.

56. *Id.* at 14.

57. *Id.* at 14, 21–27.

58. OECD, BACKGROUND INFORMATION BRIEF, *supra* note 50, at 3.

59. *Signatories of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information and Intended First Information Exchange Date*, OECD.ORG (Nov. 2, 2016), http://www.oecd.org/tax/exchange-of-tax-information/MCAA-Signatories.pdf.

60. ARGENTINA ET AL., JOINT STATEMENT BY THE EARLY ADOPTERS GROUP 1 (2014), http://www.oecd.org/tax/transparency/AEOI-early-adopters-statement.pdf; *see also* OECD, BACKGROUND INFORMATION BRIEF, *supra* note 50, at 2 ("[N]early 50 jurisdictions had joined

the CAA with a target implementation date of 2018.[61] The standards to which the countries have agreed address a range of details, including who must collect information, the level and nature of due diligence required in the collection process, the types of information that must be collected, and the types of accounts for which the specified information must be collected.[62] The CRS also covers the technical dimension of the exchange process including the preparation, organization, and delivery of information.[63]

b. EU directives. Although the OECD plan for automatic exchange (the CRS and the Model CAA) represents the broadest and most comprehensive effort to initiate a system of automatic exchange of tax information, it was not the first. In 2005, the European Union Savings Directive took effect,[64] requiring automatic exchange among EU members with respect to interest earned by resident individuals.[65] Eventually, this Directive was effectively replaced by a series of EU Directives calling for the automatic exchange among EU member states of financial account information (including interest, dividends, other income, account balances, and financial asset sales).[66] In 2015, a subsequent EU Directive called on members to agree to automatic exchange of advance cross-border tax rulings and advance pricing agreements.[67] This Directive was motivated by the public recognition that some EU member states may be issuing tax rulings that result in low taxes on "artificially high amounts of income in the country issuing . . . the advance ruling" and that leave "artificially low amounts of income to be taxed in any other countries involved."[68] In January 2016, the EU Commission introduced an Anti-Tax Avoidance

this group and committed to the early adoption of the standard developed by OECD, including a specific and ambitious timetable for doing so.").

61. OECD, AEOI: STATUS OF COMMITMENTS 1 (2016), http://www.oecd.org/tax/transparency/AEOI-commitments.pdf.

62. OECD, STANDARD FOR AUTOMATIC EXCHANGE, *supra* note 52, at 11–12.

63. *Id.* at 14, 17, 230–32.

64. Council Directive 2003/48, art. 17, 2003 O.J. (L 157) 38, 45 (EC).

65. *See* Ring, *Article 26*, *supra* 30, at 1.2.5.5.

66. *See, e.g.*, Council Directive 2014/107, 2014 O.J. (L 359) 1, 2 (EU).

67. *See* Council Directive 2015/2376, 2015 O.J. (L 332) 1, 2–3 (EU).

68. *Id.* at 1.

Package[69] comprising multiple measures, including a revised Directive proposing country-by-country reporting between member states' tax authorities on important tax-related information of multinationals operating within the EU.[70]

c. FATCA. The EU push for automatic exchange was motivated and shaped in part by the United States' enactment and implementation of its Foreign Account Tax Compliance Act (FATCA) regime in 2010.[71] Under FATCA, foreign and domestic financial institutions must report specific financial information to the United States on U.S. account holders worldwide (or face negative tax consequences).[72] The requirements imposed on foreign financial institutions were not only burdensome but they also created the potential for conflict with foreign financial institutions' domestic legal obligations.[73] As a result, the "United States entered into [intergovernmental agreements ("IGAs")][74] with various jurisdictions to offer a streamlined and legal way for financial institutions in those jurisdictions to comply with [the automatic reporting obligations under the FATCA rules]."[75] The FATCA regime and the resulting

69. European Commission, *Anti-Tax Avoidance Package, EC.EUROPA.EU* (Nov. 3, 2016), http://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package__en.

70. *European Commission Proposal for a Council Directive Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation*, at 2–3, COM (2016) 25 final (Jan. 28, 2016), http://eur-lex.europa.eu/resource.html?uri=cellar:89937d6d-c5a8-11e5-a4b5-01aa75ed71a1.0014.02/DOC_1&format=PDF.

71. *See* Ring, *Article 26*, *supra* note 30, at 1.2.5.9.2.

72. I.R.C. §§ 1471–74 (2012).

73. *See, e.g.*, Shamik Trivedi & Eric Kroh, *U.S. Issues Joint Statements on FATCA*, 67 TAX NOTES INT'L 7, 7 (2012) (quoting acting assistant Treasury secretary for tax policy, Emily McMahon, when it says that "[an IGA] addresses domestic legal impediments and reduces burdens on financial institutions").

74. The United States ultimately produced two model IGAs that it has used as the basis for negotiated agreements with other countries, IGA Model 1 and IGA Model 2. *FATCA Information for Governments*, IRS.GOV (Mar. 28, 2016), https://www.irs.gov/businesses/corporations/fatca-governments. For a list of jurisdictions that have signed IGAs with the United States, see *Additional FACTA Documents*, TREASURY.GOV (Jan. 15, 2016), http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx.

75. Ring, *Article 26*, *supra* note 30, at 1.2.5.5. Financial institutions in some jurisdictions expressed concern that provision of the taxpayer data under the FATCA rules could subject the institution to liability (criminal or civil) in their domestic jurisdiction. *See, e.g.*, *id.* at 1.2.5.5 n.109 (noting that some foreign financial institutions had raised this concern); *Chilean Banking Association Requests IGA for FATCA Implementation Purposes*, 2013 TAX NOTES TODAY 30-17

IGAs set the standard for automatic exchange of information between nations.[76] Moreover, as jurisdictions observed the number of IGAs being signed with the United States, they began to explore the possibility of acquiring comparable data on their own taxpayers' foreign income and assets from financial institutions.[77]

d. Other information exchange mechanisms. Although beyond the scope of this Article, it is worth noting the range of other mechanisms for transparency, disclosure, and exchange of information that have all played a role in crystalizing expectations and framing discussions in international taxation, including the Financial Action Task Force,[78]

(Feb. 13, 2013) ("[A]t present, . . . compliance with these aspects of FATCA [without an IGA] would subject Chilean banks and their employees to potential criminal prosecution.").

76. The OECD has characterized its CRS model as one that consciously builds on FATCA. OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL INFORMATION IN TAX MATTERS: THE CRS IMPLEMENTATION HANDBOOK 6 (2015), https://www.oecd.org/ctp/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf ("This is a standardised automatic exchange model, which builds on the FATCA IGA to maximise efficiency and minimise costs.").

77. For example, the United Kingdom signed its own IGA with Jersey. *Memorandum of Understanding Between the Government of Jersey ("Government of Jersey") and her Majesty's Revenue and Customs ("HMRC") of the United Kingdom of Great Britain and Northern Ireland Relating to Cooperation in Tax Matters*, GOV.JE, http://www.gov.je/SiteCollectionDocuments/Tax%20and%20your%20money/LD%20UKFATCAMOU%2020130327%20CP.pdf (last visited Nov. 2, 2016). For other similar agreements signed by the United Kingdom, see HM Revenue & Customs, *Automatic Exchange of Information Agreements: Other UK Agreements*, GOV.UK (Sept. 8, 2014), https://www.gov.uk/government/publications/automatic-exchange-of-information-agreements-other-uk-agreements/automatic-exchange-of-information-agreements-other-uk-agreements. Also, in 2015 Switzerland signed an agreement requiring automatic exchange of financial account information with the EU and signed a similar agreement with Australia. *See* State Secretariat for Int'l Fin. Matters, *Automatic Exchange of Information*, SIF.ADMIN.CH (Oct. 28, 2016), https://www.sif.admin.ch/sif/en/home/themen/internationale-steuerpolitik/automatischer-informationsaustausch.html.

78. The G7 established the Financial Action Task Force (FATF) in 1989 to address problems of money-laundering international drug trade money through banks and related financial institutions. FIN. ACTION TASK FORCE, 25 YEARS AND BEYOND 2 (2014), http://www.fatfgafi.org/media/fatf/documents/brochuresannualreports/FATF%2025%20years.pdf. The FATF issued guidelines for preventing, detecting, and punishing abuses of the financial system in a country. *Id.* at 2, 5–6. As with global tax enforcement, an important part of the money laundering response was grounded in transparency. FIN. ACTION TASK FORCE, FATF 40 RECOMMENDATIONS 2, 9 (2003), http://www.fatf-gafi.org/media/fatf/documents/FATF Standards - 40 Recommendations rc.pdf.

the Joint International Tax Shelter Information and Collaboration,[79] the Treaty Relief and Compliance Enhancement program,[80] and the Extractive Industries Transparency Initiative.[81] Additionally, a variety of regional tax agreements include exchange of information provisions, though often in abbreviated form. Examples of such agreements include: (1) the 2008 West African Economic Monetary Union (WAEMU) Income and Inheritance Tax Convention (Article 33);[82] (2) the South Asian Association for Regional Cooperation (SAARC) Limited Multilateral Agreement on Avoidance of Double

79. The Joint International Tax Shelter Information and Collaboration (JISTIC), began as the Joint International Tax Shelter Information Center in 2004. *See Austrailia, Canada, UK and US Agree to Establish Joint Task Force*, IRS.GOV (May 3, 2004), http://www.irs.gov/uac/Australia,-Canada,-UK-and-US-Agree-to-Establish-Joint-Task-Force. Initial members included the tax commissioners of Australia, Canada, the United Kingdom, and the United States. *Id*. In the early years, JITSIC focused on financial products involved in abusive tax shelters, taking a collaborative approach to identifying products, promoters, and responses. *Id*.; *see e.g.*, *Joint International Tax Shelter Information Centre Memorandum of Understanding*, IRS.GOV, http://www.irs.gov/pub/irs-utl/jitsic-finalmou.pdf (last visited Nov. 2, 2016) (purposes of JITSIC include "[s]har[ing] expertise, best practices and experience in tax administration to combat abustive tax schemes"). In the decade following its introduction, JITSIC expanded its membership and introduced the JITSIC Network to facilitate collaboration on issues of cross-border tax avoidance with a wider group of states. Communiqué, OECD, Meeting of the Forum on Tax Administration (FTA): Dublin, Ireland (Oct. 24, 2014), http://www.oecd.org/ctp/administration/fta-2014-communique.pdf.

80. The OECD's Treaty Relief and Compliance Enhancement Program (TRACE), with roots extending back to 2006, seeks to address the reporting and treaty challenges experienced by taxpayers, financial institutions, and tax authorities when investments are held through collective investment vehicles (CIVs). *About the Trace Project*, OECD.ORG, http://www.oecd.org/ctp/exchange-of-tax-information/aboutthetracegroup.htm (last visited Oct.. 25, 2016). The primary challenge is facilitating the availability of treaty benefits to taxpayers investing through CIVs. OECD, TRACE IMPLEMENTATION PACKAGE FOR THE ADOPTION OF THE AUTHORISED INTERMEDIARY SYSTEM: A STANDARDISED SYSTEM FOR EFFECTIVE WITHOLDING TAX RELIEF PROCEDURES FOR CROSS-BORDER PORTFOLIO INCOME 3 (2013), http://www.oecd.org/ctp/exchange-of-tax-information/TRACE_Implementation_Package_Website.pdf. The OECD expects that TRACE standards and the automatic exchange CRS will be aligned and that the TRACE program will be available only to jurisdictions that have signed on to automatic exchange and CRS. OECD, *About the Trace Project*, *supra*.

81. *See supra* note 5.

82. Règlement n°08/CM/UEMOA du 26 septembre 2008 portant adoption des règles visant à éviter la double imposition au sein de l'UEMOA et des règles d'assistance en matière fiscal [Regulation No. 08/CM/UEMOA of 26 September 2008 adopting the rules for the avoidance of double taxation within the UEMOA and the rules for assistance in taxation], Sept. 26, 2008, Tax Analysts Doc. No. 2009-19164, http://droit-afrique.com/upload/doc/uemoa/UEMOA-Convention-fiscale.pdf.

Taxation and Mutual Administrative Assistance (Article 5);[83] and (3) the Agreement Among the Member States of the Caribbean Community (CARICOM) for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment (Article 24).[84]

3. BEPS and action item 13

Perhaps the highest profile transparency and disclosure effort in recent years has been Action 13 of the OECD's BEPS Project initiated in 2012.[85] The project, which resulted in a series of final reports on fifteen action items in October 2015, included *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13—2015 Final Report* ("Final Report").[86] Action 13 comprises a three-part system for transparency and disclosure by multinational businesses: (1) the master file, (2) the local file, and (3) the country-by-country report template.[87] Each element requires different information and a different reporting process. According to the Final Report, the regime would apply to multinational businesses with "annual consolidated group revenue equal to or exceeding EUR 750 million."[88]

a. The master file. The role of the master file is to provide a "high-level overview . . . [that would] place the MNE group's transfer

83. SAARC Limited Multilateral Agreement on Avoidance of Double Taxation and Mutual Administrative Assistance in Tax Matters, Nov. 13, 2005, Tax Analysts Doc. No. 2005-23606, http://www.saarc-sec.org/userfiles/Various%20Publications,% 20Agreements,MOUs,%20%20Conventions.%20Charters/PUBLICATIONS/Taxation%20Agreement/pdf/Final%20Agreement%20on%20Avoidance%20of%20Double%20Taxation%20%20.pdf.

84. Agreement Among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Profits, or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment, July 6, 1994, Tax Analysts Doc. No. 95-30604, http://cms2.caricom.org/documents/legaldocuments/9261-agreement_among_the_member_states_of_the_caricom_for_the_avoidance_of_double_taxation_and_the_prevention_of_fiscal_evasion_False . ..._ 2.pdf.

85. *See* ACTION PLAN, *supra* note 2, at 11 ("The G20 finance ministers called on the OECD to develop an action plan to address BEPS issues in a co-ordinated and comprehensive manner.").

86. ACTION 13 FINAL REPORT, *supra* note 3.

87. *Id.* at 9.

88. *Id.* at 10.

pricing practices in their global economic, legal, financial and tax context."[89] The file is intended to effectively offer a blueprint of the multinational that addresses five major topics: organizational structure, description of businesses, intangibles, intercompany financial activities, and tax and financial situation.[90] Although the information provided need not be an exhaustive listing of the business in detail, it should include itemization of major contracts, intangibles, and transactions.[91] Annex I to the Final Report provides details regarding the content of the master file, but is only two pages and repeats essentially the same information provided in the body of the report. In terms of delivery, the Final Report envisions that the master file would be "filed directly with the tax administrations in each relevant jurisdiction as required by those administrations."[92]

b. The local file. The local file offers a much more detailed picture of the multinational's operations in a specific jurisdiction, with a focus on intercompany transactions.[93] Here, the goal is to assist the jurisdiction in assessing whether the taxpayer has complied with transfer pricing rules.[94] Thus, material data should be provided on transactions between an affiliate in the local country and related enterprises in other jurisdictions (e.g., financial information regarding the transactions, "comparability analysis, and the selection and application of the most appropriate transfer pricing method").[95] As with the master file, the annex to the report addressing the local file is two pages and generally restates the content of the report, but with a

89. *Id*. at 14–15.

90. *Id*. at 15.

91. *Id*.

92. *Id*. at 20. This direct filing has raised some concerns regarding taxpayer protection:

> Dorothy Coleman, vice president of tax and domestic economic policy at the National Association of Manufacturers, said during the event's panel discussion that those new requirements are her biggest source of concern. She said she was particularly troubled by the master file, which she noted would have to be filed directly with foreign tax authorities and would therefore not be protected by Treasury's safeguards against exchanging CbC reports with tax authorities that use the information inappropriately.

Ryan Finley, *Lawmakers Urge Limiting Exchange of CbC Reports*, 81 TAX NOTES INT'L 751, 751 (2016).

93. ACTION 13 FINAL REPORT, *supra* note 3, at 15.

94. *Id*.

95. *Id*.

bit more detail.[96] With regard to delivery of the local file, the Final Report observes that it should be "filed directly with the tax administrations in each relevant jurisdiction as required by those administrations."[97]

c. *The country-by-country template*. The most controversial element of the Action 13 transparency and disclosure package has been the country-by-country (CbC) reporting, presumably because the comparative data across countries provides a detailed *and* global snapshot of the business and because the data could readily be translated by tax authorities into a rough cut estimate of an appropriate tax obligation to the country, potentially by-passing a time consuming assessment of the taxpayer's specific activities in the jurisidiction.[98] The Final Report itself recognizes the importance of this part of the package by devoting forty-one pages of the appendix to material relevant to the CbC reporting requirement.[99] Under the CbC reporting, multinationals would be required to report the following data (the Final Report includes a template[100] in the annex): (1) revenue, (2) earnings before taxes, (3) cash tax, (4) current year tax accruals, (5) stated capital, (6) accumulated earnings, (7) number of employees, and (8) tangible assets.[101] This information would be reported on a country-by-country, not entity, basis.[102] The template triggered debate regarding the specific items to be reported, to whom template reporting would be delivered directly, and to whom access

96. *Id*. at 27–28. For example, the annex notes that the local file should include a "description of the management structure of the local entity," the reporting chain, the business strategy locally, the "[k]ey competitors," and "[c]opies of all material intercompany agreements concluded by the local entity." *Id*. at 27.

97. *Id*. at 20.

98. *Id*. at 16. A variety of concerns have emerged regarding the adoption of CbC reporting, including fears that (1) countries will use the generalized CbC information to assert an adjustment to the taxpayer's return without actually examining the taxpayers transactions, (2) the data will not be adequately protected, (3) the data will be formally made public, and (4) some countries will participate and others will not, potentially leading to a unfair competitive advantage. *See BEPS-Frequently Asked Questions*, OECD.ORG, http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm (last visited Nov. 3, 2016).

99. *See* ACTION 13 FINAL REPORT, *supra* note 3, at 29–70.

100. *Id*. at 29–30.

101. *Id*.

102. *Id*. at 29.

to the report would be granted and under what circumstances.[103] The Final Report urges that the CbC report should be used by tax authorities to assess high-level transfer pricing risk but "should not be used as a substitute for a detailed transfer pricing analysis of individual transactions and prices based on a full functional analysis and a full comparability analysis."[104]

In contrast with the master file and local file, the CbC report would be subject to a more formal implementation regime.[105] The Final Report explains that implementation of the CbC reporting requirement would begin with enactment of legislation in the jurisdiction of the ultimate parent entity of the multinational group,[106] which would require the parent to file the CbC report in that jurisdiction.[107] Then, pursuant to an automatic exchange mechanism, the parent jurisdiction would distribute the CbC report to all of the

103. *See, e.g.*, Margaret Burrow, *News Analysis: Stakeholders Find Common Ground on OECD Draft,* 73 TAX NOTES INT'L 975 (2014) (reviewing comments from NGOs, the business community, and tax advisors); Mindy Herzfeld, *News Analysis: Country-by-Country Reporting: Drawing the Battle Lines*, 73 TAX NOTES INT'L 847 (2014) (reviewing comments from the BEPS Monitoring Group, NGOs, and the business community).

104. ACTION 13 FINAL REPORT, *supra* note 3, at 16. Further emphasizing this point, the Final Report continues on to admonish that "[t]he information in the Country-by-Country Report on its own does not constitute conclusive evidence that transfer prices are or are not appropriate. It should not be used by tax administrations to propose transfer pricing adjustments based on a global formulary apportionment of income." *Id.*

105. In this regard, it is useful to note that the CbC reporting requirement regulations finalized by the United States in June of 2016 do not include guidance on either the master file or the local file. *See* T.D. 9773, 2016-29 I.R.B. 56; Lewis J. Greenwald & Lucas Giardelli, *Examining the Proposed U.S. Country-by-Country Reporting Regs*, 82 TAX NOTES INT'L 485, 490 (2016) (noting that the proposed regulations do not include a master file requirement but that it is anticipated that if the entity prepares one for another jurisdiction, it would likely be requested in a U.S. audit).

106. ACTION 13 FINAL REPORT, *supra* note 3, at 39.

107. In the event that the jurisdiction of the multinational parent did not enact such legislation, or failed to enforce it, the Final Report anticipates shifting the burden to another entity down the chain. *Id.* at 23 ("In case a jurisdiction fails to provide information to a jurisdiction fulfilling the conditions listed . . . because (a) it has not required Country-by-Country Reporting from the ultimate parent entity of such MNE groups, (b) no competent authority agreement has been agreed in a timely manner under the current international agreements of the jurisdiction for the exchange of [a report] or (c) it has been established that there is a failure to exchange the information in practice with a jurisdiction after agreeing with that jurisdiction to do so, a secondary mechanism would be accepted as appropriate, through local filing or through filing [of a report] by a designated member of the MNE group . . . .").

jurisdictions in which the multinational operates.[108] Ideally, this mechanism would be a CAA included under the Multilateral Convention.[109] That is, parties to the Multilateral Convention could sign the CAA under the Convention (a model of which is included in the annex to the Final Report) and achieve widespread automatic exchange in a more streamlined manner. Per this CAA, each signatory would exchange any CbC reports it received from multinationals headquartered in its jurisdiction with other signatories satisfying the terms of the CAA (including confidentiality). Review of this entire process is scheduled for 2020.[110]

The three-part reporting package of Action 13 triggered objections from the business community on a number of grounds, including administrative burden, inappropriate use of the information in tax enforcement, and failure to protect taxpayer privacy.[111] The OECD acknowledged these concerns directly in the Final Report and observed that Action 13 sought to strike a balance between essential enforcement information and compliance burdens.[112] The Final Report also vigorously reaffirmed the proper and exclusive function of the CbC reports in a country's tax enforcement process.[113] Furthermore, the exchange of the CbC reports would be accomplished under the framework of a tax agreement (whether the Multilateral Convention or a bilateral tax treaty) that included

108. *Id.* at 23.

109. *Id.*

110. *Id.*

111. *See, e.g.*, *id.* at 10; *Country-by-Country Reporting and Global Master Files: BEPS Action 13,* Global Tax Update, JONESDAY.COM (Sept. 2015), http://www.jonesday.com/country-by-country-reporting-and-global-master-files-oecd-beps-action-13-iglobal-tax-update i-09-16-2015/ (noting multinationals' concerns, including the potential use of reporting standards for unitary taxation, inapproiate use of information in audit, increase in transfer pricing and permanent establishment disputes, and the possible trend toward public disclosure of the data); PWC, TAX INSIGHTS FROM TRANSFER PRICING: IRS ISSUES PROPOSED REGULATIONS ON COUNTRY-BY-COUNTRY REPORTING 5–6 (2015), https://www.pwc.com/gx/en/tax/newsletters/pricing-knowledge-network/assets/pwc-irs-releases-proposed-cbcr-regulations.pdf (noting the significant compliance burden on businesses and the lack of clarity in various aspects of the regulations, including the permitted sources of data for the information to be provided in the CbC report).

112. ACTION 13 FINAL REPORT, *supra* note 3, at 10.

113. *Id.* at 16.

standards on protection of taxpayer privacy.[114] These issues raised by multinationals (burden, information abuse, and privacy) resurface later in Part III as the Article assesses the developing country perspective on the new trends in transparency and disclosure.

Before turning to a discussion of developing countries and international tax policy, it is worth observing who the primary movers have been in the recent expansion of transparency and disclosure initiatives: the OECD, the EU, the G20, and the United States.[115] As predominantly higher tax jurisdictions, these countries have been particularly concerned about loss of tax base and have viewed information as an important tool in stemming the loss of tax revenue.[116] However, the story of the transparency and disclosure trend has also been described (in the context of automatic exchange) as one focused on "establish[ing] a platform for regular flow of information mainly between tax havens and some developed countries . . . [which,] by and large, ignores the developing countries' participation in the new regime."[117] As will be outlined in more detail in the next part, efforts have been made over time to incorporate developing countries and their perspectives into the drafting and implementation process. Nonetheless, the leading advocates of recent transparency and disclosure projects have largely remained more developed and economically powerful countries.

B. Developing Countries and International Tax

This Section surveys the primary concerns faced by developing countries in confronting the emerging transparency, disclosure, and information exchange projects in international tax. First, however, a few words of analytical caution are necessary.

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114. Additionally, the model CAA that jurisdictions could sign to bring CbC report exchange under the auspices of the Multilateral Convention explicitly includes a section on "Confidentiality, Data Safeguards and Appropriate Use." *Id.* at 49.

115. *See* Vokhid Urinov, *Developing Country Perspectives on Automatic Exchange of Tax Information*, 1 LAW, SOC. JUST. & GLOB. DEV. J. 1, 3–4, 9 (2015), https://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2015-1/lgd_2015_1_urinov_pdf.pdf.

116. Recall the United States implemented the FATCA regime to gather data on U.S. taxpayer foreign accounts. *See supra* Section I.A.2.c. Additionally, the EU actively pursued automatic exchange through EU-wide savings directives. *See supra* Section I.A.2.b.

117. Vokhid, *supra* note 115, at 2.

The term *developing country* has no single agreed definition. The United Nations (UN), while recognizing the absence of an agreed definition,[118] groups countries into three broad categories—developed economies, economies in transition, and developing economies—in its *World Economic Situation and Prospects* (WESP) analysis.[119] Similarly, the OECD acknowledges the absence of a single definition, but also recognizes some commonly accepted groupings of countries.[120] Despite the range of approaches to country classification, the purposes to which such classifications are put, and the underlying normative implications of classification schemes, a number of factors seem generally relevant in assessing a country's status, including gross

118. *See* UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS, INDICATORS OF SUSTAINABLE DEVELOPMENT: GUIDELINES AND METHODOLOGIES–METHODOLOGY SHEETS 336 (3d ed. 2007), https://sustainabledevelopment.un.org/content/dsd/dsd_aofw_ind/ind_csdindi.shtml ("There is no commonly agreed definition of developing countries."). The UN identifies a subgroup, "least developed countries," for particular attention from the international community: "Since 1971, the United Nations has recognized 'least developed countries' (LDCs) as a category of States that are deemed highly disadvantaged in their development process, for structural, historical and also geographical reasons. LDCs face more than other countries the risk of deeper poverty and remaining in a situation of underdevelopment. More than 75 per cent [sic] of the LDCs' population still live in poverty. These countries are also characterized by their vulnerability to external economic shocks, natural and man-made disasters and communicable diseases. As such, the LDCs are in need of the highest degree of attention from the international community." United Nations Conf. on Trade & Dev., *Least Developed Countries (LDCs)*, UNCTAD.ORG, http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/LDCs.aspx (last visited Oct. 27, 2016).

119. UNITED NATIONS, WORLD ECONOMIC SITUATION AND PROSPECTS 143 (2014), http://www.un.org/en/development/desa/policy/wesp/wesp_current/wesp2014.pdf ("*WESP* classifies all countries of the world into one of three broad categories: developed economies, economies in transition and developing economies."); *see also* United Nations Statistics Div., *Composition of Macro Geographical (Continental) Regions, Geographical Sub-Regions, and Selected Economic and Other Groupings*, UNSTATS.UN.ORG (Sept. 26, 2016), http://unstats.un.org/unsd/methods/m49/m49regin.htm ("There is no established convention for the designation of 'developed' and 'developing' countries or areas in the United Nations system. In common practice, Japan in Asia, Canada and the United States in northern America, Australia and New Zealand in Oceania, and Europe are considered 'developed' regions or areas. In international trade statistics, the Southern African Customs Union is also treated as a developed region and Israel as a developed country; countries emerging from the former Yugoslavia are treated as developing countries; and countries of eastern Europe and of the Commonwealth of Independent States (code 172) in Europe are not included under either developed or developing regions.").

120. OECD, *Glossary of Statistical Terms: Developed, Developing Countries*, OECD.ORG (Jan. 4, 2006), https://stats.oecd.org/glossary/detail.asp?ID=6326 (citing the UN observation regarding the terms "'developed' and 'developing' countries").

national income, longevity, and education.[121] Put another way, many of the challenges faced by developing countries (including those relevant in international tax policy) are a function of their limitations or struggles in these areas.

The generic difficulty of defining the term *developing countries* is further muddied by the rise of Brazil, Russia, India, China, and South Africa (known as the "BRICS"[122]) and, particularly, the active role India and China have played in challenging the existing international tax system. In recent years, the increasing global economic engagement of these countries has led them to dispute the assumptions and framework of the international tax system that has operated throughout the 20th century.[123] This advocacy creates some confusion and ambiguity in trying to assess international tax policy from a developing country perspective: the BRICS do not share a uniform view on ideal international tax policy, and their primary goals and concerns may not reflect the dominant needs of most developing countries, even if they are challenging the preferred practices of

121. Lynge Nielsen, *Classifications of Countries Based on their Levels of Development: How it is Done and How it Could be Done* 5–6 (Int'l Monetary Fund, Working Paper No. 11/31, 2011), https://www.imf.org/external/pubs/ft/wp/2011/wp1131.pdf.

122. *See supra* note 10 and accompanying text.

123. *See, e.g.*, Pasquale Pistone & Yariv Brauner, *Introduction* to BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION, *supra* note 9, at 3, 3–6 ("Emerging Economies—most vocally, China and India—are challenging this dominance, effectively asserting some of their newly found power in various forums."). One notable example of a decision to acknowledge the alternative perspectives held by the BRICS on major topics in international tax was the inclusion of a separate chapter in the *United Nations Practical Manual on Transfer Pricing for Developing Countries* on the distinctive approaches of Brazil, China, India, and South Africa. UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS, UNITED NATIONS PRACTICAL MANUAL ON TRANSFER PRICING FOR DEVELOPING COUNTRIES 357–415 (2013), http://www.un.org/esa/ffd/documents/UN_Manual_TransferPricing.pdf. The preface to this manual observes that the approaches of these four countries do not represent the consensus of the UN:

> While consensus has been sought as far as possible, it was considered most in accord with a practical manual to include some elements where consensus could not be reached, and it follows that specific views expressed in this Manual should not be ascribed to any particular persons involved in its drafting. Chapter 10 is different from other chapters in its conception, however. It represents an outline of particular country administrative practices as described in some detail by representatives from those countries, and it was not considered feasible or appropriate to seek a consensus on how such country practices were described. Chapter 10 should be read with that difference in mind.

Id. at viii.

developed countries.[124] Thus, although the BRICS may constitute an identifiable voice speaking out against some established international tax practices, in many cases they are not concerned with the same issues as core developing countries[125] (which themselves do not constitute a homogeneous group).

The point of these caveats is neither to disregard views expressed by the BRICS nor to undermine the broader project of identifying issues of concern to developing countries. Rather, it is to indicate the degree of complexity involved in trying to identify and articulate the major concerns of developing countries in international tax.

1. The primary substantive international tax concerns of developing countries

Developing countries, as well as the BRICS in some cases, have identified a range of concerns with the international tax system, both in substantive law and tax administration. Important substantive law topics include source country taxation, the scope of permanent establishment taxation, and transfer pricing (arm's length standard v. formulary apportionment).[126] Although these issues attract attention in all jurisdictions, they can be particularly significant in developing countries for several reasons. First, source jurisdiction, or the ability to tax multinationals and others doing business in a given jurisdiction, matters greatly to those countries which have a less substantial base of tax residents (corporate or individual) earning significant global

124. *See* Diane Ring, *Institutional Aspects* (noting the examples of variation among BRICS countries interests, goals and policies, and the potential for divergence from each other but also from the bulk of developing countries), *in* BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION, *supra* note 9, at 469, 469–93; *see also* Vann, *supra* note 9, at 386–87 (noting "that by the early 2030s the [expected] output of China and India alone will exceed that of the advanced economies").

125. *See* Ring, *supra* note 124, at 469–93 (considering the degree to which the BRICS may find their connection to developing countries lessen as they are increasingly interested in residence-based taxation and other design issues more commonly associated with developed economies).

126. *See, e.g.*, Ault & Arnold, *supra* note 9, at 6–8 (identifying major developing country concerns in international taxation); Vann, *supra* note 124, at 387–92 (examining India's and China's concerns regarding international taxation); F. Alfredo Garcia Prats, *Impact of the Position of the BRICS on the UN Model Convention*, *in* BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION, *supra* note 9, at 393, 410–17.

income.[127] Second, strong permanent establishment rules, which govern taxation of a nonresident doing business in the jurisdiction, offer a way to secure source-based taxation.[128] Recognizing the centrality of the permament establishment issues for developing countries, the UN has addressed the topic of services permanent establishments and of the authority to tax in the absence of a permanent establishment or physical presence.[129]

Finally, tax planning by multinationals via transfer pricing can be difficult for developing countries to combat.[130] Under the arm's length method, a tax authority seeking to assert a deficiency must evaluate substantial quantities of factual and economic data, examine the comparables and economic analyses prepared by the taxpayer, and apply one or more complicated pricing methods to the taxpayer's transactions. Jurisdictions with limited administrative resources find this process especially daunting.

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127. *See* Ault & Arnold, *supra* note 9, at 6.

128. *Id.* at 16–19; Adolpho Martín Jimenéz, *Preventing Avoidance of Permanent Establishment Status*, *in* UNITED NATIONS HANDBOOK ON SELECTED ISSUES IN PROTECTING THE TAX BASE OF DEVELOPING COUNTRIES, *supra* note 1, at 325, 325–27.

129. For example, Art. 5(3)(b) of the UN Model provides for a services permanent establishment under some circumstances:

> The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than 183 days in any 12-month period commencing or ending in the fiscal year concerned.

UN MODEL (2011), *supra* note 22, at 10. The decision to include this language in the UN Model is a one of the notable departures it has made from the OECD Model that it tracks. *Id.* at 96–97. Additionally, the UN Committee of Experts on International Cooperation in Tax Matters has explored in detail the possibility of adding a new article to the UN Model that would provide for source country taxation of "technical services," would be expected to increase the ability of the source country to tax certain activities occurring inside the jurisdiction by lowering the threshold for taxation. *See* U.N. Comm. of Experts on Int'l Cooperation in Tax Matters, Note from the Coordinator of the Subcommittee on Tax Treatment of Services: Draft Article and Commentary on Technical Services 9–10, U.N. Doc. E/C.18/2014/CRP.8 (Sept. 30, 2014), http://www.un.org/esa/ffd/wp-content/uploads/2014/10/10STM_CRP8_TechnicalServices1.pdf; *see also* Jimenéz, *supra* note 128, at 374–75 (referencing the work of the United Nations Committee of Experts on the possible inclusion of a technical services article in the UN Model).

130. *See, e.g.*, Ring, *Transparency and Disclosure*, *supra* note 34, at 530–31 (noting the challenges faced by developing countries with more limited audit resources).

2. Administrative constraints faced by developing countries

More broadly, the inability of developing countries to effectively respond to multinationals' tax planning efforts as an administrative matter may prove distinctly harmful. A 2015 study by the International Monetary Fund concluded that lower-income developing countries rely more substantially on the corporate tax portion of their tax base, thus, base erosion and profit shifting among multinational businesses generates distinct burdens for such countries.[131] Quantifying this harm, the OECD estimated that "developing countries lose three times more to tax havens than they receive in international aid."[132]

Developing countries, recognizing some of their shared concerns, have joined together to assess and pursue new strategies. For example, in July 2015, the South African Revenue Service (SARS) conducted a meeting with the tax commissioners from its neighboring jurisdictions to discuss prominent tax and customs issues, citing the OECD's conclusion (discussed above) regarding the disparity between lost tax revenue and developing country aid.[133] Jurisdictions participating in the SARS meeting (Botswana, Lesotho, Namibia, South Africa, Swaziland, and Zambia) drafted a joint resolution.[134] Among the topics addressed was the suitability of the current BEPS CbC design

131. Ernesto Crivelli, Ruud De Mooij & Michael Keen, *Base Erosion, Profit Shifting and Developing Countries* 4–5 (Int'l Monetary Fund, Working Paper No. 15/118, 2015), https://www.imf.org/external/pubs/ft/wp/2015/wp15118.pdf. Relatedly, a Eurodad report concluded that illicit financial flows out of developing countries totaled "$6 billion in 2011," equivalent to "4.3% of their GDP," and that developing countries "lost a higher proportion of their GDP than middle-income developing countries." JESSE GRIFFITHS, FINANCING FOR DEVELOPMENT: KEY CHALLENGES FOR POLICY MAKERS 7 (2015), http://eurodad.org/files/pdf/1546457-financing-for-development-key-challenges-for-policy-makers.pdf.

132. *Tax Them and They Will Grow*, ECONOMIST, July 11–17, 2015, at 67 (citing "Angel Gurría, the secretary-general of the OECD").

133. South African Revenue Service, *SARS Convenes Cross-Border Forum on Illicit Financial Flows*, SARS.GOV (July 17, 2015), http://www.sars.gov.za/Media/MediaReleases/Pages/17-July-2015—-SARS-convenes-cross-border-forum-on-illicit-financial-flows.aspx.

134. JOINT STATEMENT OF THE COMMISSIONERS GENERAL AND HEADS OF DELEGATION OF SOUTH AFRICA, BOTSWANA, LESOTHO, MOZAMBIQUE, NAMIBIA, SWAZILAND AND ZAMBIA 1 (2015) [hereinafter JOINT STATEMENT], http://www.sars.gov.za/AllDocs/Documents/MediaReleases/Joint%20statement%20of%20the%20Comissioners%20General%20and%20heads%20of%20delegation%20-%20%20Illicit%20Financial%20Flows%20meeting%20-%2016%20July%202015.pdf.

for developing countries. The joint resolution concluded, "[T]he [Euro] threshold for CbC reporting may be too high for multinational enterprises headquartered in the sub-region. We agree to explore the possibility of a lower threshold for these enterprises in our sub-region."[135] In essence, the complaint was that the high CbC threshold established by the OECD would prevent these developing countries from taking advantage of the informational benefits wrought by BEPS CbC reporting because multinationals headquartered in the region would be unlikely to trigger this Euro reporting threshold.

Relatedly, a UN Tax Committee questionnaire[136] on base erosion and profit shifting broadly, and on the BEPS Project specifically, revealed that developing country respondents generally agreed that among the fifteen BEPS action items, the eight items most related to strengthening source country taxation or improving transparency between tax authorities and multinationals were the most important.[137] A number of respondents indicated, however, that the remaining seven BEPS action items were also important.[138] Notably, however, respondents also enumerated the following international tax problems that were *not* included in the BEPS Project yet *did* warrant attention, even if they were most relevant to developing countries: (1) domestic anti-avoidance rules, (2) taxation of capital gains (under both domestic law and treaties), (3) rebalancing source and residence taxation (particularly under treaties), (4) the taxation of branch profits, (5) the cash economy, and (6) the use of tax incentives.[139]

From an administrative and implementation perspective, the constraints that plague developing countries in other arenas also impact their ability to engage in effective cross-border taxation.[140] And

135. *Id.* at 1–2.

136. United Nations Dep't of Econ. & Soc. Affairs, *Base Erosion and Profit Shifting*, UN.ORG, http://www.un.org/esa/ffd/tax-committee/tc-beps.html (last visited Nov. 4, 2016) (providing information on the base erosion and profit shifting questionnaire and the responses to that questionnaire). Thirteen countries responded publicly to the questionnaire, as did "Christian Aid and Action Aid" and "Economic Justice Network and Oxfam South Africa." *Id.* Additional countries responded but requested confidentiality. Carmel Peters, *Developing Countries' Reactions to the G20/OECD Action Plan on Base Erosion and Profit Shifting*, BULL. FOR INT'L TAX'N, June/July 2015, at 375.

137. Peters, *supra* note 136, at 379.

138. *Id.* at 379–81.

139. *Id.*

140. *Id.* at 381.

these same constraints may impact their ability to take advantage of or to comply with the requirements of the emerging transparency and disclosure initiatives. Often grouped under the broad heading of a need for "capacity building,"[141] these difficulties can include inadequately trained staff, inability to retain trained staff who can shift to the private sector, limited technology, unclear division of responsibility for tax issues (e.g., tax holidays granted by other departments of government), and limited budgets.[142] Although automation has been helpful in increasing effective tax collection in some contexts,[143] certain tasks, such as the taxation of multinationals, will likely continue to require trained personnel.

One very significant issue that bridges substantive law and administration is information, or the lack thereof. Developing countries note the lack of information as an impediment to successful tax enforcement.[144] In part, the lack of information may be a function of limited exchange of information agreements, limited or untimely

141. The question of precisely what constitutes "capacity" and how to successfully improve it is itself the subject of study. *See, e.g.*, Anthony Land, *Developing Capacity for Tax Administration: The Rwandan Revenue Authority* (Eur. Ctr. for Dev. Policy Mgmt., Discussion Paper No. 57D, 2004), http://ecdpm.org/wp-content/uploads/2013/11/DP-57D-Developing-Capacity-Tax-Administration-Rwanda-Revenue-Authority.pdf.

142. INT'L MONETARY FUND ET AL., ENHANCING THE EFFECTIVENESS OF EXTERNAL SUPPORT IN BUILDING TAX CAPACITY IN DEVELOPING COUNTRIES: PREPARED FOR SUBMISSION TO G20 FINANCE MINISTERS 10, 12, 19–22, 30, 38 (2016), http://pubdocs.worldbank.org/en/858011469113510187/Enhancing-the-Effectiveness-of-External-Support-in-Building-Tax-Capacity.pdf (noting issues with training staff, retaining specialists, technology integration, budget, transparency, and tax expenditures). Additional challenges that developing countries face in trying to improve their tax systems are issues of corruption and violence. *See, e.g.*, JOINT STATEMENT, *supra* note 134, at 2 ("We resolve to work together to root out all forms of corruption."); *Tax Them and They Will Grow*, *supra* note 132, at 67 ("By one reckoning a fifth of tax collectors in the capital [of Somalia], Mogadishu, were killed in 2012–14. Armed guards now accompany the remainder on their rounds.").

143. *See, e.g.*, Ben Gasore, *Rwanda: Local Government Collection Goes Online*, NEW TIMES (Aug. 27, 2015), http://allafrica.com/stories/201508270921.html (describing changes in Rwanda's revenue collection and the move towards automation to improve "efficiency and effectiveness"); *Tax Them and They Will Grow*, *supra* note 132, at 67 (reporting that Rwanda increased tax revenue collection six and one-half times after it introduced automation to the collection process).

144. Peters, *supra* note 136, at 379 (developing country respondants listed BEPS Action 13, which provides information valuable in assessing transfer pricing, as among the most important elements of the BEPS Project).

exchange, or an inability to adequately process information.[145] To the extent foreign multinationals have historically posed a threat to effective tax administration due to limited transparency and disclosure, that risk can be greater for developing countries, which often have substantially more inbound investment than outbound investment (and thus more foreign than domestic multinationals) but less access to information about such inbound investment or ability to process it.[146] In this way, developing countries depend more heavily on information exchange mechanisms to secure relevant tax data regarding the foreign multinationals operating in their jurisdictions.

3. Treaties-related constraints on developing countries

A major debate in contemporary international tax policy rages over the value of income tax treaties to developing countries.[147] Though perhaps not immediately obvious, there is an important connection between this debate and recent transparency and disclosure trends. Because the value of a tax treaty to developing countries is debatable, many developing countries may have neither traditional bilateral treaties nor an extensive TIEA network. To the extent that these treaty relationships are prerequisites for participation in some transparency and disclosure regimes, developing countries may be constrained from participating fully.[148] At a deeper level, the reasons why the value of treaties for developing countries is being debated in the first place serve as useful reminders that the needs and circumstances of countries vary greatly. Even a regime touted as a universally desirable step toward positive cooperation with other countries (and initially designed to be equitable and balanced) may prove otherwise in the context of a developing country.

145. *See id.* at 378–79; Ring, *Transparency and Disclosure*, *supra* note 34, at 501; *see also* Urinov, *supra* note 115, at 9–12 (detailing the ways in which countries might avoid true participation and exchange with some countries).

146. *See* Ring, *supra* note 34, at 501.

147. As noted in the introduction, there has been debate regarding whether tax treaties are good for developing countries, whether and which international organizations adequately represent and consider their needs, and whether the dominant concerns of current global tax discussions reflect their primary concerns. *See supra* notes 7–9 and accompanying text.

148. *See* Urinov, *supra* note 115, at 8–12 (noting, for example, that not all developed countries have signed the Multilateral Convention and therefore automatic exchange with them would need to take place via a bilateral mechanism).

Although many developing countries have entered into tax treaties,[149] a number of scholars strongly question the value of a tax treaty (at least treaties negotiated under the OECD Model or even the UN Model) for developing countries.[150] Bilateral tax treaties modeled on the OECD Model or the UN Model prioritize residence over source taxation by having the source jurisdiction typically reduce or eliminate withholding tax on certain income earned by nonresidents.[151] If the two signatories have relatively comparable investment flows, then favoring residence-based taxation should have little net impact on taxable income in the jurisdictions.[152] However, if the two signatories do not have comparable flows, as would be expected in the case of an income tax treaty between a developed country and a developing country, the result is not revenue neutral. By agreeing to reduce or eliminate source-based withholding, the signatory with more capital inflows from non-resident taxpayers—i.e. the developing country—may be effectively surrendering its ability to collect tax on income otherwise deemed earned and sourced in its jurisdiction. Consequently, a larger portion of available tax revenue would end up in the hands of the developed country.

Despite the potential loss in tax revenue due to the preference for residence taxation, treaties have often been characterized as an essential tool for encouraging multinationals to invest in developing countries.[153] The tradeoff for surrendering significant source country

149. For a listing of tax treaties by jurisdiction, see *Tax Research Platform*, IBDF, http://www.ibfd.org/IBFD-Tax-Portal/About-Tax-Research-Platform (last visited Sept. 22, 2016).

150. *See supra* note 7 and accompanying text.

151. *See* 2014 OECD MODEL, *supra* note 22, at I-5 to I-6; UN MODEL (2011), *supra* note 22, at ix.

152. *See* Vann, *supra* note 9, at 387–92 (noting the importance of balanced income and investment flows in justifying more residence-based tax treaty provisions).

153. *See, e.g.*, Ariane Pickering, *Why Negotiate Tax Treaties?*, *in* PAPERS ON SELECTED TOPICS IN NEGOTIATION OF TAX TREATIES FOR DEVELOPING COUNTRIES 1, 3–4 (2014), http://www.un.org/esa/ffd/wp-content/uploads/2014/08/Papers_TTN.pdf (describing but not necessarily endorsing the asserted advantages of such treaties, including "[r]emoving or reducing double taxation on the inbound investment or transfers," "[r]educing excessive source taxation," "[p]roviding certainty and/or simplicity with respect to taxation of the inbound investment or transfers," "[d]eveloping a closer relationship between tax authorities and business (for instance, through the mutual agreement procedure)," "[m]aintaining benefits of tax concessions and tax holidays provided with respect to inbound investment or transfers," "[s]ending a message of willingness to adopt international tax norms," "[f]ostering diplomatic

taxing rights is the expected increase in inbound investment as the developing country commits to some shared rules and practices regarding cross-border taxation and dispute resolution, and the accompanying non-tax benefits.[154] Ultimately, the question of the effects of income tax treaties on inbound investment is an empirical one. The issue has been the subject of debate and study, without clear resolution regarding the size and value of any increased inbound investment, particularly as compared to any surrendered source country tax revenue.[155] As a result, the justification for treaties as the tool for attracting meaningful, new inbound investment remains uncertain.[156]

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or other relations with the other country," and "[s]trengthening regional diplomatic, trade and economic ties"); *see also* Eric Neumayer, *Do Double Tax Treaties Increase Foreign Direct Investment to Developing Countries?*, 43 J. DEV. STUD. 1501 (2007) (empirical study of whether the expected trade-off between lost tax revenue and increased investment is real).

154. *See, e.g.*, Tsilly Dagan, *BRICS: Theoretical Framework and Potential of Cooperation* (challenging the reality of investment benefits for developing countries from income tax treaties), *in* BRICS AND THE EMERGENCE OF INTERNATIONAL TAX COORDINATION, *supra* note 9, at 15, 18.

155. *See, e.g.*, Fabian Barthel et al., *The Relationship Between Double Taxation Treaties and Foreign Direct Investment*, *in* TAX TREATIES: BUILDING BRIDGES BETWEEN LAW AND ECONOMICS 3 (Michael Lang et al. eds., 2010); Martha O'Brien & Kim Brooks, *Direct Taxation, Tax Treaties and IIAs: Mixed Objectives, Mixed Results*, *in* IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 303 (Armand de Mestral & Céline Lévesque eds., 2013); THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAX TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009); K.V. Bhanu Murthy & Niti Bhasin, The Impact of Bilateral Tax Treaties on FDI Inflows: The Case of India (Mar. 18, 2013) (unpublished manuscript), http://ssrn.com/abstract=2234966; Neumayer, *supra* note 153; Sunghoon Hong, Tax Treaties and Foreign Direct Investment (Apr. 25, 2016) (unpublished manuscript), http://ssrn.com/abstract=2769772; *see also* Dagan, *supra* note 154, at 18 n.4 (explaining that "J.P. Daniels, P.O'Brien & M.B. von der Ruhr, *Bilateral Tax Treaties and US Foreign Direct Investment Financing Modes*, Int'l Tax & Pub. Fin. (2014)," "show[s] increased foreign direct investment activity associated with treaties, but not[es] that the increase may—in many cases—be explained by endogenous factors such as the shift of certain countries to market economies; such countries needed visible signals that their economies have changed—thus the surge in treaties that preceded the investment").

156. *See supra* note 153. In a paper studying the spillover from international corporate tax policy, the International Monetary Fund (IMF) noted that "[t]he empirical evidence on the investment effects of treaties is mixed," and that the the potential revenue loss, "especially to developing countries . . . has caused increasing concern." INT'L MONETARY FUND, SPILLOVERS IN INTERNATIONAL CORPORATE TAXATION 26 (2014), http://www.imf.org/external/np/pp/eng/2014/050914.pdf. Utlimately, the IMF advocated caution for any capital importing country contemplating a bilateral tax treaty and suggested that a combination of domestic law and a tax information exchange agreement may be a more appropriate alternative. *Id.* at 27.

The distributional and jurisdictional concerns driving objections to bilateral double tax treaties do not apply directly to agreements to exchange information, which impose no constraints on the taxing decisions of the signatories. Thus, a developing country could plausibly conclude that current double tax treaties were undesirable, and yet pursue commitments to exchange information and promote transparency and disclosure. However, as noted above, many developing countries do not have universal networks of TIEAs.[157] Moreover, the same broad concerns that plague tax treaties may be relevant to TIEAs as well. It is possible that a regime—in the case of TIEAs, an information-exchange regime—that is presumed to be in all countries' best interests may contain built-in assumptions and may inadvertently produce an outcome that fails to reflect the best interests of a wide swath of countries. This critique is echoed in the concerns, outlined below, regarding the emerging automatic exchange and BEPS reporting mechanisms.

4. International organizations and tax policy

International organizations, particularly the OECD and the UN, play an active role in shaping international tax policy. Various commentators and observers of international tax policy debates have argued that international organizations, and in particular the OECD, favor wealthier, developed economies in designing and supporting various international tax policies and disregard the distinctive needs and policy preferences of developing countries, whether intentionally or not.[158] The claim is not new, but the increased emphasis on international tax cooperation in the past fifteen to twenty years has generated renewed interest.[159] Certainly the UN's decision to introduce its own model tax treaty, based on, but distinct from the OECD Model work, reflected its view that there should be a model that more accurately reflected the needs of developing countries. The

157. *See supra* note 148.

158. *See supra* note 8.

159. *See, e.g.*, Léonce Ndikumana, *International Tax Cooperation and Implications of Globalization* 11 (United Nations Dep't of Econ. & Soc. Affairs, Background Paper No. 24, 2014), http://www.un.org/en/development/desa/policy/cdp/cdp_background_papers/bp2014_24.pdf ("The increased capital mobility has motivated debates on the need for global and regional cooperation on corporate income and capital taxation policies.").

title of the UN Model, *United Nations Model Double Taxation Convention Between Developed and Developing Countries*,[160] highlights the focus on developing countries. Moreover, the *Introduction* to the UN Model offers specific examples of likely divergence between developing countries and developed countries on foundational treaty issues:

> [The UN Model] generally favours retention of greater so called "source country" taxing rights under a tax treaty—the taxation rights of the host country of investment—as compared to those of the "residence country" of the investor. This has long been regarded as an issue of special significance to developing countries, although it is a position that some developed countries also seek in their bilateral treaties.[161]

Yet, the story of how policy choices were made in the model treaty context is complex and not simply one of disparate power. Even those who have questioned both the value of treaties for developing countries and the current emphasis on cooperation in taxation nonetheless note that the disconnect between the OECD Model and that which might be favored by developing countries may be in part a reflection of the OECD's historical focus, rather than purely a product of disparate power.[162] The OECD Model evolved for use among OECD members, which were largely developed countries. Thus, the distributive impact of the residence-country bias was not as significant as it is today, now that the same model is used as the basis for negotiations between developing and developed economies. It is not surprising that a series of trade-offs and design choices reached by a cohort of relatively more comparable nations might be less suited to the needs of a later-arriving cohort—the developing countries—to the treaty negotiating table.

More recently, a number of international organizations whose roles and memberships differ from that of the OECD and the UN have begun to focus on international tax policy and developing countries. In that context, they have frequently critiqued the more dominant policy player, the OECD, for being influenced by developed

160. UN MODEL (2011), *supra* note 22.

161. *Id.* at vi.

162. Dagan, *supra* note 154, at 25.

countries and multinational corporations,[163] even though some positions advocated by the OECD have elicited strong objections from the business community.[164] Some groups have urged increased engagement of developing countries in the new work on international tax encapsulated in the BEPS Project.[165] In that regard, a policy brief produced by thirty-four international organizations described the participation in the BEPS Project by Brazil, South Africa, Indonesia, and India as "a positive step," but rejected the idea that their involvement was sufficient because "[i]t cannot be assumed . . . that

163. *See, e.g.*, *New Reports on OECD and Developing Countries: Progress, But Far to Go*, *supra* note 8 ("The lingering worry, of course, is always that the OECD is a club of rich countries and is still merely offering a veneer of representation while getting on with the business of looking after its core member states' interests."); Press Release, Christian Aid, *supra* note 8 (quoting Christian Aid's Principal Economic Justice Adviser, Toby Quantrill, when it states that "[t]he results of the OECD's project so far suggest that rich countries and multinationals may have had more influence over it than many poor countries").

164. For example, the country-by-country reporting recommendations in the BEPS Project have generated significant reaction from the business community. *See, e.g.*, Margaret Burow, *CbC Could Be a Nightmare for Corporate Tax Departments*, 77 TAX NOTES INT'L 674, 674 (2015) (quoting Intel Corp.'s vice president of finance and director of global tax and trade, Ronald D. Dickel, when it says that "[CbC reporting] is 'going to be a nightmare, a real game-changer' for corporate tax departments"); Herzfeld, *supra* note 103, at 847–52 (noting the objections to the proposed CbC reporting from the business community, including concerns about compliance burden, confidentiality, and impact on the arm's length standard).

165. For example, a 2013 policy brief produced by thirty-four international organizations (including Oxfam, ActionAid International, Christian Aid (UK), and the Tax Justice Network), applauded the work of the OECD and the G20 in targeting international tax problems, but judged the role of developing countries in the process to be inadequate:

> The OECD's BEPS Action Plan is a welcome and long overdue step forward . . . [and] provides a unique opportunity to foster fundamental changes . . . . [W]e call upon the G20 and the OECD to . . . [t]ake effective steps to ensure that developing countries can participate in the BEPS process on an equal footing, and assist them in implementing measures to stem their losses from international tax avoidance that deprives governments of badly needed tax revenue.

FIXING THE CRACKS IN TAX: A PLAN OF ACTION 2 (2013), https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/fix-the-cracks-in-tax_0.pdf. The G20, which encouraged the BEPS Project, has also recognized that the needs and circumstances of developing countries can be different:

> We ask the OECD to continue to draw on engagement with developing economies to ensure that the outcomes of the BEPS Action Plan take into account their specific challenges, in particular for the action items that will have the greatest impact for developing economies [which includes Action 13], while respecting their sovereignty.

G20, *supra* note 44, at 8.

the interests of [these] countries . . . are synonymous with those of smaller non-G20 countries."[166]

Partly in response to concerns that developing countries did not have an adequate role in the BEPS process,[167] the OECD modified the process leading up to the production of the final reports in October 2015. Initially, when the BEPS Action Plan was first introduced in 2013, the OECD explained the project's methodology and incorporation of non-OECD countries as follows:

> Accomplishing the actions set forth in this Action Plan requires an effective and comprehensive process that involves all relevant stakeholders. To this end, and in order to facilitate greater involvement of major non-OECD economies, the "BEPS Project" will be launched. In light of the strong interest and support expressed on several occasions by the G20, it is proposed that interested G20 countries that are not members of the OECD will be invited to be part of the project as Associates, i.e. on an equal footing with OECD members (including at the level of the subsidiary bodies involved in the work on BEPS), and will be expected to associate themselves with the outcome of the BEPS Project. Other non-members could be invited to participate as Invitees on an ad hoc basis. Developing countries also face issues related to BEPS, though the issues may manifest differently given the specificities of their legal and administrative frameworks. The UN participates in the tax work of the OECD and will certainly provide useful insights regarding the particular concerns of developing countries. The Task Force on Tax and Development (TFTD) and the OECD Global Relations Programme will provide a useful platform to discuss the specific BEPS concerns in the case of developing countries and explore possible solutions with all stakeholders. Finally, existing mechanisms such as the Global Fora on Tax Treaties, on Transfer Pricing, on VAT

166. FIXING THE CRACKS IN TAX: A PLAN OF ACTION, *supra* note 165, at 4.

167. The UN Subcommittee on Base Erosion and Profit Shifting, created in 2013, seeks input from developing countries on the BEPS Project. *See* United Nations Dep't of Econ. & Soc. Affairs, *Subcommittee on Base Erosion and Profit Shifting*, UN.ORG, http://www.un.org/esa/ffd/tax-committee/tc-subcommitte-beps.html (last visited Nov. 4, 2016). However, a concern emerged that developing countries might be "hesitant to submit comments on the . . . project because they are largely left out of the decision-making process." Margaret Burow, *Developing Countries Seek Voice on BEPS Treaty Proposals*, 74 TAX NOTES INT'L 114, 114 (2014) (quoting a policy manager with the European Network on Debt and Development).

> and on Transparency and Exchange of Information for Tax Purposes will all be used to involve all countries in the discussions regarding possible technical solutions.[168]

The OECD hosted regional events in 2014 for developing countries to participate in BEPS discussions.[169] However, the effectiveness of the opportunity was critiqued on two grounds: (1) the inability of some countries to send representatives due to budgetary constraints, and (2) the reality that developing countries were not participating on equal footing with the OECD and G20 nations.[170] Additionally, in September 2014, the G20 Finance Ministers requested that the OECD and others "build on [the] current engagement with developing countries and develop a new structured dialogue process, with clear avenues for developing countries to work together and directly input in the G20/OECD Base Erosion and Profit Shifting project."[171] These groups were urged to "work together to develop toolkits to assist developing economies implement Base Erosion and Profit Shifting action items."[172]

Directly acknowledging the G20 call for further involvement of developing countries, the OECD announced an expanded role for developing countries in the BEPS Project in November 2014.[173] Under this new format, the OECD identified three key engagements with developing countries on BEPS: (1) developing countries from various regions and income levels, along with regional tax organizations, would be invited to attend meetings of the OECD Committee on Fiscal Affairs (the OECD decision-making body regarding the BEPS Project), thereby offering an opportunity for direct input, (2) regionally-based networks comprising tax policy and administrative offices would be set up for continued dialogue with a

168. ACTION PLAN, *supra* note 2, at 25–26.

169. *See The BEPS Project and Developing Countries: From Consultation to Participation*, OECD.ORG (Nov. 2014), http://www.oecd.org/ctp/strategy-deepening-developing-country-engagement.pdf.

170. *See, e.g.*, Margaret Burrow, *Developing Countries' Options Limited in BEPS Discourse*, 75 TAX NOTES INT'L 365, 365 (2014).

171. Communiqué, G20, Meeting of G20 Finance Ministers and Central Bank Governors: Cairns 4 (Sept. 20–21, 2014), http://www.mofa.go.jp/files/000059877.pdf.

172. *Id.*

173. *The BEPS Project and Developing Countries: From Consultation to Participation*, *supra* note 169.

broader group of developing countries, and (3) toolkits would be developed, with input from the regional networks, to assist developing countries in their implementation of BEPS measures.[174]

Finally, following the release of the Final BEPS Reports in October 2015, the OECD in February 2016 announced "a new framework" for country participation in updating international tax rules and participating in the BEPS Project, called the "Inclusive Framework."[175] This Inclusive Framework would enable all interested countries to "participate as BEPS Associates in an extension of the OECD's Committee on Fiscal Affairs (CFA)."[176] Responsive to some of the earlier critiques directed at the meaningfulness of the inclusion of non-OECD members, the OECD announced that these "BEPS Associates . . . will work on an equal footing with the OECD and G20 members on the remaining standard-setting under the BEPS Project, as well as the review and monitoring of the implementation of the BEPS package."[177] Participation requires that the BEPS Associates agree to implement the four minimum standards delineated in the final BEPS Project recommendations: (1) tackling harmful tax practices, (2) confronting treaty shopping, (3) implementing country-by-country reporting, and (4) improving dispute resolution.[178] The first meeting under this new framework was held in June 2016 with representatives from eighty-two countries and jurisdictions in attendance (though only thirty-six had formally committed to joining as BEPS Associates).[179] However, failure to formally participate does not exclude a country from scrutiny of its compliance with the four BEPs project minimum standards. The OECD has indicated that

174. *Id.*

175. *All Interested Countries and Jurisdictions to Be Invited to Join Global Efforts Led by the OECD and G20 to Close International Tax Loopholes*, OECD.ORG (Feb. 23, 2016), http://www.oecd.org/ctp/all-interested-countries-and-jurisdictions-to-be-invited-to-join-global-efforts-led-by-the-oecd-and-g20-to-close-international-tax-loopholes.htm.

176. *Id.*

177. *Id.*; *see also* OECD, BACKGROUND BRIEF: INCLUSIVE FRAMEWORK FOR BEPS IMPLEMENTATION 5 (2016) (detailing how jurisdictions would participate on an equal footing), https://www.oecd.org/tax/background-brief-inclusive-framework-for-beps-implementation.pdf.

178. *See* Stephanie Soong Johnston, *OECD Inclusive Framework Moving on BEPS Implementation*, 83 TAX NOTES INT'L 32, 32 (2016).

179. *Id.*

"economically relevant" jurisdictions will be reviewed "even if those countries decline to participate."[180]

The OECD's introduction of the new inclusive framework and new role for developing and other countries has not fully stemmed objections to its dominant role in international tax policy. Developing countries may not be inclined to commit to the four minimum standards required to become BEPS Associates, given that they did not participate in the original decision-making process and might find the fourth standard (dispute resolution) ill-advised in light of their poor past experience with such mechanisms.[181] Arguably, other major international organizations, such as the International Monetary Fund and the World Bank, may be positioning themselves for a more substantive role in international tax policy on the grounds that they are better able to represent the interests of developing countries.[182] Some observers continue to advocate for an enhanced role for the UN Committee on Experts on International Cooperation in Tax Matters in an effort to move towards a global tax body.[183] Although the international tax landscape continues to evolve, the role of international organizations and the question of membership and participation remain central in the design and acceptance of emerging international tax policy developments.

C. Summary

The review of the recent tax transparency and disclosure initiatives in Section I.A reveals a series of connected but distinct efforts to promote a combination of third-party reporting, taxpayer reporting, and exchange of information as the path to enhanced transparency and information exchange. For purposes of this Article's inquiry, however, it is important to note that these developments have been at the behest

180. Rick Mitchell, *OECD Will Review 'Relevant Countries' Tax Policy Compliance*, DAILY TAX REP., July 12, 2016, at I-4.

181. *See* Johnston, *supra* note 178, at 33 ("[M]any states, in particular developing countries, have had negative experiences with arbitration of investment disputes and would not want to go down that same path with tax issues. . . . [S]ome developing countries have shown reluctance toward joining the inclusive framework, as they were not part of the actual decision-making process during the BEPS project.").

182. Mindy Herzfeld, *Should the OECD Take Over the Tax World?*, 82 TAX NOTES INT'L 1032, 1032 (2016).

183. Specifically, the issue is whether this UN committee should become an intergovernmental tax body. *See id.*; Stephanie Soong Johnston, *OECD Proposes Framework for BEPS Implementation*, 81 TAX NOTES INT'L 727, 728 (2016).

of developed country organizations such as the G20, the EU, the OECD, and even individual developed countries such as the United States. Developed countries have played the dominant role not only in setting the agenda, but also in designing the specifics of the various new mechanisms.

As Section I.B discussed, however, developing countries were not wholly excluded from influencing these initiatives, and over time there have been increasing efforts to integrate them into the planning and implementation process. Yet it is only now, after the final BEPS reports, that the OECD has introduced another path for developing countries to participate in the ongoing BEPS related work on an equal footing. To a notable degree, the BEPS framework has already been set and many choices made. Developing countries can now have a stronger voice in future action, but this comes at the price of having to agree to the already-established minimum standards from the BEPS Project listed in I.B.4 (harmful tax practices, treaty shopping, CbC reporting, and dispute resolution). Some believe that this price—particularly the requirement that these countries commit to the minimum standards for dispute resolution—may be higher than the participation *right* is worth. As part of the BEPS Project, a multilateral instrument (the MLI) has been drafted that would allow for more streamlined implementation of all BEPS measures that are treaty based (as compared to a renegotiation of all bilateral treaties to bring them into compliance with the relevant BEPS intiatives).[184] Among the provisions included in the MLI is a clause regarding improved dispute resolution[185]—one of the four minimum standards. Although BEPS does not make mandatory arbitration a requirement of the commitment to improved dispute resolution, the new draft MLI will likely include an opt-out binding arbitration clause.[186] Commentators

184. OECD, ACTION 15: A MANDATE FOR THE DEVELOPMENT OF A MULTILATERAL INSTRUMENT ON TAX TREATY MEASURES TO TACKLE BEPS 3–7 (2015), https://www.oecd.org/ctp/beps-action-15-mandate-for-development-of-multilateral-instrument.pdf.

185. *Id*. at 4; *see also* Stephanie Soong Johnston, *OECD 'On the Eve' of Concluding MLI Negotiations*, 83 TAX NOTES INT'L 1125, 1125 (2016) (noting the likely content of the MLI under negotiation).

186. Johnston, *supra* note 185.

have voiced concern about arbitration for developing countries.[187] Mandatory binding arbitration may not be suitable for many developing countries,[188] which may lack the capacity to successfully present their position in an arbitration setting.[189] Development of this required capacity would come at the cost of resource allocation in other arenas. Moreover, some developing countries have already had negative experiences in this regard through arbitration of investment disputes.[190] Even if the MLI language presents mandatory arbitration as opt-out, there may be significant pressure on developing countries to agree to the provision.[191]

Having broadly surveyed developments in transparency and disclosure and outlined the primary concerns of developing countries in advancing the project, the remainder of this Article takes a closer look at the application of key initiatives to developing countries and the effects they may have on the decisions and behaviors of such countries.

II. TRANSPARENCY AND DISCLOSURE PRACTICES AS APPLIED TO DEVELOPING COUNTRIES

The new trends in transparency and disclosure bring benefits, risks, and uncertainty to all participants. But developing countries face a distinct set of possible benefits, risks, and criticism from their engagement in these new practices. This Part reviews the major transparency and disclosure trends from the perspective of developing countries, highlighting the distinctive ways in which they might benefit and the special risks they might face.

187. *See, e.g.*, Stephanie Soong Johnston, *Business Reps Neutral on OECD Arbitration Style*, 83 TAX NOTES INT'L 110, 111 (2016) (noting the objections raised on behalf of developing countries).

188. *See* BEPS MONITORING GROUP, PRESENTATION AT THE ENLARGED FRAMEWORK ON BEPS AT THE OECD COMMITTEE ON FISCAL AFFAIRS 3 (2016), https://bepsmonitoringgroup.files.wordpress.com/2016/07/presentation-to-cfa-if-june-2016.pdf; *see also* Johnston, *supra* note 178, at 33 (giving the BEPS Monitoring Group's position regarding mandatory binding arbitration when it says that "the approach adopted so far, especially as regards a mandatory binding arbitration procedure, is not suitable for developing countries").

189. *See* Johnston, *supra* note 187.

190. *See* BEPS MONITORING GROUP, *supra* note 189; Johnston, *supra* note 178, at 33.

191. *See* BEPS MONITORING GROUP, *supra* note 189; *see also* Johnston, *supra* note 187 (noting concerns about the ability of "opt-out" drafting to protect developing countries).

A. BEPS Action 13

Although the BEPS work is just now being implemented, during its development phase there was significant opportunity to debate and discuss the operation of the transparency and disclosure program. As a result, it is possible to enumerate some of the likely advantages as well as risks and limitations for developing countries.

1. Advantages

The impetus behind the three-part package (master file, local file, and CbC report) of Action 13 is the expectation that all countries could benefit from better information and self-reporting by multinationals regarding transfer pricing and allocation of profits globally.[192] But developing countries might benefit specifically from the information. Although the benefits outlined below do not accrue exclusively to developing countries, on balance it seems plausible that these are advantages that would be particularly significant for such jurisdictions, especially given the role corporate taxes play in their domestic revenue mobilization.[193]

a. Access to information directly from multinationals. The first major benefit regards access to the information that would be provided by multinationals under the plan. In this realm, three related advantages emerge. First, to the extent developing countries suffer from limited tax enforcement and audit resources, the global expectation (enforced through domestic law) that multinationals provide a meaningful business overview, along with local and comparative data, allows tax administrators to automatically receive those materials and begin their analysis. If some multinationals previously resisted providing information, the new globally standardized expectations regarding provision of information to the tax authorities should lessen these taxpayers complaints about and objections to information demands.

192. ACTION 13 FINAL REPORT, *supra* note 3, at 9–10.

193. *See* INT'L MONETARY FUND, REVENUE MOBILIZATION IN DEVELOPING COUNTRIES 33–37 (2011), https://www.imf.org/external/np/pp/eng/2011/030811.pdf.

Second, we can expect that, as the BEPS Action 13 regime is implemented, the information furnished will be relatively uniform.[194] This would facilitate the use of such information by the tax administrations in developing countries. It would be relatively simple for staff to be trained to read and assess a standard set of materials, as opposed to an array of idiosyncratic reports submitted by taxpayers. Third, if developing countries receive the same master file and CbC report that the taxpayer is delivering to all jurisdictions in which it operates, their tax administrators may be able to rely on the accuracy of the content with a higher degree of confidence than if the data were provided only to the developing country. It is likely that a multinational would be hesitant to be too creative with numbers that will be uniformly evaluated by tax administrators in both developed and developing countries.[195]

b. Impact on domestic legislation. The second major benefit from the Action 13 reporting regime for developing countries derives from its possible impact on domestic tax disclosure rules. For jurisdictions

194. Such uniformity would be due in part to the baseline format provided by Action 13 for the CbC report and the master file, and in part to the fact that both of these reports would be prepared once by the parent company and then shared with the relevant jurisdictions in which it operations. ACTION 13 FINAL REPORT, *supra* note 3, at 14–16 (explaining the three tiered approached to documentation and reporting).

195. There certainly remains a risk for the developing country regarding the quality of the analysis and materials received. Given that the local file is a package sent specifically and uniquely to each jurisdiction, there is no second pair of eyes (much less multiple pairs of eyes) outside that country evaluating the filing. However, even those materials theoretically submitted to all relevant jurisdictions (the master file and the CbC report) pose several possible risks. First, a developing country would only be certain it received the same report as all of the developed countries if they all accessed one document. Otherwise there is the potential for different versions to be supplied to different countries. This concern seems more realistic if the taxpayer provides the master file, for example, in different languages depending on the jurisdiction, or provides the CbC report directly to a country that requests it from the taxpayer because the country lacks an exchange of information agreement with the taxpayer's parent jurisdiction. Second, developed and developing countries might be looking at the same package with a different focus. If the information most significant to developing countries is not compelling for developed countries, then the latter may not devote significant energy to its scrutiny. Third, even if a developed country, with additional resources and expertise to devote to the review of the filings, does determine that there were important errors or inconsistences there is no guarantee nor obligation that the country share that new information with other jurisdictions relying on the original submissions.

that lack sophisticated reporting requirements for multinationals[196] (rules comparable, for example, to the various reporting obligations that the United States already imposes on U.S. parented multinational groups[197]), the new regime provides the framework for the rules and the underlying expectation that such rules be implemented.

The Final Report for Action 13 includes three model CAAs, one for multilateral agreement and two bilateral agreements to exchange CbC reports of multinationals headquartered in the signatories jurisdiction (one based on a bilateral tax treaty and the other based on a tax information exchange agreement).[198] The language of the model CAAs provides that the signatories will ensure that their own domestic laws require resident multinationals to file an annual CbC report.[199] This commitment is necessary because, unlike the master file and local file, which the Final Report suggests be provided directly by taxpayers to their relevant jurisdictions, the CbC report will be filed with the parent jurisdiction of the multinational, which would then exchange the CbC report with appropriate jurisdictions pursuant to a CAA executed under an existing treaty.[200] In all cases, the model CAAs anticipate that signatories would have in place or would implement under domestic law a requirement that their own multinationals file CbC reports, which could then be exchanged under the agreement: "Whereas, the laws of their respective Jurisdictions require or are expected to require the Reporting Entity of an MNE Group to annually file a CbC Report."[201] The annex to the Final Report also includes model domestic legislation to facilitate the process of conforming domestic laws to the expected CbC requirement.[202] This suggests that tax administrations seeking domestic legislative support for rules requiring specific reporting by multinationals may get a boost from the combination of an available international framework that can be adopted, the requirement that conforming domestic laws be

196. Developing countries vary widely, and some do not presently have comprehensive international tax substantive rules, much less disclosure rules. *See, e.g.*, PHYLISS LAI LAN MO, TAX AVOIDANCE AND ANTI-AVOIDANCE MEASURES IN MAJOR DEVELOPING ECONOMIES 12 (2003) (observing that tax statutes and regulations in developing countries are often "skimpy").

197. *See, e.g.*, IRS FORM 5471 (2015) (requiring certain U.S. owners of controlled foreign corporations to file specific information with the IRS).

198. ACTION 13 FINAL REPORT, *supra* note 3, at 45.

199. *Id*. at 31.

200. *Id*. at 20–21.

201. *Id*. at 45, 59, 65.

202. *Id*. at 39.

implemented to take advantage of this framework, and global momentum for this type of multinational disclosure.

c. Tax enforcement resources. A third major benefit from the Action 13 plan is its potential to help shape domestic conversations about tax policy and allocation of resources. To the extent that significant and possibly useful tax information might be forthcoming from multinationals on a regular basis, tax authorities may find themselves in a position to argue for more enforcement resources. Relatedly, the effectiveness of enforcement may be enhanced by the new information, which may allow resources to be more usefully deployed to generate revenues and compliance. Developing countries might also be pushed to rethink their approaches to specific international tax issues, such as transfer pricing and other special arrangements. For example, if in the past the tax authorities found that they lacked the substantive law to challenge certain transactions, or faced political resistance to the examination of certain taxpayers, the prospect of a new norm and the increased capacity to administer the tax system (due to improved information) may generate a new domestic conversation regarding enforcement priorities in international tax policy.

2. Risks and limitations

Action 13's contribution to transparency and disclosure is not without risk and limitations, both for developing countries and for the multinationals subject to the regime.

a. Limitations on developing country upside. From the developing country perspective, the introduction of the new reporting regime could overstate the boon to tax enforcement and disguise, at least for some time, continuing challenges. First, lack of the type of information that Action 13 provides has not been the sole problem facing developing country tax administrations. Substantive areas of tax law, including rules governing capital assets and tax holidays (i.e. tax competition), also pose difficulties.[203] These areas remain unaddressed by the transparency and disclosure steps, but still warrant attention.

Second, if a developing country participates in the Action 13 plan and receives valuable information from multinationals, they are

203. *See, e.g.*, Vito Tanzi & Howell Zee, *Tax Policy for Developing Countries*, IMF.ORG (Mar. 2001), http://www.imf.org/external/pubs/ft/issues/issues27/ (noting issues in the use of tax holidays and in taxing investment capital in developing countries).

effectively stepping up their international tax enforcement efforts. Tax audit staff will gain further experience on international tax questions while multinationals operating in the jurisdiction will experience increased interactions with the local tax authorities on these questions. It would not be surprising to see an increase in the efforts of multinationals to attract trained tax enforcement staff from local tax administrations, exacerbating the drain on skilled government tax personnel. This possibility does not militate against participation, but it does suggest planning for evolving staffing needs that might be triggered by the new regime. Given limited resources, increased allocation of resources to multinational taxation might reduce resources for domestic enforcement, including domestic consumption tax and SME (small and medium-sized enterprises) enforcement.

Third, the G20's request for outside support to developing country tax administrations may ultimately be harder to satisfy and less likely to receive support from developed countries than other elements of the G20's BEPS message. Yet many developing countries may need significant domestic reform before they can begin participating in the new world of information exchange (whether Action 13, or the automatic exchange discussed in the following section).[204] These jurisdictions must establish domestic law rules regarding taxpayer disclosure obligations and taxpayer data protection, and then implement procedures that effectively provide the required level of privacy and protection. Once they participate, these jurisdictions must be able to meaningfully evaluate the information that they receive. Thus, tax auditors must have the language and other skills necessary to be able to access the documents exchanged or submitted, as well as the technical skill to take the information in the disclosure and use it to identify problem areas for the taxpayer and determine appropriate next steps in the audit.

b. Issues of concern to multinationals. Multinationals, too, have expressed a number of concerns regarding developing country participation in the Action 13 disclosure program. Perhaps the

204. *See* Lien Hoang, *Asian Bank Prods Poor Nations to Join Global Tax Campaigns,* 25 TAX MGMT. TRANSFER PRICING REP. 339, 339 (2016) (noting that the Asian Development Bank contended that a "focus on less prosperous countries is necessary because they 'lack the resources and expertise to comply with international standards for tax transparency and to protect domestic tax bases against aggressive forms of tax planning'").

primary articulated concern is how developing countries will use the information received from the master file, local file, and especially from the CbC report.[205] In particular, taxpayers fear that such jurisdictions will use the data received as a short cut to a tax adjustment and will fail to engage in the full transfer pricing analysis that would otherwise be expected.[206] A jurisdiction with limited audit resources that sees evidence that other countries are receiving a larger allocation of the multinational group's revenue might forgo resource-consuming audit steps to arrive at an audit position that seems self-evident or defensible based on the CbC data (despite the exhortation in the BEPs report that the CbC data only be used for risk assessment).[207]

Taxpayers have also indicated concern that the disclosure program will lead to tax adjustments for related party transactions based not on the arm's length standard, but rather on formulary apportionment, particularly given the multi-factor CbC report, which is reminiscent of formulary apportionment based on sales, assets, and payroll.[208] This shift towards formulary apportionment could occur indirectly by shaping government thinking in working with the new information and audit adjustment. Alternatively, the shift could occur directly, by leading developing countries to advocate more explicitly for a formulary approach to transfer pricing, perhaps one based on data in the soon-to-be ubiquitous CbC Reports.[209]

205. *See, e.g.*, Herzfeld, *supra* note 103, at 850–51.

206. *See, e.g.*, *id.* at 851.

207. ACTION 13 FINAL REPORT, *supra* note 3, at 16.

208. *See, e.g.*, Herzfeld, *supra* note 103, at 851.

209. *See* Toby Quantrill, *End Transnationals' $212 Billion Tax Dodge on Poorest Countries*, ECOLOGIST (June 5, 2015), http://www.theecologist.org/campaigning/2896978/end_transnationals_12_billion_tax_dodge_on_poorest_countries.html (discussing the newly released report of the Independent Commission on the Reform of International Corporate Taxation (ICRICT) which advocates the end of separate entity taxation of multinationals and the introduction of taxation on a single entity basis (i.e. formulary)); *Christian Aid Welcomes Call For a Global Tax System That Works For All*, CHRISTIANAID.ORG (June 2, 2015), http://www.christianaid.org.uk/pressoffice/pressreleases/june_2015/christian-aid-welcomes-call-for-a-global-tax-system-that-works-for-all.aspx (reporting on the same ICRICT report and supporting developing country efforts to challenge existing international tax rules that allow multinationals to significantly reduce taxes paid to developing countries).

The other major risk area identified by multinationals is taxpayer privacy and confidentiality.[210] Taxpayers have questioned whether developing countries would be able to adequately protect the important data that would be transmitted under the Action 13 disclosure program.[211] Given that participation in the regime (i.e. signing a competent authority agreement to exchange CbC Reports under a multilateral or bilateral treaty) is premised on demonstrating adequate privacy rules and practices, presumably the real complaint must be all, or at least one, of the following: (1) jurisdictions that do not qualify to participate formally in the CbC exchange under the plan will nonetheless demand the CbC report during audit from the local entity, (2) the master file and local file are not provided via an international agreement but are to be delivered by the taxpayer directly to the countries,[212] thus bypassing any obligation to demonstrate compliance with standards of taxpayer privacy and confidentiality, (3) treaty partners of developing countries will not hold developing countries to appropriate privacy standards, and (4) even developing countries that nominally have the proper privacy structures and rules in place will lack the intent or resources to carry through with the commitment to the expected standards.

210. *See, e.g.*, Bill Brennan, *BEPS Country-by-Country Reporting: The Practical Impact for Corproate Tax Departments*, THETAXADVISER.COM (May 1, 2015), http://www.thetaxadviser.com/issues/2015/jun/brennan-june15.html ("There is also the lurking vulnerability of confidential information mismanagement between governments, as well as information transfer and cross-border sharing security risk, which is too apparent to be ignored. With the number of governments that will be receiving this information on an annual basis, leaks to the press are inevitable. It is also possible that, in the future, a government will pass laws requiring the information be made publicly available. Therefore, the question is whether taxpayers can rely on governments to keep their information secure and assure confidentiality, and whether they can depend on countries' installing the appropriate safeguards and information-transfer controls.").

211. *See, e.g.*, *id*. The issue of developing countries' capacity to protect data can be viewed as a problem for the developing countries if it prevents them from gaining access to CbC data. Alternatively, it can be a problem for taxpayers if developing countries are given access to CbC data without sufficient scrutiny of their systems and rules for data protection. *See* Marie Sapirie, *IRS Concerned About Implementing CbC Reporting,* 77 TAX NOTES INT'L 744, 745 (2015) ("In anticipation of the 2020 review [of BEPS CbC], there need to be standards for what coutnries should look for as they monitor and review other countries, [David] Varley [acting director of transfer pricing operations in the IRS Large Business and International Divison] said. He added that although the U.S. is well situated to build the necessary systems, he sympathizes with developing countries that don't have the same level of resources.").

212. ACTION 13 FINAL REPORT, *supra* note 3, at 20.

There are no simple responses to these concerns. The first two points are undoubtedly valid, although arguably countries could already have requested the information in the past.[213] The second two points identify possible failures on the part of either country involved in an agreement to exchange information. It is worth pointing out that multinationals would have recourse to their own tax administrations in the event that abuses or lapses arise with developing country treaty partners, whether due to intent or administrative failure.[214]

One highly controversial privacy question concerning Action 13 is whether the data (particularly the CbC report) should be made public.[215] Though not specifically a developing country issue, the public disclosure debate implicates developing countries which are imagined to be a likely beneficiary of such disclosure. Of course, under the Action 13 Final Report there is no plan for public disclosure, and privacy is extensively addressed.[216] Multinationals, however, cannot have missed the campaign in some quarters to make the information public.[217] Most recently, the government of the United Kingdom accepted an amendment to a Finance Bill that "will enable HM Treasury to make regulations requiring large multinationals to publish country-by-country (CbC) reports of their profits and taxes."[218]

213. It would, however, be fair to argue that this possibility is greater now that actual reports will exist (master file and CbC report), or that country specific reports could be prepared (local file) according to the new clearly established format under Action 13.

214. To the extent CbC information was provided to the developing country via treaty, then the exchange would be premised on compliance with and commitment to various data protection standards. Failure to comply with those standards would be subject to challenge by the taxpayer's own jurisdiction. *See* ACTION 13 FINAL REPORT, *supra* note 3, at 62, 68.

215. *See, e.g.*, Stephanie Soong Johnston, *G-20 Officials Warn Against Public Country-by-Country Reporting*, 83 TAX NOTES INT'L 383 (2016).

216. *See e.g.*, ACTION 13 FINAL REPORT, *supra* note 3, at 19–20.

217. *See, e.g.,* Ryan Finley, *NGOs Urge Treasury, IRS to Make CbC Reports Public*, 82 TAX NOTES INT'L 765 (2016).

218. Andrew Goodall, *U.K. Paves the Way for Public CbC Reporting but Stresses Multilateral Approach*, WORLDWIDE TAX DAILY (Sept. 7, 2016), http://www.taxnotes.com/worldwide-tax-daily/information-reporting/uk-paves-way-public-cbc-reporting-stresses-multilateral-approach/2016/09/07/18589306; *see also* Penny Sukhraj, *U.K. Opts for Public Country-by-Country Reporting*, BLOOMBERG PROFESSIONAL: TREASURY AND RISK MANAGEMENT (Sept. 7, 2016), https://www.bloomberg.com/professional/blog/u-k-opts-public-country-country-reporting/; Vanessa Houlder, *MPs Claim Corporate Tax Transparency Victory*, FINANCIAL TIMES (Sept. 6, 2016), http://www.ft.com/cms/s/0/9282cd9a-7444-11e6-bf48-b372cdb1043a.html#axzz4K4tB8VWm.

Although this legislation does not itself require public disclosure of CbC reports but rather authorizes the government to issue regulations requiring disclosure, the move marks a dramatic step towards public reporting. Perhaps in an effort to dampen concern over the impact of the provision, the U.K. government has indicated that it would seek international agreement on an appropriate model for public reporting of data before acting on its new powers.[219]

Some of the rationales for public disclosure apply across jurisdictions, such as the desire to have a well-informed populace that can evaluate the effectiveness of tax administration and tax rules in their own jurisdiction. [220] Other rationales may be more compelling in the context of developing countries. For example, if such jurisdictions have limited resources to assess and evaluate the incoming data from multinationals under the Action 13 plan, interested international organizations or third parties could also review the data and offer their comments, analyses, and perspectives to the broader public and to the under-resourced developing country's tax administration. Furthermore, if a jurisdiction considers corruption to be a non-negligible risk, then public disclosure of a multinational's tax position may reduce pressure for special tax arrangements.[221] Moreover, public disclosure makes it possible to compare the revenues collected with the jurisdiction's budget expenditures in order to identify possible sources of corruption. Finally, public access to the data would make it available to all developing countries regardless of their formal participation in exchange of information agreements.[222] At present,

219. Goodall, *supra* note 218.

220. *See* Alex Cobham, *OECD Country-By-Country Reporting: Only For the Strong*, UNCOUNTED (Sept. 14, 2015), http://uncounted.org/2015/09/14/oecd-country-by-country-reporting-only-for-the-strong/ (suggesting that public disclosure enables "investors, analysts, journalists or activitists the opportunity to hold multinational accountable")

221. For example, in the extractive industries, a move towards public disclosure of payments made to governments is intended to provide transparency and help address corruption. *See* Commissioner Luis A. Aguilar, *Public Statement: Enhancing the Transparency of Resource Extraction Revenue Payments*, SEC.GOV (Dec. 11, 2015), https://www.sec.gov/news/statement/disclosure-of-payments-by-resource-extraction-issuers.html.

222. *See, e.g.*, *Budget Tax Reforms Leave Poor Countries Out in the Cold, Says Christian Aid*, CHRISTIANAID.ORG.UK (Mar. 18, 2015), http://www.christianaid.org.uk/pressoffice/press releases/march_2015/budget-tax-reforms-leave-poor-countries-out-in-the-cold-says-christian-aid.aspx (stating that the UK should require public reporting of CbC data because "[f]ailure to do this means few developing countries will benefit from the information being given to the UK's tax authority").

CbC reports would be made available to jurisdiction via a treaty mechanism (the report would be filed with the multinational's parent jurisdiction which would then share the report with relevant jurisdictions pursuant to their treaty terms).[223] However, to the extent developing countries lack an extensive network of bilateral treaties or TIEAs, their participation in the new world of CbC data will be curtailed.

Independent of concerns grounded in privacy and data protection, multinationals have argued that many jurisdictions will not be able to meaningfully use the material that businesses are being asked to prepare and provide.[224] Presumably, the claim here is that the net result is an unjustified burden because it does not advance tax enforcement efforts but imposes a burden on the complying taxpayer. Ultimately, though, it is not clear how far this burden argument extends. The master file and CbC report would be expected by every (participating) jurisdiction in which the multinational operates, and certainly some of them will be able to use the information effectively. In that case, the only potential waste or burden derives from sending the materials to additional jurisdictions that are unable to make the same use of it. The local file, however, would be prepared individually for a country. Thus, one might argue that preparing a local file for a jurisdiction that cannot and will not use it is inefficient. Assessments of inefficiency, though, should not be measured by a static snapshot of current capacity to use data. As noted above, one anticipated benefit for developing countries from the Action 13 package is its ability to spur developing country domestic legislation, resource allocation, and effective auditing.

B. Automatic Exchange of Information

For developing countries, the dominant mechanism for automatic exchange of information will be the OECD's automatic exchange of information under the Common Reporting Standard (CRS), as implemented by CAAs through the Multilateral Convention. Many of the benefits and the concerns that arise regarding developing countries in this context are broadly the same as those discussed above for Action 13. However, their precise details may differ.

223. ACTION 13 FINAL REPORT, *supra* note 3, at 14–23.

224. *See, e.g.*, Herzfeld, *supra* note 103, at 850 ("The notion that the information being requested greatly exceeds what is needed to perform an appropriate risk assessment is reflected in virtually all the comments the OECD has received from the business community.")

1. Benefits: More reliable access to information

One benefit for developing countries from participation in automatic exchange is the ability to secure information that would be burdensome or impossible to acquire (due, for example, to bars on "fishing expeditions" in exchanges on request) under an existing bilateral treaty or tax information exchange agreement.[225] For jurisdictions that rely substantially on an income tax, tax evasion is a significant problem and access to the kind of account information provided through automatic exchange would be valuable.[226] Moreover, the broad scope of the information provided further enhances the exchange program. For example, automatic information exchange would yield data on entity accounts, not just individual taxpayer accounts.[227] If a jurisdiction has historically faced corruption or pressure on the tax administration, the automatic nature of the information delivery guarantees that a participating jurisdiction will receive account information, leaving the government only with the decision to act on the information received.

2. Risks and limitations

a. Domestic law changes required. As with the Action 13 program, developing countries must implement a specified set of domestic law changes regarding taxpayer privacy and data protection in order to participate in automatic exchange. Inability to do so bars them from participation. Moreover, and perhaps more importantly, the developing countries must commit *providing* information to their treaty partners, i.e. the agreement to engage in automatic exchange of

225. *See, e.g.*, Robert Goulder, *Should the U.S. Adopt the OECD's Common Reporting Standard?*, FORBES.COM (June 29, 2016, 11:14 AM), http://www.forbes.com/sites/taxanalysts/2016/06/29/should-the-u-s-adopt-the-oecds-common-reporting-standard/#605e17de6af8 (noting the difference between bilateral treaties and restrictions regarding "fishing expeditions" and potential flow of information to governments under CRS).

226. According to one analysis, tax havens that facilitate hidden offshore accounts negatively impact many developing countries, which suffer tax losses representing a higher percentage of their GDP than developed countries. *New SwissLeaks Analysis Reveals How Tax Haven Secrecy Harms Developing Countries,* CHRISTIANAID.ORG (Sept. 30, 2015), http://www.christianaid.org.uk/pressoffice/pressreleases/september_2015/new-swissleaks-analysis-reveals-how-tax-haven-secrecy-harms-developing-countries.aspx.

227. OECD, COMMON REPORTING STANDARD, *supra* note 44, at 16 (discussing reporting and due diligence requirements regarding entity accounts).

information is reciprocal.[228] Under Action 13, in comparison, only the CbC reports would be subject to treaty-based direct exchange between jurisdictions.[229] And in that case, underlying reports and data would not be the product of tax administration effort. Rather the jurisdiction would commit to implementing rules requiring its multinationals to prepare and file the reports with them, and would commit to sharing that information with other jurisdictions. Arguably, that more passive role for the tax administration in the CbC process may be easier for a developing country to meet than the more active role established in automatic exchange.

In recognition of this difference, some have advocated for a nonreciprocal approach to automatic exchange of information for developing countries, at least on an interim basis.[230] Under that frame, a developing country would need to meet the standards for data protection and confidentiality, but, at least for some window of time, would not need to be able to provide reciprocal data in order to receive data.

b. Participation from key jurisdictions. For automatic exchange to be effective, developing countries must be able to obtain exchange commitments from the jurisdictions in which its taxpayers are most likely to have accounts. Despite the availability of a multilateral CAA under the Multilateral Convention, which reduces the number of

228. Although the OECD drafted a model competent authority automatic exchange of information agreement that is not reciprocal, that is intended to cover situations in which a jurisdiction does not impose an income tax and thus does not need the information. There is no comparable provision for temporary or permanent nonreciprocal automatic exchange of informnation between a developed and developing country. *See* OECD, STANDARD FOR AUTOMATIC EXCHANGE, *supra* note 52, at 215, 223; *see also* Press Release, Tax Justice Network, New OECD Report on Automatic Information Exchange: Will Developing Countries Be Left Out? (Feb. 13, 2014), http://www.taxjustice.net/2014/02/13/press-release-tjn-responds-new-oecd-report-automatic-information-exchange/ (critiquing the requirement of reciprocity).

229. *See* ACTION 13 FINAL REPORT, *supra* note 3, at 20–21 (reviewing the filing process for the CbC reports).

230. Proposals for ways to mitigate the exclusive focus on reciprocity, at least for developing countries, have been offered. *See, e.g.*, Urinov, *supra* note 115, at 13 (detailing the problem and noting the option of "staged reciprocity" suggested by the Tax Justice Network); *see also* TAX JUSTICE NETWORK, OECD'S AUTOMATIC INFORMATION EXCHANGE STANDARD: A WATERSHED MOMENT FOR FIGHTING OFFSHORE TAX EVASION? 7 (2014), http://www.internationaltaxreview.com/pdfs/TJN2014_OECD-AIE-Report.pdf ("There should be model provisions for staged reciprocity, for which developing countries would be eligible.").

agreements that must be negotiated, there is skepticism regarding the ability of developing countries to secure the commitment of those jurisdictions with which they most want exchange.[231] Signatories otherwise obligated to exchange can rely on a number of techniques to avoid exchange with participating jurisdictions.[232] Also, in many cases, important exchange jurisdictions have not joined as signatories. These nonparticipants may include jurisdictions often classified as tax havens, as well as some countries that may not always attract that moniker (such as the United States).[233]

This limitation is somewhat different from the participation challenge regarding Action 13. With respect to Action 13, the major jurisdictions from which a developing country would be seeking information (though the CbC report) would be the parent jurisdiction of the multinational operating in their country. This will frequently be a developed, capital-exporting country. Such countries, some of which have been active BEPS participants, may be more inclined to participate in the Action 13 exchange than tax havens would be to participate in automatic exchange.

C. Summary

Although both developed and developing countries can benefit from the transparency and disclosure wrought by BEPS Action 13 and automatic exchange, the discussion above highlights the ways in which developing countries might get an extra enforcement boost. The fact that developing countries are likely to have more limited audit resources and less extensive domestic infrastructure and taxpayer reporting requirements suggests they may reap potentially significant

231. *See, e.g.*, Urinov, *supra* note 115, at 9–14 (detailing the ways in which countries might avoid signing on to a multilateral CAA).

232. *See, e.g.*, *id.* at 9–12 (detailing the ways in which countries might avoid true participation and exchange with some countries).

233. The United States has taken the position that exchange of information in the context of FATCA and the related IGAs will constitute its method for committing to and performing automatic exchange of financial account information. OECD, *supra* note 61, at 1 n.1 ("The United States has indicated that it is undertaking automatic information exchanges pursuant to FATCA from 2015 and has entered into intergovernmental agreements (IGAs) with other jurisdictions to do so. The Model 1A IGAs entered into by the United States acknowledge the need for the United States to achieve equivalent levels of reciprocal automatic information exchange with partner jurisdictions. They also include a political commitment to pursue the adoption of regulations and to advocate and support relevant legislation to achieve such equivalent levels of reciprocal automatic exchange.").

gains from joining these transparency and disclosure initiatives. But there are also possible negative effects, including questions about developing countries' realistic ability to participate, the potential for participation in the regimes to mask other problems, misuse of information, and failure to use the data provided.

III. DEVELOPING COUNTRY STRATEGIES IN A TRANSPARENCY AND DISCLOSURE WORLD

As explored in Part II, developing countries face a combination of benefits, risks, and consequences from participating in the emerging tax transparency and disclosure practices. The new mechanisms provide momentum, structure, and support for a developing country's own efforts to improve its domestic law, infrastructure, and tax enforcement efforts. Yet, the global trend simultaneously threatens to leave some countries behind to the extent that they are either unable to meet the requirements to participate to effectively utilize the information that they receive. Even for countries attempting to participate, their ability to join the transparency and disclosure movement could at least temporarily disguise their continuing challenges in effective tax administration in other areas.

Additionally, before these mechanisms have even been implemented, developing countries have faced scrutiny from multinationals challenging their ability to protect data and privacy and to use the information in the agreed manner. This Part argues that the same characteristics of developing countries that make participation especially beneficial also create risks that developing countries will not benefit (a neutral result), be harmed, or potentially cause harm to others. In addition, this Part identifies a series of factors that will dictate whether joining the transparency and disclosure trend is likely to be a net positive or negative for developing countries. To the extent they can actively manage these pressure points, developing countries increase the likelihood that the new transparency and disclosure mechanism will benefit them.

A. Dual Edge of Developing Country Characteristics

One critical thread running through analysis of developing country participation in the new transparency and disclosure mechanisms is their ability to improve their capacity sufficiently.The capacity question is common across virtually all developing countries and provides the seed for both their unique ability to benefit from

transparency and disclosure efforts and their distinct potential to struggle under the new regimes.

1. Benefit

While there have been longstanding efforts from both international organizations and from individual countries over the years to provide various kinds of capacity-building support to developing countries,[234] the recent work on the BEPS Project has focused additional attention on capacity building. On April 19, 2016, the International Monetary Fund, the World Bank, the OECD, and the United Nations announced their joint engagement on a Platform for Collaboration on Tax.[235] The *Concept Note* that accompanied the four groups' announcement emphasizes the collaboration that will take place among these major international organizations in providing support and assistance to developing countries.[236]

Not everyone has viewed the announced platform project with optimism, however. For example, Oxfam's tax policy expert cautioned: "This global tax platform represents a step in a long road towards building a fairer and more transparent tax system. The platform must be able to deliver tangible results and combat inequality, but most importantly, it must give the poorest countries a voice in all discussions and agreements. For too long, the concerns of

234. *See, e.g.*, *Tax Inspectors Without Borders*, OECD.ORG, http://www.oecd.org/tax/taxinspectors.htm (last visited Nov. 5, 2016); Press Release, Dep't for Int'l Dev. et al., UK Plans Major Boost to Tax Collection in Developing Countries (Nov. 20, 2013), https:// www.gov.uk/government/news/uk-plans-major-boost-to-tax-collection-in-developing-countries; *United Nations Capacity Development Programme on International Tax Cooperation: Progress Report*, Newsletter of FfDO/DESA (Fin. for Dev. Office, New York, N.Y.), Number 2014/5, June 2014, at 1, 1; U.N. Comm. of Experts on Int'l Cooperation in Tax Matters, Overview of Cooperation on Capacity Building in Taxation, U.N. Doc. E/C.18/2010/CRP.11 (Oct.. 11, 2010), http://www.un.org/esa/ffd/tax/sixthsession/OverviewCapacityBldg.pdf; *Capacity-Building Tools*, TAXJUSTICEAFRICA.NET, http://www.taxjusticeafrica.net/en/resources/downloads/capacity-building-tools/ (last visited Nov. 5, 2016).

235. *See* Press Release No. 16/176, Int'l Monetary Fund, International Organizations Take Major Step to Boost Global Cooperation in Tax Matters (Apr. 19, 2016), http://www.imf.org/en/news/articles/2015/09/14/01/49/pr16176.

236. INT'L MONETARY FUND ET AL., THE PLATFORM FOR COLLABORATION ON TAX: CONCEPT NOTE 5 (2016), http://www.imf.org/~/media/Websites/IMF/Imported/external/np/sec/pr/2016/pdf/_pr16176pdf.ashx ("The overarching aim for cooperation among the [four groups] is to better support governments in addressing the tax challenges they face.").

developing countries have been outweighed by those of powerful and wealthy governments and business interests."[237]

Still, if the recent transparency and disclosure efforts could bring about significant improvement in actual administrative tax capacity, this would be a significant value added. The Platform founders recognize the difficulty of this task.[238] It remains to be seen whether the currently planned steps of the Platform, which include training manuals and toolkits specifically requested by the G20 Developing Working Group,[239] will add significantly to developing country technical capacities.

As discussed,[240] in order for countries to participate in transparency and disclosure mechanisms, they must satisfy the required domestic law minimum standards regarding privacy and protection of data and, in the context of BEPS Action 13, put in place reporting requirements for their own multinationals. Additionally, they must join the appropriate international agreements. For developing countries constrained by various capacity limitations, these very requirements (including their specificity and global application) may facilitate the country's ability to satisfy them; for example, if they provide a political boost to tax authorities' requests for domestic law reform and budgetary support, or if they result in allocation of resources to satisfying these standards and agreements. Moreover, by prescribing clearly defined expectations and standards regarding privacy and data protection, or taxpayer reporting requirements, the new regimes offer clear goals for domestic law and available models for revision and adoption.

If developing countries are able to participate in transparency and disclosure mechanisms by taking the above steps, the potential benefits, including the ability to access, verify, and process information that historically was difficult for developing countries to secure

237. Simon Hernandez-Arthur, *Success of "Global Tax Platform" Hinges on How Well It Represents Developing Countries and Fights Inequality*, OXFAM.ORG (Apr. 19, 2016), https://www.oxfam.org/en/pressroom/reactions/success-global-tax-platform-hinges-how-well-it-represents-developing-countries.

238. IMF Managing Director, Christine Lagarde, observed that the platform will "not produce miracles." Stephanie Soong Johnston, *International Organizations to Reveal Tax Cooperation Platform*, WORLDWIDE TAX DAILY (Apr. 19, 2016), http://www.taxnotes.com/worldwide-tax-daily/base-erosion-and-profit-shifting-beps/international-organizations-reveal-tax-cooperation-platform/2016/04/19/18462931.

239. INT'L MONETARY FUND ET AL., *supra* note 236, at 4.

240. *See, e.g.*, *supra* Section I.A.2.a and Section II.A.2.b.

because of their limited capacity, may now be within reach. In this way, the transparency and disclosure mechanisms, which are expected to benefit all jurisdictions, could provide an enhanced benefit to developing countries more constrained in their options prior to the new regimes.

In summary, the transparency and disclosure regimes may be beneficial to capacity-constrained developing countries because the ways in which these regimes offer assistance to or incentivize behaviors by such countries map directly onto these capacity problems and help alleviate them. The following examples highlight this notion:

Problem	**Solution**
Limited domestic support for multinational reporting requirements and/or effective substantive rules for addressing multinational tax planning	Global attention to transparency and disclosure may raise the profile of the issue and of the available administrative and substantive law options
Limited requirements for disclosure by business and taxpayers under domestic law	The new regimes spell out what should be provided in disclosure by businesses
Developing countries have limited leverage to demand disclosures	Disclosures are made automatically, and often go to multiple states, thus increasing the likelihood that the disclosures will be made and will be reasonably accurate
Inadequate resources to obtain documents from taxpayers and secure information via exchange on request under bilateral treaties	No need to pressure taxpayers to prepare documentation, because Action 13 ensures preparation and delivery of information, as it will also be delivered to other countries with more leverage and enforcement resources
Limited training, support, and resources	Limited range of formats for provision of information may facilitate training staff to work with the standardized data sets provided

2. Risks and harms

Yet the very same capacity limitations that may cause developing countries to uniquely benefit from the transparency and disclosure trends may lead to failure or harm. First, in the case of automatic exchange, jurisdictions must not only agree to various domestic law reforms and provisions but must also be able to affirmatively bear the administrative burden of gathering, organizing, and sharing information under what is expected to be a reciprocal regime. This additional burden may prove too large a leap in capacity for jurisdictions that heretofore have struggled in their own domestic tax enforcement. Absent agreement by treaty partners to temporarily accept non-reciprocal information exchange and permit developing countries to automatically receive information without providing it, developing countries that cannot (with assistance) meet the domestic legislation obligations regarding privacy and data protection will ultimately be excluded from the exchange process because the required capacity building is currently beyond their reach.[241] In essence, the regime would create a cliff effect. Jurisdictions with just enough capacity to participate have the opportunity to significantly improve their tax enforcement, whereas those unable to meet that threshold would be excluded altogether.

Second, developing countries participating in the BEPS Action 13 may find that the pressures created by their still-limited enforcement capacity may lead them to take the information gathered through the CbC reporting and use it as a backstop where transfer pricing analysis is too burdensome. As noted earlier, auditing a multinational's transfer pricing requires technically trained tax compliance and enforcement staff. Where such staff is limited, whether due to budget constraints, technological resources, private sector poaching, or linguistic facility, the audit team may be inclined to use the more easily accessible information and factors on the CbC report to determine the proper allocation of profits and losses among related parties. Although some advocates of formulary apportionment may deem this an acceptable form of self-help, other tax observers and most multinationals would likely see it as a violation of the agreed terms of the BEPS Action 13 package.

241. Proposals for ways to mitigate the exclusive focus on reciprocity, at least for developing countries, were noted *supra* note 230.

Beyond the possibility of too much reliance (implicit or otherwise) on the CbC data to shape an audit position, developing countries may find themselves (1) advocating more strongly for a shift toward formulary apportionment or (2) urging public disclosure of data to create public momentum, to facilitate indirect oversight and scrutiny by international organizations, and to counteract corruption or other personal pressures. These two points, unlike others considered here, are negative only from the perspective of certain actors in the international tax arena. With regard to formulary apportionment, advocates of this transfer pricing alternative would likely consider such developments a positive outcome. However, multinationals, countries not advocating formulary, and those tax analysts who view formulary as an unrealistic solution to the underlying problems created by multinational tax planning would not welcome renewed attention to the subject. Similarly, with regard to public disclosure of multinational tax data, the multinationals themselves are unlikely to support such a move, but various tax advocacy groups would consider such public releases a welcome and necessary policy shift. Governments would be expected to hold varying views, as evidenced by the United Kingdom's move in early September 2016 towards public disclosure of CbC reports.[242]

Third, countries with perhaps even more limited capacity and resources may find themselves receiving information (in particular the local file) that they ultimately are not in a position to evaluate and use in an audit process. Thus, rather than posing a risk of using material in a manner considered outside the agreed scope of, say, BEPS Action 13, these jurisdictions would simply fail to process the data at all. Multinationals arguing this point rely on the limited processing and enforcement capacity of developing countries to justify not providing information at all. However, even the more developed countries are not immune to arguments that they may impose burdens through these transparency and disclosure regimes and then fail to use the data in a meaningful audit process. Additionally, this objection to increased transparency and disclosure mechanisms adopts a relatively static view of states and their capacity, and relies on that static view to argue against increased provision of information. It is certainly plausible that with the reality of data to support investigations and analysis, countries will more effectively manage this audit and tax enforcement resource.

242. *See supra* note 218 and accompanying text.

Fourth, to the extent that developing countries with limited capacity are able to engage somewhat effectively in the transparency and disclosure process, international organizations and developed countries may lose sight of the fact that participation should not be equated with completed capacity building. Rather, *capacity* is a sweeping term that encompasses a range of resources, skills, infrastructure, and background rules. Participating countries may be viewed as successes unlikely to need substantial administrative assistance on a forward-looking basis. However, if this prediction is wrong, countries may lose valuable momentum and resources for their broader tax-related capacity building.

Developing countries may find themselves in a somewhat conflicted position vis à vis the transparency and disclosure trends. The very aspects of constrained capacity that may characterize their current tax administration and enforcement may render them particularly likely to benefit from participation in the new regimes, but simultaneously create the foundation for the risks generated by their participation. This observation serves not as a recommendation against participation but rather as a notice of the importance of continued support and capacity building throughout the process, not simply in the preparatory stages for participation. The next Section, building in part on an understanding of both the advantages and the challenges of transparency and disclosure for developing countries, identifies the pressure points in the evolving transparency and disclosure trends that must be managed to ensure that developing countries can participate in the new transparency and disclosure regimes and do so successfully.

B. Managing the Pressure Points

The analyses in Parts I and II regarding the new transparency and disclosure regimes, the distinct circumstances of developing countries, and the intersection of these features, illuminate a series of factors and trigger points that will significantly impact the ability of developing countries to meaningfully benefit from the new international tax trends. Such factors include (1) the specific transparency and disclosure mechanism put in place, (2) local conditions in the specific developing country, (3) the success of the commitments (encouraged by the G20) to provide continuing tax administration aid to developing countries, (4) the ability of developing countries to make necessary domestic changes to participate in the transparency and

disclosure options, and (5) the ability of the developing country to join the relevant international agreements undergirding the transparency and disclosure mechanisms.

A transparency and disclosure program that makes fewer demands on a jurisdiction might be a more feasible first step as the country seeks to build its capacity, including its ability to eventually participate in a broader array of mechanisms. Thus, as noted earlier,[243] BEPS Action 13 may impose fewer initial burdens on a developing country's tax administration than automatic exchange, which demands that an administration exhibit significant capacity to collect, organize, process, and distribute data. Local conditions can influence the likelihood of whether initial capacity building support will rapidly translate into domestic reforms sufficient to meet participation thresholds. However, local conditions may also shape a jurisdiction's views of its transparency and disclosure priorities. If a country is more concerned about individual tax evasion than multinational tax planning, automatic exchange may prove a more valuable tool and one worth pursuing. To that end, developing countries could strenuously argue for a period of non-reciprocal automatic exchange during which, with the professed assistance of the international organizations, they would seek to build their administrative and enforcement capacity.

Given that most of the difficulties faced by developing countries in joining the transparency and disclosure trend originate in capacity concerns, the commitments made by organizations and developed countries in response to the G20's call for tax administration aid will be pivotal. But capacity building is not merely a function of outside support and advisors. In reality, it requires domestic commitment on multiple fronts to (1) put in place legislation and practices that ensure taxpayer privacy and data protection, (2) enact substantive tax laws that provide the legal foundation for taxing multinationals and individuals, (3) properly train, equip, and compensate a sufficient tax enforcement staff, and (4) fund a baseline level of technology and infrastructure. Successful capacity building is likely to be the result of an integrated approach that combines the guidance and input of outside advisors with the internal vision and commitment of the national government.

Part of the challenge for developing countries is navigating through regimes that demand a level of infrastructure currently

243. *See supra* Section II.B.2.a.

inconsistent with their own reality. They will need to identify those adjustments or changes to the deal already struck by the international community[244] that will allow the new system to meet the needs of developing countries without unduly compromising legitimate concerns of taxpayers or other jurisdictions. Examples of these refinements that have already been articulated include (1) a lower threshold for CbC reporting in some regions of the world, presumably on the theory that businesses meeting those thresholds are major players in the economy[245] and (2) the above-mentioned ability of developing countries to participate in automatic exchange of information on (at least initially) a nonreciprocal basis.[246]

These changes to transparency and disclosure regimes as established by the global tax community under the leadership of the OECD recognize the multiple ways in which developing countries may be different, but can still provide certain basic taxpayer protections. Thus, for example, the lower reporting threshold allows a subset of developing countries (that may find the major multinationals operating in their borders to be smaller in revenue than those operating in other regions or sectors) to reasonably benefit from an exchange of information program. The Euro threshold set by the OECD Action 13 Final Report of Euro 750 million[247] represents a benchmark for what size multinationals should be expected to provide CbC documentation. However, a country's perspective on the threshold at which its businesses might appropriately be asked to report is likely a function of the size of the economy and the size of the largest businesses operating in that economy.

Still another possibility is whether some form of public disclosure of multinational data, not necessarily identical to the BEPS Action 13 package, could serve as a compromise for jurisdictions that are unable to presently join the groups of nations expected to receive master files, local files, and CbC reports due to their inability to satisfy various thresholds and join the relevant international agreements. This idea,

244. On the assumption that for the moment developing countries will not be successful in advocating for completely new channels of transparency and disclosure, their better option is to advocate for changes in the emerging systems.

245. *See supra* notes 134–135 and accompanying text.

246. *See supra* note 230 and accompanying text.

247. *See* ACTION 13 FINAL REPORT, *supra* note 3, at 21.

which may have seemed implausible earlier this year (regardless of whether it was considered desirable), seems less so now that the United Kingdom has taken a step as first mover in that direction.[248]

Ultimately, developing countries and those organizations seeking to act in their best interests need to explore a three-pronged strategy to best position these nations to join any transparency and disclosure program that they consider beneficial: (1) domestic legal reforms, (2) capacity building—with both its internal and external commitments, and (3) contextualization of the transparency and disclosure regimes to the realities of developing countries. The third may be especially significant as the first two take some time, and may be supported by the promise of plausible participation in these new programs.

IV. CONCLUSION

Both the transparency and disclosure trend and the focus on developing countries's substantive tax rules and ability to collect tax revenue constitute significant strands in contemporary tax policy. Neither is altogether new but both have been the subject of significant attention and study in recent years. The current challenge is determining how to effectively manage the intersection of both strands. Ideally, developing countries (which might benefit most from enhanced and more effective tax enforcement) should find a path to participation in the new transparency and disclosure programs. Yet as detailed above, such participation is contingent on demonstrating compliance with a series of legal and administrative requirements that some countries may struggle to meet, at least in the short term. The decisive question is whether developing countries will find themselves shut out of the process, or conversely will be able to access tax information through these programs without compromising the programs' integrity.

Particularly in the case of the poorest jurisdictions, the ability to comply not only with the domestic law changes but also with the implementation of adequate taxpayer privacy regimes (for both BEPS and Automatic exchange) and with adequate information gathering and transmitting mechanisms (especially for automatic exchange) seems uncertain. Future research can assess the status of developing countries under these regimes by determining which and how many developing countries have joined in BEPS Action 13 and automatic

248. *See supra* note 218 and accompanying text.

exchange (which presumably signals that they have implemented the minimum level of domestic law changes required). We can then evaluate the experiences of these countries after they have tried to join or fully participate in the transparency and disclosure programs. Finally, the formal re-evaluation of the BEPS Project in 2020 offers another window into the mid-term effects of a trend that is just taking hold. Ultimately, however, if the transparency and disclosure trend proves successful and enables participating jurisdictions to more effectively administer their tax systems, the failure to incorporate developing countries into the process could widen the gap between developed and developing countries, with notable distributional consequences.