Tax base erosion and profit shifting in Africa – part 1: what should Africa's response be to the OECD BEPS Action Plan?*

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Abstract

This article acknowledges that the BEPS concerns facing developing countries (such as those in Africa), may not necessarily be the same as those facing developed countries. Part 1 of the article addresses what Africa's response should be to the OECD BEPS Action Plan, while Part 2 offers a critical analysis of some aspects of the BEPS Action Plan from an African perspective. To discuss Africa's response to BEPS, I explain the concepts of tax avoidance and tax planning with reference to international case law, which is of persuasive value in most African countries, or forms part of their common law. I then explain the causes of BEPS, the challenges BEPS poses to the corporate tax systems, the importance of corporate taxes in Africa, and the factors that exacerbate BEPS in Africa. Thereafter an explanation is given of the difference between BEPS and illicit financial flows – a matter giving rise to major confusion among the general public in understanding BEPS issues and finding solutions to the problem of capital flight in Africa. Against this background, I address the relevance of the OECD BEPS Action Plan in Africa and how Africa should respond to the plan.

INTRODUCTION

The term 'base erosion and profit shifting' (BEPS) refers to 'tax avoidance' by multinational enterprises (MNEs) that use gaps in the interaction between different tax systems to reduce taxable income artificially, or shift profits to

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low-tax jurisdictions in which little or no economic activity is performed.[1] Curtailing BEPS and preserving countries' tax bases has been a concern of the international community and of national governments for decades. Over the last few years, concerns about budgetary deficits as a result of the 2007/2008 global financial crisis[2] propelled international concerns about curtailing BEPS to the forefront, prompting the Organisation for Economic Cooperation and Development (OECD) to issue a report in 2013 in which it was noted that: 'BEPS constitutes a serious risk to tax revenues, tax sovereignty and tax fairness for OECD member countries and non-members alike.'[3] The OECD notes that what is at stake is the international corporate tax system. This prompted it to come up with a 'Fifteen Point BEPS Action Plan' which is intended to ensure that profits are taxed where the economic activities generating those profits are performed and where value is created.[4]

UNDERSTANDING THE CONCEPTS OF TAX AVOIDANCE, TAX PLANNING, AND TAX MITIGATION

To understand why countries need to curtail BEPS, it is important first to explain the freedom that taxpayers enjoy to avoid taxes legally. To curtail tax avoidance, the practice in question has to be prevented through anti-tax avoidance provisions in domestic tax laws, double tax treaties, and through countries adhering to international initiatives and recommendations against

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1 OECD *Addressing base erosion and profit shifting* (2013) 5.

2 McKibbin 'The global financial crisis: causes and consequences' (2010) 9 *Asian Economic Papers* 54 86; Shah 'Global financial crisis' (2010) 28 *Global Issues*. Available at: www.globalissues.org/article/768/global-financial-crisis (last accessed 24 June 2014).

3 See OECD n 1 above at 5.

4 The OECD 15 Point Action Plan is as follows: Action Plan 1: Address the Tax Challenges of the Digital Economy; Action Plan 2: Neutralise the Effects of Hybrid Mismatch Arrangements; Action Plan 3: Strengthen Controlled Foreign Companies Rules; Action Plan 4: Limit Base Erosion via Interest Deductions and Other Financial Payments; Action Plan 5: Counter Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance; Action Plan 6: Prevent Treaty Abuse; Action Plan 7: Prevent the Artificial Avoidance of PE Status; Action Plan 8: Assure that Transfer Pricing Outcomes are in Line With Value Creation with respect to Intangibles; Action Plan 9: Assure that Transfer Pricing Outcomes are in Line With Value Creation with respect to Risks and Capital; Action Plan 10: Assure that Transfer Pricing Outcomes are in Line With Value Creation With Respect to Other High-Risk Transactions; Action Plan 11: Establish Methodologies to Collect and Analyse Data on BEPS and the Actions to Address It; Action Plan 12: Require Taxpayers to Disclose Their Aggressive Tax Planning Arrangements; Action Plan 13: Re-examine Transfer Pricing Documentation; Action Plan 14: Make Dispute Resolution Mechanisms More Effective; Action Plan 15: Develop a Multilateral Instrument.

tax avoidance, such as those in the OECD 15 Point BEPS Action Plan (BEPS Action Plan 15).

The term 'tax avoidance' must be distinguished from the term 'tax evasion', which is illegal and entails the non-compliance with the tax laws and includes activities (like the falsification of tax returns and books of account) that are deliberately undertaken by a taxpayer to free itself illegally from the tax which the law charges upon its income. Tax authorities normally resort to criminal prosecution to prevent tax evasion.[5] Tax avoidance involves using legal methods of arranging one's affairs, so as to pay less tax. This is done by using loopholes in tax laws and exploiting them within legal parameters.[6] Since tax avoidance is legal, it can only be prevented if the legislature amends the law and prohibits the practice in question. It is in this regard that the courts have historically held the view that no legal obligation rests upon a taxpayer to pay higher taxes than it is legally bound to pay under the taxing Act and that a taxpayer is not prevented from entering into a genuine, or *bona fide,* transaction which, when carried out, has the effect of avoiding or reducing liability to tax. As early as 1928, a United Kingdom (UK) court (whose decisions are of persuasive value in most countries previously colonised by the UK) held in *Levene v IRC*[7] that

> [i]t is trite law that His Majesty's subjects are free, if they can, to make their own arrangements so that their cases may fall outside the scope of the taxing Act. They incur no legal penalties, and they, strictly speaking, no moral censure if having considered the lines drawn by the legislature for the imposition of taxes, they make it their business to walk outside them.

Such arrangements by taxpayers to reduce their tax liability are generally referred to as 'tax planning' or 'tax mitigation'. In *CIR v Challenge Corporation Ltd,*[8] it was explained that: 'Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax

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5 Meyerowitz *Meyerowitz on income tax* (2009) in par 29.1; OECD *Issues in international taxation No 1: international tax avoidance and evasion (Four related studies*) (1987) 1.

6 See Meyerowitz n 5 above in par 29.1; Olivier 'Tax avoidance options available to the Commissioner for Inland Revenue' (1997) 4 *SALJ* 1–3. Rapakko *Base company taxation* (1989) 39.

7 [1928] AC 21.

8 [1987] AC 155.

liability'.[9] In *CIR v Willoughby*,[10] the court held that the hallmark of tax mitigation is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that parliament intended to be suffered by those taking advantage of the option.

Tax avoidance and tax morality

Historically, the courts have held that there is no morality when it comes to paying taxes. This was confirmed by Lord President Clyde in the UK case of *Ayrshire Pullman Motors Services and D M Ritchie v IRC* [11]

> [n]o man in this country is under the smallest obligation, moral or otherwise, to arrange his legal relations to his business or to his property so as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow – and quite rightly – to take advantage, which is open to it under the taxing Statutes for the purpose of depleting the taxpayer's pocket. The taxpayer is in the like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue.

Lord Tomlin also held in the celebrated case of *Duke of Westminster*[12] as follows

> [e]very man is entitled if he can to order his affairs so that the tax attaching under the appropriate Act is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however inappropriate to the Commissioner of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

Even though tax avoidance is not illegal, over the years it is has been frowned upon by the courts and by tax authorities as the resultant loss of tax revenue has the effect of limiting a government's ability to pursue its economic and social objectives.[13] Indeed, the morality of tax avoidance was questioned years back in *Re Weston's Settlements*,[14] where Lord Denning

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9 1987] AC 155.
10 [1997] 4 All ER 65 at 73.
11 *Ayrshire Pullman Motors Services and DM Ritchie v IRC* 14 TC 754.
12 *ICR v Duke of Westminster* 51 TIR 467.
13 Brooks & Head 'Tax avoidance: in economics, law and public choice' in Cooper *Tax avoidance and the rule of law* (1997) 53 91.
14 *Re Weston's Settlements* [1968] All ER 338 at 342.

made a characteristically terse admonition that 'the avoidance of tax may be lawful, but it is not yet a virtue'.[15] In *CIR v McGuckian,*[16] Lord Steyn remarked that the *Duke of Westminster* notion that a taxpayer is free to arrange its financial affairs as it thinks fit, had 'ceased to be canonical' as to the consequences of a tax avoidance scheme. And in the New Zealand case of *Elmiger v CIR,*[17] it was held that the

> ingenious legal devices contrived to enable individual taxpayers to minimise or avoid their tax liabilities are often not merely sterile or unproductive in themselves (except perhaps in respect of their tax advantages for the taxpayer concerned), but that they have social consequences which are contrary to the general public interest.[18]

The House of Lords recognised the limits of the decision in *Duke of Westminster* In *IRC v Burmah Oil Co Ltd,*[19] Lord Tomlin pronounced that the *Duke of Westminster* case 'tells us little or nothing as to what methods of ordering one's affairs will be recognised by the courts as effective to lessen the tax that would otherwise attach to them if business transactions were conducted in a straight-forward way'. Consequently, over the years some countries have attempted to distinguish between proper 'tax planning' – which involves the organisation of a taxpayer's affairs so that they give rise to the minimum tax liability within the law – and those instances where taxpayers resort to artificial arrangements which have little or no actual economic impact upon the taxpayer, and are designed solely to manipulate tax laws in order to achieve results that conflict with or defeat the intention of the legislature.[20] In Australia, for instance, the 1999 Report on Business Taxation[21] refers to a form of tax avoidance which is essentially a misuse or abuse of the law, and is driven by the exploitation of structural loopholes in the law to achieve tax outcomes that were not intended by parliament. This includes the manipulation of the law and a focus on form and legal effect rather than substance. In South Africa, the notion of 'impermissible tax avoidance' is used to refer to certain tax-avoidance practices that extend

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15 *Ibid*.
16 [1997] 3 All ER 817 (HL).
17 *Elmiger v CIR* [1966] NZLR 683 (SC) at 686.
18 *Ibid*.
19 [1982] STC 30 (HL) at 32.
20 Australian Government *Final report of the review of business taxation: a system redesigned* (1999) 6.2(c).
21 *Ibid*.

beyond what is legally acceptable[22] and often involve taxpayers concealing their assets and income and keeping them outside their domestic tax jurisdiction in low-tax and tax haven jurisdictions.[23] This concealment can cross the dividing line between tax evasion and tax avoidance.

OVERVIEW OF PREVIOUS INTERNATIONAL MEASURES TO CURTAIL BEPS

In an attempt to lessen their global tax exposure, MNEs have increasingly used global tax avoidance strategies to maximise profits while their links to any country with a favourable tax climate have become more tenuous. In response, countries have enacted various anti-avoidance measures to curtail these tax avoidance strategies – taxpayers, however, are usually one step ahead. The cycle of continuous amendment to close loopholes in tax legislation has complicated most countries' corporate income tax provisions without, however, preventing well-advised taxpayers from aggressively avoiding domestic taxes by keeping their income in low-tax jurisdictions.

For decades the OECD failed to acknowledge that its member countries had dealings with and actively supported many tax havens.[24] OECD member countries also failed to acknowledge that they benefited from their dealings with tax havens.[25] As the growth of tax havens continued to be a major cause of the depletion of countries' tax bases, from the early 1990s the international community began to take measures to stifle their development. The European Union (EU), for instance, issued a report containing recommendations on company taxation in Europe that would prevent residents of member countries from transferring investments to other member countries that levied lower taxes. Since then the EU has issued

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22 Law Administration SARS *Discussion paper on tax avoidance and section 103 of the Income Tax Act, 1962 (Act No 58 of 1962)* (2005). See also the general anti-avoidance provisions in section 80A-L of South Africa's Income Tax Act 58 of 1962, as amended.

23 The OECD defines a tax haven as a jurisdiction that actively makes itself available for the avoidance of tax that would have been paid in high-tax countries. See OECD n 5 above at 1.

24 Diamond & Diamond *Tax havens of the world* (2002) at INTRO 15. Note that United Kingdom has for years lent credibility its overseas territories which have the status of British Crown dependencies. See Foreign and Commonwealth office 'Partnership for progress and prosperity – British and overseas territories'. Available at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1018028164839 (last accessed 18 May 2015).

25 Stikeman *Towards a level playing field: regulating corporate vehicles in cross border transactions* (2002) 15 16.

various directives to prevent the depletion of its members' tax bases.[26] In 1997, the EU Council of Economic and Financial Ministers agreed on a package of measures to tackle harmful tax competition in order to help reduce distortions in the single market, and to prevent excessive loss of tax revenue.[27] The measures included a 'Code of Conduct' on business taxation.[28] Subsequently, a group of representatives of the EU member states termed the 'Primarolo Group' was set up to gather information and to assess any national tax measures that might fall foul of the Code.[29] In 1998 the Primarolo Group came up with a report blacklisting harmful national tax measures.[30]

In 1998 the OECD issued a Report on Harmful Tax Competition,[31] in which it pointed out that tax haven jurisdictions and harmful preferential tax regimes[32] have harmful tax practices in place that may lead to the depletion of other countries' tax bases and distort financial and investment flows between countries.[33] The report stated further that these harmful tax practices undermine the integrity and fairness of tax systems; discourage compliance by all taxpayers; cause undesirable shifts in the tax burden to less mobile tax bases such as labour, property and consumption; and increase the administrative costs and compliance burdens on tax authorities and taxpayers.[34] In order to counter those harmful tax practices, the OECD recommended certain anti-avoidance measures that countries should to adopt in order to enhance the effectiveness of their domestic legislation in curbing offshore tax avoidance.[35]

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26 Kesti *KPMG European tax handbook* (2013) 14.

27 Bennet *International initiatives affecting financial havens* (2001) 115.

28 The 'Code of conduct' is a political commitment, not a legally enforceable rule. See Bratton & McCahery ''Tax coordination and tax competition in the European Union: evaluating the code of conduct on business taxation' (2001) 28 *Common market law review* 677.

29 Terra & Wattel *European tax law* (4ed 2005) 284.

30 *Ibid*.

31 OECD *Harmful tax competition* (1998) par 74.

32 A harmful preferential tax regime can occur in both tax haven and high-tax jurisdictions. Harmful tax regimes are characterised by having no or low effective tax rates on income; the regimes are ring-fenced and there is a general lack of transparency and effective exchange of information with other countries. *Id* at par 75.

33 OECD n 31 above at par 75; Spitz & Clarke *Offshore service* (2002) at OECD/3.

34 Ware & Roper *Offshore insight* (2001) 27.

35 OECD n 31 above 67–71.

Over the years, the G8/G20 have reinforced the EU and OECD initiatives tackling harmful tax competition and obtaining information about transactions in tax havens and preferential tax regimes.[36] Despite the OECD's 1998 Report on Harmful Tax Competition,[37] there was no political will among the governments of rich economies to deal with their own harmful tax practices and preferential tax regimes.[38] Instead, the OECD, under its Global Forum, placed emphasis on ensuring that tax havens implement its standards of transparency and exchange of information for tax purposes, and that they exchange information on investments by foreign residents in their jurisdictions.[39]

THE OECD BEPS PROJECT

In the aftermath of the 2007/8 global financial crisis, concerns about MNE not paying their fair share of taxes again took centre stage, engineered by non-governmental organisations like Christian Aid[40] and the Tax Justice Network,[41] which voiced public concerns about companies paying little or no corporation tax in the countries in which they conduct business. As a

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36 G8 Information Centre: the Birmingham Summit 'G7 Initiative on harmful tax competition' (15–17 May 1988). Available at: http://www.g7.utoronto.ca/summit/1998birmingham/harmfultax.html (last accessed 3 July 2015).

37 See Diamond & Diamond n 24 above at INTRO 13.

38 Avi-Yonah 'Prepared testimony of Reuven S Avi-Yonah, Irwin I Cohn Professor of law, University of Michigan Law School before the US Senate Permanent Subcommittee on Investigations, Hearing on offshore transactions' (1 August 2006). Available at: http://hsgac.senate.gov/_files/STMAviYonahUafMI.pdf#search=%22Prepared%20testimony%20of20Avi-Yonah%20before%20permanent%20subcommitte%20 (last accessed 18 May 2015).

39 OECD 'Tax co-operation towards a level playing field: 2007 assessment by the Global Forum on taxation'. Available at: www.oecd.org/document/29/0,3343,fr_2649_201185_39473821_1_1_1_1,00.html–27k (last accessed 9 April 2015).

40 Aid 'Death and taxes: the true toll of tax dodging' (May 2008) 21 23. Available at: http://www.christianaid.org.uk/images/deathandtaxes.pdf (last accessed 28 September 2014).

41 Tax Justice Network 'Economic crisis + offshore'. Available at: http://www.taxjustice.net/cms/front_content.php?idcat=136 (last accessed on 6 June 2015).

result, at the 2012 G20[42] summit in Mexico, the national leaders explicitly referred to the need to prevent BEPS[43] and, at the behest of the G20, in February 2013 the OECD released its BEPS Report.[44]

BEPS is enabled by the fact that the current international corporate taxation framework has not kept pace with the changing business environment.[45] Domestic rules for international taxation and internationally agreed standards remain grounded in an economic environment characterised by a lower degree of economic integration across borders, rather than today's environment of global taxpayers, which is characterised by MNE companies that are increasingly placing importance on intellectual property as a value-driver and the development of information and communication technologies. Although businesses increasingly cooperate across borders, the tax rules often remain uncoordinated, and businesses invent structures that are technically legal, but take advantage of asymmetries in domestic and international tax rules.[46] The OECD notes that 'what is at stake is the corporate income tax'.

ARE CORPORATE TAXES STILL RELEVANT?

Since its inception more than a century ago, the corporate income tax has brought various advantages to countries' tax systems. The corporate tax is an important backup for personal income tax and it can prevent excessive income shifting between labour income and capital income. Corporate taxes ensure tax on equity income earned by non-resident shareholders, which might otherwise escape taxation in the source country.[47] Corporate taxes also provide a means of preventing the deferral of taxes by wealthy individuals

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42 The G20 (Group of Twenty) is an international forum for the governments and central bank governors from 20 major economies. The members, include European Union and nineteen countries: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom and the United States. The G20 was founded in 1999 with the aim of studying, reviewing, and promoting high-level discussion of policy issues pertaining to the promotion of international financial stability. For details see Wikipedia 'G-20 major economies''. Available at: http://en.wikipedia.org/wiki/G-20_major_economies (last accessed 78 May 2015)

43 G20 'Leaders' declaration' (Los Cabos, Mexico 2012) Available at: http://g20mexico.org/images/stories/temp/G20_Leaders_Declaration_2012.pdf (last accessed 3 August 2013).

44 OECD n 1 above at 7.

45 *Ibid*.

46 *Id* at 49.

47 OECD *Fundamental reform of corporate income tax* (2007) 16.

who would be able to invest in foreign subsidiary companies and defer taxes indefinitely (until the corporation distributes dividends or when shares are sold).[48] Taxing corporate profits on an accrual basis, through the use of controlled foreign company legislation, ensures that individuals cannot use foreign subsidiaries as tax shelters. Corporate tax has also been used as an important vehicle by which to regulate corporate behaviour. It can be used as a disincentive for behaviour the legislator deems undesirable – for example paying bribes or participating in boycotts – or it can be used as an incentive for desirable behaviour, such as investments incentives, hiring incentives, clean energy incentives. [49]

This notwithstanding, some critics argue that corporate tax should be abolished as it has become very complicated and ineffective due to the tax avoidance strategies used by MNEs in the wake of globalisation and technological advances. The administrative costs of trying to make the corporate tax system work impose significant losses on the economies of many countries.[50] It is therefore contended that abolishing corporate taxes would not only reduce or eliminate the incentive to shift profits to low-tax jurisdictions, but would also eliminate all the time, effort and money that companies spend on tax avoidance. This would level the playing field for smaller domestic businesses that typically cannot afford to hire lawyers and accountants to devise the tax-avoidance strategies that give MNEs a potential competitive advantage. It is also argued that corporate tax amounts to an additional tax on income by individuals in that although the tax is levied on companies, it is ultimately borne by individuals. Thus levying corporate taxes amounts to double taxation since the tax on investment in corporate stocks which would already have been taxed when earned by the individual, is taxed again when it is paid out in dividends or sold subject to a capital gain.[51] The relative importance of corporate tax in developed countries has also been questioned. In general and across the OECD, corporate income tax raises, on average, revenues equivalent to around three per cent of GDP or about ten per cent of total tax revenue.[52] Data released by KPGM reveal that due to tax competition between countries, global

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48 Avi-Yonah 'Hanging together: a multilateral approach to taxing multinationals'. Available at: http://ssrn.com/abstract=2344760 (last accessed 24 May 2015).

49 *Ibid*.

50 *Ibid.*

51 *Ibid*.

52 *Ibid*.

corporate tax rates have generally declined between 2006 and 2013,[53] which poses questions as to the importance of corporate taxes in light of the challenges discussed above.

The importance of corporate income taxes in Africa

Despite the above arguments, the corporate tax system is a very important source of revenue in African countries and must be retained.[54] While in OECD countries corporate tax does not represent an important source of revenue, this is not true of developing countries where it generally contributes more than 25 per cent of total revenue. In Africa, the continental average is 29 per cent of total revenue.[55] It should also be noted that unlike in developed countries which derive reasonable amounts of revenue from individual income and consumption taxes, in many developing countries domestic economic activity is informal through businesses which maintain few if any bookkeeping and financial records. As a result, developing country governments' ability to raise revenue from individual and consumption taxes is limited. For these countries, it is important to generate revenue through corporate taxes, as they would otherwise have to rely entirely on the regressive value added tax. In Africa, corporate tax from MNEs represents a major portion of the tax base[56] revenue since the domestic corporate tax base is often limited. For developing countries the concerns raised by double taxation resulting from corporate taxation, are not that serious in that a number of those shouldering the tax burden – for example the providers of capital and consumers – are non-residents. It should also be noted that in most African countries much of the corporate tax is levied on corporate profits derived from rents for the exploitation of country-specific resources, which makes it an effective tax for the country.[57] From the above, it is clear that for developing countries, an effective international tax system is of vital importance as their development depends on it. Therefore, there is a need for African countries to be associated with the OECD BEPS project, as it has the potential to put an end to tax avoidance by MNEs and so help to raise corporate tax revenues.

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53 KPMG 'Corporate tax rates table'. Available at: http://www.kpmg.com/global/en/services/tax/tax-tools-and-resources/pages/corporate-tax-rates-table.aspx (last accessed 24 May 2015)

54 Avi-Yonah n 48 above.

55 *Ibid*.

56 Durst 'Beyond BEPS: a tax policy agenda for developing countries' (June 2014, ICTD Working Paper 18) 8.

57 Avi-Yonah n 48 above.

Importance of corporate taxation in domestic resource mobilisation to ensure sustainable development in Africa

At the United Nations Millennium Summit held on 6 September 2000 in New York, world leaders committed their nations to a new global partnership to reduce extreme poverty by 2015.[58] They came up with the Millennium Development Goals which focus on mobilising resources to address the major gaps in human development. Building on the Millennium Development Goals, at the 2012 United Nations Conference on Sustainable Development in Rio de Janeiro, Brazil,[59] world leaders launched a set of Sustainable Development Goals that would promote sustained and inclusive economic growth. [60]

For decades, many African countries have relied on foreign donor aid to boost economic growth and fund government expenditure. Even though foreign aid has contributed significantly to development, it alone is not sufficient to ensure that African countries will achieve sustainable, equitable growth and poverty reduction. This is especially so now that many traditional donors from Europe and the USA have limited budgets because of the recession resulting from the 2007/2008 global financial crisis.[61] The volatility associated with external funding has forced African leaders to the realisation that external sources like foreign aid will be insufficient to meet the Millennium Development Goals and sustain progress beyond the 2015 target date.[62] In the current global economic context, the development of African economies must depend primarily on the efforts of African countries themselves – their ability to mobilise domestic resources from the public and

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58 UN 'Millennium Summit' (6–8 September 2000). Available at: http://www.un.org/en/events/pastevents/millennium_summit.shtml (last accessed 24 May 2015) The Millennium Development Goals are to: eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria and other diseases; ensure environmental sustainability; and to develop a global partnership for development.

59 Rio + 20 'United Nations conference on sustainable development'. Available at: http://www.uncsd2012.org/ (last accessed 25 May 2015).

60 UN 'Open Working Group proposal for sustainable development goals'. Available at: https://sustainabledevelopment.un.org/sdgsproposal (last accessed 24 May 2015).

61 Centre for Strategic and International Studies 'Paying for development: domestic resource mobilization'. Available at: http://csis.org/publication/paying-development-domestic-resource-mobilization (last accessed 3 December 2014).

62 North-South Institute 'Domestic resource mobilisation in Africa: an overview' (2012). Available at: http://www.nsi-ins.ca/wp-content/uploads/2012/10/2010-Domestic-Resource-Mobilization-in-Africa-An-Overview.pdf (last accessed 3 December 2014).

private sectors if they are to advance Africa's development agenda.[63] Domestic resources mobilised from both the public and private sectors and are vital for state-building.[64] The public sector does this largely through taxation, non-tax, and other forms of government revenue generation.[65] Since corporate taxes from MNE form a large proportion of many African countries' tax bases,[66] it is important to preserve this tax base as it has the potential to contribute considerably to domestic revenue mobilisation (DRM) which would play a big role in fostering long-term financing for sustainable development and thereby ensure government funding of public goods and services. It would also ensure that African countries are weaned off the long- term aid dependency so that they have their own stable and predictable sources of revenue. African countries could then take ownership of their development policies so enabling them to implement strategies that reflect their development priorities. This would facilitate effective fiscal planning in that resources could be allocated to priority sectors rather than being constrained by donor conditions which often dictate the sectors to which financial aid should flow.

Although in recent years DRM has grown in many African countries (DRM in sub-Saharan Africa is estimated to constitute about 70 per cent of development finance, with the remaining 30 per cent being made up by loans, foreign financial aid or other forms of public finance), there are still enormous challenges facing DRM in sub-Saharan Africa. This is because the tax bases across much of Africa are very narrow and the tax burden falls disproportionately on the small formal sector of the economy.[67] In addition, savings in most African countries are low and institutional capacity to mobilise domestic resources is weak.[68] DRM is also hampered by the fact that many African countries grant tax incentives to foreign investors in order to attract foreign investments, but tax incentives have been seen to distort resource allocation leading to sub-optimal investment decisions which are harmful to long-term growth. Many African tax statutes also allow various costly tax exemptions in terms of revenue lost. The exemptions complicate

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63 UNCTAD Report 'Economic development in Africa' (2007) ch 1.

64 See North-South Institute n 62 above.

65 *Ibid*.

66 See Durst n 56 above at 8.

67 See North-South Institute n 62 above.

68 Culpeper & Bhushan, International Centre for Trade and Sustainable Development 'Why enhance domestic resource mobilisation in Africa?'. Available at: http://www.ictsd.org/bridges-news/trade-negotiations-insights/news/why-enhance-domestic-resource-mobilisation-in-africa (last accessed 3 Dec 2014).

tax systems and open the door to political interference and corruption.[69] The limited tax reporting, low levels of tax education among the population, as well as the general culture of non-tax compliance, weak capacity, and inadequate resourcing of most tax administrations, coupled with the lack of political will to insulate tax administration from political incursions, all contribute to low DRM.

Tax officials also often have a high discretionary power which leads to pervasive corruption and the lack of transparency which inhibit citizens' willingness to comply with tax laws. The fact that many African countries levy high taxes coupled with the incomprehensive and complex tax legislation in some countries, further encourages tax evasion and tax avoidance and undermines collection. Over and above these factors, the main stumbling block to DRM in Africa is capital flight as discussed below.

BEPS AND PERSPECTIVES ON CAPITAL FLIGHT IN AFRICA: DISTINGUISHING LEGITIMATE AND ILLICIT FINANCIAL FLOWS

From a legal perspective, it is important to clarify that the problem of capital flight in Africa falls under two main categories: legitimate capital flight and illicit capital flight. The civil society organisation 'Global Financial Integrity' notes that 'Illicit financial flows are by far the most damaging economic problem facing Africa' and are considered the 'most pernicious global development challenge of our time'.[70] There is, however, no universally agreed definition of illicit financial flows and its boundaries are disputed. The term generally implies the movement of money in a way that contravenes the laws or regulations of a country. These money movements can be the result of illegal activities like tax evasion, organised crime, customs fraud, money laundering, terrorist financing, and bribery. However, some controversial definitions include in illicit financial flows certain corporate tax avoiding practices, such as BEPS despite their being legal.[71]

The OECD acknowledges that although there are cases of illegal abuse (which are the exception rather than the rule), MNEs engaged in BEPS

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69 *Ibid*.

70 Baker *Capitalism's Achilles heel: dirty money and how to renew the free-market system* (2005) 25.

71 Rowe, Bolger, Payne & Shubert 'Policy options for addressing illicit financial flows: results from a Delphi Study' (2014) 4.

comply with the legal requirements of the countries involved in that they use legal methods to circumvent the application of a country's tax law. The exceptions could (as explained above) cover cases where taxpayers secretly conceal their foreign investments from their domestic tax authorities thereby blurring the dividing line between illegal tax evasion and tax avoidance. In the past, taxpayers have made use of banking secrecy rules that operated in tax haven jurisdictions and certain low-tax countries, by which the ownership of assets, or income, or their business transactions are kept from the knowledge of the tax authorities.[72] Because of the secrecy involved, these activities are difficult to monitor which has prompted certain civil society organisations to equate the resulting BEPS to illicit financial flows. It is, however, worth noting that in its 2014 report on 'Illicit Financial Flows from Developing Countries Between 2003 and 2012', Global Financial Integrity stated that capital flight includes both legitimate and illicit capital and that legitimate capital flight is recorded and tracked, thereby significantly lowering the probability that it has a corrupt or criminal source. In contrast, illicit financial flows are by nature unrecorded, and cannot be used as public funds or private investment capital in their country of origin.[73]

This notwithstanding, over the last few years public confusion been created by a strong drive from certain civil society organisations (*eg* Oxfam, Global Financial Integrity and the Tax Justice Network) which have to come up with estimates by which to approximate BEPS behaviour by equating BEPS with illicit finical flows. There are, however, very few studies that have reliably evaluated the extent of illicit capital transfers from Africa. This is due in part to the unavailability of data from and the lack of transparency in the entities involved in these transactions. The main estimates in this regard have been produced by studies carried out by Global Financial Integrity which estimated that the tide of tax and illicit capital flight from African is between US$50billion and US$80 billion per annum, and that in certain cases revenue lost exceeds the level of aid received.[74] Furthermore, over a

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72 United Nations Ad Hoc Group of Experts on international co-operation in tax matters international cooperation in tax matters *Guidelines for international cooperation against the evasion and avoidance of taxes (with special references to taxes on income, profits, capital, and capital gains*) (1984) 18.

73 Kar & Spanjers *Global financial integrity 'illicit financial flows from developing countries: 2003 2012* (2014) par 2. Available at: http://www.gfintegrity.org/wp-content/uploads/2014/12/Illicit-Financial-Flows-from-Developing-Countries-2003-2012.pdf (last accessed 22 June 2015).

74 As reported by Thabo Mbeki Foundation 'Tackling illicit capital flows for economic transformation'. Available at http://www.thabombekifoundation.org.za/Pages/Tackling-

thirty-nine-year period, Africa lost a staggering US$854 billion to cumulative capital flight. Even though there are significant regional differences, the overwhelming bulk of capital flight through illicit means was from sub-Saharan African countries. Western African countries, particularly those with natural resources, have also seen very high levels of illicit transfers.[75] Illicit financial flows from Africa are said to have spiked between 2000 and 2008 relative to the earlier decades, driven in the main by increased average outflows from the West, Central and Southern regions due to rising income levels fuelled by a global spike in the price of commodities.[76] Global Financial Integrity notes that 'these illicit outflows sapped 5,7 per cent of GDP from sub-Saharan Africa over the last decade, more than any other region in the developing world.[77] Perhaps most alarmingly, outflows from sub-Saharan Africa were found to be growing at an average inflation-adjusted rate of more than 20 per cent per year, underscoring the urgency with which policymakers should address illicit financial flows.'[78]

In another 2013 joint report by Global Financial Integrity and the African Development Bank, it is reported that

> the problem with illicit outflows from Africa is so severe that after adjusting all recorded flows of money to and from the continent (e.g. debt, investment, exports, imports, foreign aid, remittances, etc.) illicit financial outflows from Africa between 1980 and 2009 meant that Africa was a net creditor to the rest of the world by up to US$1.4 trillion.[79]

Global Financial Integrity reports that South Africa alone has lost out on billions in tax revenue over the past decade as large corporations, wealthy individuals, and criminal syndicates slipped nearly R1trillion out of the country. South Africa suffered 'illicit financial flows' totalling more than

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Illicit-Capital-Flows-for-Economic-Transformation.aspx (last accessed 9 March 2015); see also African Tax Administration Forum 'Twenty one African countries finalise mutual agreement in collecting taxes'. Available at: http://www.ataftax.net/news/ataf-in-the-media/twenty-one-african-countries-finalise-mut (last accessed 26 June 2015).

75 See Thabo Mbeki Foundation n 74 above.

76 *Ibid*.

77 *Ibid*.

78 Global Financial Integrity 'GFI welcomes new US-Africa partnership to combat illicit finance' (2014) 2.

79 African Development Bank and Global Financial Integrity 'Illicit financial flows and the problem of net resource transfers from Africa: 1980–2009' (2013) 2.

$122 billion between 2003 and the end of 2012.[80] Furthermore, in 2012 alone, $29,1billion left the country 'under the radar'. In proportion to the size of the economy, South Africa's illicit financial flows amounted to 7,6 per cent – nearly twice the average for developing countries.

Several economic models have been used to estimate illicit financial flows and capital flight. The most widely used model subtracts the total funds actually used by a country from the total funds entering that country. The inflow of funds is defined as any increase in foreign debt plus incoming foreign direct investment. Funds used are those necessary to finance the deficit in the current account (one of the components of the balance of payments) and to add to the country's official reserves. If there are more funds coming in than funds being used, the resulting shortfall is regarded as illicit flows.[81] For example, a study carried out by Ndikuman and Boyce[82] (which came up with conclusions similar to those above) estimates that the total real capital flight from Africa between 1970 and 2004 amounted to $444 billion. This is equivalent to 104 per cent of Africa's exports and 124 per cent of its imports (2007 values). The study further found that capital flight amounted to an annual average of $49 billion for the period 2000–2008 which would account for fifty-four per cent of Africa's infrastructure financing gap.[83]

With tax non-compliance by MNEs not paying their fair share of taxes in the countries where they operate, many governments are also contemplating the vexed issue of determining and measuring the extent of tax evasion and/or avoidance.[84] Although the question of how much revenue is lost due to profit shifting is very interesting for the public, it has been noted that there are methodological flaws underlying the estimates which prevent them from

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80 See Kar & Spanjers n 73 above; 'Billions of rands leave SA under the radar' *Times Live.* Available at: http://www.timeslive.co.za/thetimes/2015/01/11/billions-of-rands-leave-sa-under-the-radar (last accessed 9 March 2015).

81 Kar & Cartwright-Smith 'Illicit financial flows from developing countries: 2002–2006' (2008). Available at: http://www.gfip.org/index.php?option=content&tas_k=view&id=274 (last accessed 6 March 2015). See also Thabo Mbeki Foundation n 74 above.

82 Ndikumana & Boyce 'Measurement of capital flight: methodology and results for Sub-Saharan African countries' (2010) 22/4 *African Development Review* 471–481.

83 See Thabo Mbeki Foundation n 74 above.

84 This exemplified by a UK pole which showed that 59% of the UK public thinks that tax avoidance is morally wrong. See Economia 'Majority says unacceptable to avoid tax' (2 March 2015). Available at: http://economia.icaew.com/news/march-2015/majority-says-unacceptable-to-avoid-tax#sthash.XUU2VtlW.dpuf (last accessed 18 May 2015).

being particularly reliable. For example, a Report by the Oxford University Centre for Business Taxation notes that some estimates approximate taxable income or tax payments in absence of tax avoidance by using profits from financial accounts multiplied by the statutory tax rate to capture differences between financial and tax accounting.[85] Other estimates approximate foreign capital stocks multiplied by a deemed return and an average tax rate without considering the role of tax incentives and tax base regulations.[86] Comparing taxable profits with these inadequate benchmarks reveals conceptual differences between the underlying statistics rather than the scale of profit-shifting activity.

Even though African countries, like other developing countries, face significant challenges which impact on revenue collection as a result of illicit financial flows, equating BEPS to illicit financial flows is not correct in terms of the international tax law norms. As indicated above, BEPS is as a result of a perceived weakness in the international tax laws, as well as the lack of administrative capacity fully to assess and audit international tax risks which are exploited by MNEs. Illicit financial flows arise from a wide range of illegal flows of money including organised crime, money laundering, terrorist financing, bribery, and customs fraud. Equating BEPS and illicit financial flows fosters confusion in understanding international tax principles and in solving the problem of capital flight.

Although all financial flows (whether illicit or legitimate) have an impact on revenue collection, the legal solutions to resolve legitimate BEPS issues differ from those required to resolve illicit financial flows. Curtailing BEPS requires reforming the international tax system and providing anti-tax avoidance measures – which is what the OECD BEPS agenda is all about. Curtailing illicit financial flows, on the other hand, requires criminal sanctions. It should also be noted that there is no single tax avoidance measure that can be used to curtail all BEPS schemes effectively. Transfer pricing legislation that is required to curtail transfer pricing schemes cannot be applied to curtail treaty abuse; nor can one apply controlled foreign

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85 Oxford University Centre for Business Taxation 'The tax gap for corporation tax' (2012) Paper 3 commissioned by the National Audit Office. Available at: http://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/TaxGap_3_12_12.pdf (last accessed 15 June 2015).

86 Fuest & Riedel '*Tax evasion and tax avoidance in developing countries: the role of international profit shifting'* (2010) *Oxford University Centre for Business Taxation Working Paper* 10/12.

company rules that are used to prevent the deferral of taxes, to curtail schemes involving excessive deductions of interest. That is why the BEPS Action Plan has various action items requiring countries to provide different anti-avoidance rules that can be applied to curtail BEPS that arises from the various tax avoidance schemes.

In the case of illicit financial flows, the use of the term illicit implies that the illegal nature of these activities calls for criminal action. Illegal tax evasion is a criminal matter, not a BEPS matter. Tax evasion has to be proved in terms of the respective countries' penal codes, as would be the case for any other criminal activities resulting in illegal movements of money. Illicit financial flows through 'trade mis-invoicing', which was estimated by Global Financial Integrity in 2012 to account for nearly 99 per cent of illicit financial outflows from Africa,[87] is not a BEPS matter and it should not be confused with the concept of 'transfer pricing' – a BEPS matter. Trade mis-invoicing falls under the category of revenue laws that deal with customs. It is a customs fraud which involves buyers and sellers presenting fraudulent documentation to customs officials. They falsify the value of their trade by under- or over-invoicing their documents to reflect less or more than the actual market value in order to circumvent the payment of customs duties.[88] The 2014 UNCTAD Trade and Development Report[89] notes that illicit flows of capital through developing countries due to trade mis-invoicing is one of the most pressing challenges facing policymakers since it costs countries billions of dollars in revenue. The UNCTAD report[90] recommends that in order to prevent channel financing through trade mis-invoicing, governments need to resort to capital management measures, including capital controls.[91]

There is no doubt that, as is the case with BEPS, international cooperation is required to address illicit financial flows. Indeed, at the August 2014 US/Africa Leader's Summit, US President Obama expressed concern about illicit financial flows from Africa. This resulted in an agreement between the US and certain African countries to form a partnership to curb illicit financial flows from African economies.[92] Commenting on this partnership,

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87 See Kar & Spanjers n 73 above.
88 See Times live n 80 above.
89 UNCTAD 'Trade and development: global governance and policy space for development' (2014) at 11.
90 *Ibid*.
91 *Ibid.*
92 See Global Financial Integrity 'GFI welcomes New US – Africa partnership' n 78 above.

Global Financial Integrity cautioned that any effective partnership must address deficiencies, in both the US and in Africa, which facilitate the haemorrhage of illicit capital from Africa.[93] Global Financial Integrity noted that 'for every country losing money illicitly, there is another country absorbing it. Illicit financial outflows are facilitated by financial opacity in tax havens and in major economies like the United States.' Further,

> while governance remains an issue for many African countries, structural deficiencies in the US financial system are just as responsible for driving the outflow of illicit capital. In effect, the US-Africa partnership on curbing illicit financial flows from African cannot place the onus entirely on the shoulders of African governments. The burden for curtailing these illicit flows must be shared equally by policymakers in the US and in Africa for this partnership to be effective.[94]

There is also no doubt that transparency, through the use or exchange of information between countries, will play a prominent role in exposing both BEPS and illicit financial flows. However, equating illicit financial flows and BEPS under the current legal framework is a misconception of the law, and addressing BEPs under the umbrella of the illicit financial flows is not in line with international tax law norms.

BEPS IN AFRICA

In Africa concerns about BEPS are not new. Like other developing countries, African countries have been victims of this practice for decades, with their residents shifting money to developed countries and tax haven jurisdictions.[95] The loss of tax revenue resulting from BEPS leads to critical under-funding of public investment that could help promote economic growth. It also impacts negatively on badly needed finances to fund public infrastructure such as roads, hospitals, and schools. BEPS undermines the integrity of the tax system. It discourages tax morality and encourages a perception that the tax system is unfair. This, in turn, undermines voluntary compliance by all taxpayers. It also undermines competition as MNEs enjoy

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93 *Ibid*.

94 *Ibid*.

95 A tax haven is described as a jurisdiction actively making itself available for the avoidance of tax that would have been paid in high-tax countries. See OECD Issues in international taxation No 1 n 5 above at 20; Ginsberg *International tax havens* (2ed 1997) 5–6; Roper & Ware *Offshore pitfalls* (2000) 5.

a competitive edge over enterprises that operate at domestic level (especially small and medium-sized enterprises).

It has to be pointed out that there are some MNEs whose business transactions in Africa are generally 'straight'. Such companies assert that their tax concerns in Africa are focused on core compliance rather than tax planning given the rising efforts of revenue officials to curtail tax avoidance. Furthermore, these companies contend that the relatively small size of African operations in certain sectors does not lend itself to tax planning projects which can have an overall impact on their global effective income tax rates. Nevertheless, African countries' tax officials deal with many cases of MNEs that are involved in tax avoidance schemes which are eroding their tax bases. There is also circumstantial evidence of this – for example, the famous SABMiller report by Action Aid[96] which exposed the tax 'dodged' by SABMiller in Africa (particularly in Ghana). Action Aid explains that many of the company's local beer brands like Castle, Stone, and Chibuku were developed in African countries like Ghana, South African and Zambia, but were sold by the London-based beer company SABMiller to its subsidiary in the Netherlands, to benefit from Netherland's advantageous tax rules which permit companies to pay low taxes on royalties.[97] Although there is circumstantial evidence that BEPS' activity is widespread in Africa, it is difficult to reach reliable conclusions as to what extent BEPS actually takes place. There is no accurate estimate of the amount of the profit shifted.[98]

FACTORS THAT EXACERBATE BEPS IN AFRICA

Lack of relevant international tax laws and lack of a clear understanding of how these laws work

Many African countries do not have proper international tax laws to counter BEPS. Historically the reasons for this lie in the fact that in most African countries strict exchange control regulations discouraged their residents from investing abroad. Many African countries adopted a policy encouraging domestic companies to produce goods for local consumption

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96 ActionAid 'Calling time: why SABMiller should stop dodging taxes in Africa' (2012) 6. Available at: https://www.actionaid.org.uk/sites/default/files/doc_lib/calling_time_on_tax_avoidance.pdf (last accessed 22 June 2015).

97 *Ibid*.

98 Fuest, Spengel, Finke, Heckemeyer & Nusser 'Profit shifting and aggressive tax planning by multinational firms: issues and options for reform' (2013) *Oxford University Centre for Business Taxation Discussion Paper No 13–078* 9.

and to provide services to the local economy thereby growing the local economy.[99] Those countries' tax systems prioritised the taxation of the domestic income of resident taxpayers.[100] This meant that the development of international tax laws in Africa lagged behind that of developed countries.

With the increasing internationalisation of economic relations, many African countries are now paying attention to international tax issues. This is especially so given that many African countries have large resource bases that are exploited by foreign investors.[101] Despite the various geo-political and infrastructural challenges that complicate doing business on the continent,[102] progress is being made by various countries to establish a positive environment which is encouraging investors to enter their markets. In the wake of these developments, foreign investors have over the past decade begun to recognise that: 'Africa is the new frontier of the global economy'.[103] The OECD also noted that: 'Africa is the new emerging markets investment frontier.'[104] As global capital starts flowing into frontier markets across Africa,[105] governments will have to deal with the resulting tax schemes. This, coupled with the globalisation of the world economy, implies that African countries can no longer isolate their tax systems. The development of multinational enterprises which have shifted their management structures from country-specific operating models to global models,[106] implies that African countries cannot ignore the need to draft the relevant international tax laws to address BEPS.[107] The adoption of

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99 Thuronyi *Tax law design and drafting* (1998) vol 2, ch 18 sec III B.

100 *Ibid*.

101 *Ibid*.

102 Corey 'Africa is the new frontier of global economy' (2008), quoting JA Simon the US ambassador to the African Union. Available at: http://www.america.gov/st/econ-english/2008/October/20081010111004WCyeroC0.1286432.html (last accessed 7 June 2014.

103 *Ibid*.

104 Santiso, OECD Development Centre 'Policy insight No 55: Africa: a new frontier for emerging markets' (2007). Available at: http://www.oecd.org/dataoecd/58/22/39733178.pdf (last accessed 7 June 2015).

105 Rodrik 'Global capital heads for the frontier' where he states that the so-called 'frontier market economies are the latest fad in investment circles. Though these low-income countries – including Bangladesh and Vietnam in Asia, Honduras and Bolivia in Latin America, and Kenya and Ghana in Africa – have small, undeveloped financial markets, they are growing rapidly and are expected to become the emerging economies of the future'. Available at: http://www.project-syndicate.org/commentary/frontier-market-economy-fad-by-dani-rodrik-2015-03#mPMikAToAiogq8md.99 (last accessed 18 May 2015).

106 OECD *Action Plan on Base Erosion and Profit Shifting* (2013) 25.

107 *Ibid*.

international tax rules has the added advantage of increasing the capacity of a country to enforce taxation of the domestic income of residents through provisions relating to the exchange of information on tax matters.

Tax treaty negotiation dynamics that contribute to BEPS

Double-tax treaties are an important aspect of international tax law. However, many African countries have signed only a few double-tax treaties and some of those treaties were entered into mainly as political gestures and not on the basis of significant capital flows from the developed countries concerned.[108] Many African countries took the view that they did not need double-tax treaties as signing treaties would result in the loss of taxing rights in that it means giving up part of the revenue from source taxation and being bound to restrictive bilateral treaty provisions (for example the provisions that require source countries to levy reduced withholding taxes on dividends and interest). However, over the last decade many African's countries' attitudes about tax treaties have changed which is demonstrated by their expanding tax treaty network. The new policy shift has come about because many African countries have now come to appreciate that despite the fact that tax treaties can be restrictive, there are benefits that flow from concluding as they can encourage and facilitate capital inflows from capital-exporting countries.[109] However, this puts African countries in a position whereby, in the absence of measures to counter tax avoidance, the treaties entered into can be abused resulting in BEPS. This is a major concern as the tax laws of most African countries are not sufficiently developed to prevent BEPS arising from the abuse of tax treaties.[110] Treaty abuse is exacerbated when countries negotiate treaty provisions that are not in their favour but rather reflect the position of the other contracting state.[111] The ability to negotiate favourable provisions depends largely on the treaty negotiating power of the relevant country. In general, developed countries are better skilled in negotiating tax treaties than developing countries.[112] The United Nations notes that:

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108 *Ibid.*

109 See Thuronyi n 99 above in ch 18 sec III B.

110 *Ibid.*

111 Akunobela 'The relevance of the OECD and UN Model Conventions and their Commentaries for the interpretation of Ugandan tax treaties' in Lang, Pistone, Schuch & Staringer *The Impact of the OECD and UN Model Tax Conventions on bilateral tax treaties* (2012) 1089.

112 PWC, EuropeAID *Implementing the tax and development policy agenda: final report on transfer pricing and developing countries* (2011) 21.

> Developing countries, especially the least developed ones, often lack the necessary expertise and experience to efficiently interpret and administer tax treaties. This may result in difficult, time-consuming and, in a worst case scenario, ineffective application of tax treaties. Moreover, skills gaps in the interpretation and administration of existing tax treaties may jeopardize developing countries' capacity to be effective treaty partners, especially as it relates to cooperation in combating international tax evasion. There is a clear need for capacity building initiatives, which would strengthen the skills of the relevant officials in developing countries in the tax area and, thus, contribute to further developing their role in supporting the global efforts aimed at improving the investment climate and effectively curbing international tax evasion.[113]

Negotiating tax treaties requires the tax authorities to be conversant with international tax law and tax treaty principles, as well as a certain level of technical knowhow. The challenge for most developing countries is the lack of administrative capacity to negotiate tax treaties.[114] When the residents of the other contracting state conduct business in the developing country and, under the tax treaty, pay no or minimal taxes in the source state, disputes often arise from a lack of understanding of the tax treaty. For tax officials not conversant with tax treaty issues, it is important to emphasise that, in general, treaties do not impose tax – rather they limit the taxes that can be imposed by the contracting states.[115] A treaty cannot impose tax where the income is not subject to tax under domestic legislation.[116] As understanding of this issue is very important as tax losses often arise from perceptions that the relevant transaction ought to have been taxed, whereas the domestic law does not provide for its taxation.

Limited tax administrative capacity

Many African countries have limited capacity to implement solutions to curtail BEPS. It is acknowledged that African tax systems are not homogenous, and that the levels of economic development in African countries varies immensely, as do the levels of capacity to deal with the challenges associated with BEPS.[117] To curtail BEPS, African counties need

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[113] United Nations *Handbook on selected issues in administration of double tax treaties for developing countries* (2013) at iii.

[114] See Thuronyi n 99 above in ch 18 sec III.

[115] Oliver & Honiball *International tax: a South African perspective* (2011) 273–274.

[116] *Ibid*.

[117] G20 Development Working Group on domestic resource mobilisation 'G20 response to 2014 reports on base erosion and profit shifting; and automatic exchange of information

to re-vamp their administrative capacity. This entails: employing competent tax officials in various fields such as accountants, lawyers and economists, who can understand and administer complex international tax laws. Continuous training is required to ensure that these officials keep abreast of current international developments. For African governments to hire and retain specialised tax officials, they need to adopt a policy which ensures that these officials are paid salaries comparable to those in the private sector. Administrative capacity also requires the training of such officials so that they gain technical expertise to carry out tax audits. Effectiveness in this regard necessitates the electronic and technological development of tax systems to handle BEPS issues, for example, those relating to automatic exchange of information in tax matters. Measures to improve the competency of tax officials must be combined with measures to ensure their integrity as this is key to enhancing revenue collection. The wide discretionary powers allowed tax authorities often encourage corruption. This must be rooted out.

These matters have already been recognised in a number of countries which have begun introducing reform programmes. These countries include: Ethiopia which is working on enhancing the capacity of the revenue authority – a central part of Ethiopia's public sector reform programme; Cameroon, which introduced administrative reforms in 2004 followed by the 2007 Fiscal Reform Commission; Tanzania, which introduced reforms to strengthen tax administration to curtail the extensive loopholes and rampant corruption; and Rwanda, which as a result of recommendations by the IMF, introduced tax policy reform measures from 2010.[118]

THE RELEVANCE OF THE OECD BEPS PROJECT TO AFRICA

The OECD 2013 BEPS Action Plan notes that in order to ensure international consensus in addressing BEPS, it would take into account the perspectives of developing countries.[119] However, criticism has been raised that the OECD agenda is driven by the interests of developed countries and that the interests of developing countries are not being addressed as they were not consulted as to tabling their concerns before the OECD 15 Point

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for developing countries' (2014). Available at: https://g20.org/wp-content/uploads/2014/12/16%20G20%20response%20to%202014%20reports%20on%20BEPS%20and%20AEOI%20for%20developing%20economies.pdf (last accessed 4 March 2015).

118 See Culpeper & Bhushan n 68 above.

119 See OECD *Action Plan on Base Erosion and Profit Shifting* n 106 above at 25.

Action agenda was drafted and closed. The OECD's initial regional consultations only served as orientations to a pre-existing plan which fell short of global equal participation in the formulation of the international tax reforms. Its BEPS Action agenda is criticised for embodying rules set by a few countries so reinforcing a system that exacerbates global inequality.[120]

The OECD's approach has also been criticised for not addressing fundamental international tax reforms or re-examining the basic principles of the international tax system which are pivotal in addressing BEPS, such as the allocation of tax income between residence and source countries. The OECD chose to focus on curtailing tax avoidance schemes by strengthening existing anti-avoidance provisions, to ensure that they would be more effective in curtailing BEPS under modern business models. However, since taxpayers have manipulated these anti-avoidance provisions to a point at which they have become ineffective, there is little reason to expect that strengthening the rules further will prevent BEPS. It has therefore been suggested that the OECD's BEPS Action agenda is a reactionary approach to meet revenue demands by European countries to cover their budgetary deficits after the 2007/2008 global financial crisis which left many of them in a position of capital importers and which are now disadvantaged by the international tax rules that were crafted to suit them. Now that damaging effects have been felt by rich countries, they have developed the political will to the find solutions to the problems that developing countries have been struggling with for decades. Criticism has also been levelled at the ambitious two-year period which the OECD granted countries to address the 15 BEPS Action agenda without consideration of the administrative, economic and systemic challenges that many developing countries face.

HOW SHOULD AFRICA RESPOND BE TO THE OECD BEPS ACTION PLAN?

No African country is a member of the OECD, and African countries are not bound to follow OECD recommendations. Although the primary focus of the

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[120] Francophone LIC Finance Ministers Network, Press Note 'LIC Ministers demand their fair share of global tax revenues' (9 October 2014). The Press Note states Finance Francophone LICs 'require a more fundamental reform of the international tax system in order to get their fair share of global tax revenues… current G20/OECD initiatives against tax avoidance and evasion are not tackling the key practices which most reduce LIC revenues…The cause of these problems is the lack of decision making power for LICs in global tax discussions. Consultation by the IMF and OECD cannot be sufficient: LICs need an equal seat at the table…'.

OECD is on its member countries, its additional goals of contributing to the expansion of world trade and the development of the world economy, also affect non-members.[121] It would, therefore, be in the interest of African countries to respond to the OECD recommendations since BEPS is a global challenge that requires a global solution. All countries (including African economies) have a shared interest in strengthening the integrity of the international corporate tax system.[122] Given that many African countries have large resource bases that are exploited by foreign investors,[123] it is important that they take proactive steps to prevent BEPS.

It is also important to note that in spite of all the above criticisms of the OECD BEPS agenda, one cannot but acknowledge that internationally, there has been a shift in the philosophies of some governments that encouraged the perpetuation of certain notorious tax avoidance schemes. For example, the Irish government has taken measures to close tax loopholes that permit the use of the 'double Irish sandwich' scheme which allowed companies registered in Ireland to be stateless and thus pay tax nowhere.[124] Switzerland has signed the Multinational Convention on Mutual Assistance in Tax Matters thereby committing to cooperate with other governments in exchanging information on tax matters.[125] The will to address BEPS does not only exist on a governmental and international level, but MNEs also appear to have pulled back on aggressive tax avoidance due to increasing concerns about reputational risks, as a result of the controversies in the United Kingdom over the tax arrangements of MNEs such as Starbucks, Amazon, and Google. Tax avoidance and resulting reputational risks are now a topic of discussion in company board meetings.

With the current global stance on BEPS, African countries should not be passive as regards OECD BEPS Action Plan; they should make use of this opportunity to ensure that their longstanding BEPS concerns are addressed while the international political will and support of the international community still stands. African countries should use the current

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121 See OECD 'History of the OECD'. Available at: http://www.oecd.org/document/63/0,2340,and_2649_201185_1876671_1_1_1_1,00.html (last accessed 20 November 2014).

122 See G20 Development Working Group on domestic resource mobilisation n 117 above at 8.

123 *Ibid.*

124 Institute of Development Studies 'Will changes to the international tax system benefit low-income countries' *Rapid Response Briefing* Issue 06 January 2014.

125 *Ibid.*

international political will to address BEPS, to combine their efforts in regional organisations such as the African Tax Administration Forum (ATAF – which promotes and facilitates mutual cooperation among African tax administrators) to develop a united position on BEPS priority concerns that are relevant to them. African countries should ensure they present their views on the different OECD discussion drafts on the various Action Plans. Currently, comments on these discussion drafts are dominated by representatives of big business and lobbyists from the tax-avoidance industry. Civil society mainly in developed countries has also provided detailed and constructive comments on all the discussion drafts but there has not been much comment from African countries. There is need for a stronger voice from Africa and increased civic education on fiscal matters. It is understood that the OECD is considering including in the BEPS or the post-BEPS agenda, concerns that affect developing countries, and that a final package of proposals is currently under discussion and being put together for final presentation to G20 Leaders in November 2015. This is important in order to achieve principled and sustainable reforms that can lay a foundation for international tax rules suited for the 21st century. It is incumbent on African countries to call on all stakeholders such as the G20 countries, international and regional organisations, civil society and donors, to raise awareness of the significance of BEPS issues in Africa by holding high-level political dialogues on these issues with the countries' Ministers of Finance and other relevant ministries.[126] There must be a change in attitude among African countries away from the impression that has been created that they are instruction-takers rather than decision-makers.

INITIATIVES IN AFRICA IN RESPONSE TO THE OECD BEPS AGENDA

Initiatives by regional bodies

In March 2014, the AFAF held a conference in Johannesburg, South Africa, on the Global Tax Agenda for Heads of African Tax Administrations and Ministries of Finance, bringing together participants from 29 African countries and OECD officials to consider an African response to the New Rules of the Global Tax Agenda and the G20/OECD-driven project on BEPS. In its Conference Outcomes Document,[127] the ATAF noted that the

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[126] See G20 Development Working Group on domestic resource mobilisation n 117 above at 8.

[127] ATAF 'Outcomes Document: consultative conference on new rules of the global tax agenda'. Available at: http://www.slideshare.net/DrLendySpiresFoundation/outcomes-

development of rules for global taxation should address the concerns of all countries, and that it should be inclusive to ensure that the international tax rules can be applied effectively by developed, emerging and developing countries. In this regard the ATAF notes that it is imperative that all African countries should be involved in the BEPS process and that Africa must participate in the OECD BEPS Project and use the opportunity to shape the issues in the 15-Action-Points project to address Africa's concerns and ensure that sufficient attention is given to the different levels of readiness of African tax administrations to address BEPS and the resource and capacity limitations they have.[128] The ATAF notes that much needs to be done to improve administrative capacity, broaden the tax base, and increase tax revenue in Africa as a proportion of GDP.[129] Consequently, committed to facilitate African participation in the Global Tax Agenda and to put in place structures to enable on-going dialogue about BEPS on the continent and internationally, so as to ensure that African countries understand the G20/OECD processes and can engage with these countries more productively.[130] To this end, the ATAF developed an African Work Plan on the Global Tax Agenda, in terms of which a 'Cross Border Taxation Technical Committee'[131] was established to provide guidance on an African BEPS approach and to give input on the OECD BEPS process. The ATAF recognises that Africa needs to re-examine its own regional tax cooperation and practices, and develop an approach on how the continent would engage with the rest of the world on these matters. It has, therefore, called on African countries to strengthen their support for and commitment to the ATAF as this will ensure the ATAF a greater impact in engaging with the OECD.[132]

Following its 2014 consultative conference on 'New Rules of the Global Tax Agenda', the ATAF convened another conference on 'Cross Border Taxation in Africa' in April 2015 in Johannesburg, South Africa. The conference focused on an African position on the BEPS Action points; and on providing African countries with an opportunity to define the base-

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ataf-consultative-conference-on-new-rules-of-the-global-tax-agenda (last accessed 28 April 2015.

128 *Ibid*.

129 *Ibid.*

130 *Ibid.*

131 ATAF Secretariat 'Ist Meeting of cross boarder technical committee' (21–22 November 2014).

132 See ATAF 'Outcomes Document' n 127 above.

eroding practises that are most relevant to Africa. Speaking at this conference, South Africa's Minister of Finance reiterated that it is critical that African countries use all opportunities to make inputs in the BEPS project, so as to ensure that the views and experiences of African countries shape the development of the potential BEPS-related solutions. African countries should further ensure that any redefinition of the international tax rules should take into consideration the needs and conditions of the African continent.[133] Furthermore: 'Africa must protect its own tax base and advance domestic resource mobilisation through a common voice, a common concern and a common action plan.'[134] The Minister remarked that the current global focus on international taxation offers a unique opportunity for African leaders to embark on their own continental taxation renaissance, which should include considering the establishment of a Tax Policy and Tax Administration Commission which is missing within the structures of the African Union. Such a commission would deal with harmonising the continent's tax policy, legislation and administration, as well as seeking ways to improve cross-border cooperation to optimise continental revenue mobilisation.[135] In this regard, the ATAF has indicated that it intends to formalise its engagement with the African Union at ministerial level, as it is of the view that the involvement of African heads of state in the implementation of agreed proposals contemplated in the OECD BEPS process, is critical to resolving BEPS in Africa. [136]

BEPS Initiatives at national level

Efforts to address BEPS in Africa have also been made at national level. In this regard, South Africa appears to have taken the lead in addressing BEPS in Africa. In July 2013, South Africa's Minister of Finance appointed a tax review committee (the Davis Tax Committee) to inquire into the role of South Africa's tax system in the promotion of inclusive economic growth, employment creation, development, and fiscal sustainability.[137] On the international front, the Committee is required to address concerns about 'base erosion and profit shifting' (BEPS), especially in the context of

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133 Nene 'African Tax Administration Forum conference on cross border taxation in Africa' (21 April 2015). Available at: http://www.gov.za/speeches/page-1-11-speech-minister-finance-mr-nhlanhla-nene-ataf-conference-cross-border-taxation (last accessed 28 April 2015).

134 *Ibid.*

135 *Ibid.*

136 *Ibid.*

137 The Davis Tax Committee 'Introduction'. Available at: http://www.taxcom.org.za/ (last accessed 12 May 2015).

corporate income tax, as identified by the OECD and the G20. In December 2014, the Davis Tax Committee released its first BEPS Interim Report for public comment. African countries are looking to South Africa for guidance on how to move forward on these issues and are to this end keenly following the work of the Davis Tax Committee. The outcomes of the work of the Davis Tax Committee are therefore of critical importance from a regional and continental integration point of view.

At the November 2013 'G-20 and Africa's Economic Growth and Transformation' meeting, South Africa's Minister of Finance stated that the South African Revenue Service (SARS) aims to ensure that companies and wealthy individuals pay their fair share of taxes.[138] The Minister noted that SARS was dealing with several cases of BEPS which impact on billions of Rand of tax payable to South Africa and that SARS had uncovered a number of cases 'of high net worth individuals who are not paying their fair share'. The Minister remarked that South Africa was taking a front-row seat in global tax reform.[139]

It is worth pointing out that although South Africa is not a member of the OECD, it was awarded OECD observer status in 2004[140] and is a member of the OECD BEPS Committee. South Africa is also the only African country that is a member of the G20. This does not mean that South Africa's membership in these international bodies is representative of the interests of African countries. Nevertheless, as a major economic power on the African continent, it important that South Africa champions the cause of Africa in the OECD BEPS Committee. As a member of the G20 Development Working Group, South Africa plays an important role in conveying the views of developing economies in Africa.[141]

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138 Kotch 'South Africa aims to lead in closing tax loopholes' *BusinessDay*. Available at: http://www.bdlive.co.za/africa/africanbusiness/2013/11/12/south-africa-aims-to-lead-in-closing-tax-loopholes (last accessed 12 Nov 2013).

139 *Ibid*.

140 See Olivier & Honiball n 115 above at 9.

141 See G20 Development Working Group on domestic resource mobilisation n 117 above.

INTERNATIONAL INITIATIVES THAT AFRICAN COUNTRIES SHOULD EMBRACE TO IMPROVE THEIR TAX SYSTEMS AND ADMINISTRATIVE CAPACITIES

United Nations' initiatives on BEPS

The UN has historically championed the cause of developing countries in international tax issues. Its work on international tax matters has been carried out by an Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries, formed in 1968, comprising tax experts and officials from twenty countries acting in their individual capacities and not representing their countries.[142] It was the work of this Ad Hoc Group of Experts that culminated in 1980 in the UN Model Double Taxation Convention between Developed and Developing Countries which favours of source countries. However, the effectiveness of the UN's work in this regard has been hampered by under-funding. As a result of the Monterrey International Conference on Financing for Development, which called for the strengthening of international tax cooperation through enhanced dialogue among tax authorities, and for special attention to be paid to the needs of developing countries and those in transition, the Economic and Social Council of the United Nations elevated the UN Ad Hoc Group of Experts on International Cooperation in Tax Matters to the status of a permanent UN Committee in November 2004. This change in status is likely to increase the voice of developing countries in international fora dealing with tax issues.[143]

The UN participates in the tax work of the OECD to provide insights into concerns peculiar to developing countries. Commenting on the causes of BEPS, the UN notes that historically, countries have viewed the development of domestic international tax laws as a matter for each sovereign state, and in making these decisions, more often than not, little or no account is taken of either the impact that their laws have on other countries, or the impact that the laws of other countries have on them.[144] However, the tax laws and policies of one country can adversely affect another country's ability to collect tax due to it. This may be an unintended effect, but whether it is intended or not, it has budgetary effects on the

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142 McIntyre *Developing countries and international cooperation on income tax matters: a historical view* (2015) at 23.

143 *Ibid.*

144 UN 'Subcommittee on base erosion and profit shifting issues for developing countries'. Available at: http://www.un.org/esa/ffd/tax/BEPS_note.pdf (last accessed 24 May 2015).

country that is losing tax revenue. These, in turn, impede its economic development.[145] If some countries do not tax their own multinationals effectively, this will motivate the multinationals to shift profits or to minimise their taxable presence in other countries where they operate,[146] or where they have their headquarters.[147]

The UN acknowledges that although developing countries also face issues related to BEPS in the same way as developed countries, the issues may manifest themselves differently given the specificities of their legal and administrative frameworks.[148] In October 2013, the UN Committee of Experts on International Cooperation in Tax Matters established a sub-committee on BEPS issues for developing countries[149] to monitor developments on BEPS, to communicate them to officials in developing countries, and to ensure that the developing countries' views are fed into the OECD/G20 BEPS project and on-going UN tax cooperation work. In 2014, the UN sub-committee released a questionnaire asking developing countries to provide feedback on their experience of BEPS and their principal BEPS concerns.[150] Developing countries that made submissions are: Brazil, Chile, China, India, Malaysia, Mexico, Singapore, Bangladesh, Thailand, Tonga. From Africa, feedback was received only from South Africa, Ghana, Lesotho and Zambia. Responses were also received from NGOs: Christian Aid & Action Aid, the Economic Justice Network, and Oxfam South Africa.[151] It is important that the UN is adequately funded to carry out its mandate.

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145 *Ibid.*

146 *Ibid.*

147 *Ibid.*

148 See OECD *Action Plan on Base Erosion and Profit Shifting* n 106 above at 26

149 See UN 'Subcommittee on base erosion and profit shifting issues' n 144 above.

150 UN 'Questionnaire: base erosion and profit shifting issues for developing countries'. Available at: http://www.un.org/esa/ffd/wp-content/uploads/2015/01/BepsIssues.pdf (last accessed 24 May 2015).

151 UN Committee of Experts on International Cooperation in tax matters tenth session 'Responses to questionnaire for developing countries from the UN subcommittee on base erosion and profit shifting' (31 September 2014); Peters 'Developing countries' reactions to the G20/OECD Action Plan on base erosion and profit shifting' (June/July 2015) *Bulletin For International Taxation* at 375 .

OECD initiatives on BEPS that can benefit Africa

Although the OECD's main concern is its member countries, the rise of emerging economies like the BRICS[152] countries that are influencing world economics, has moved the OECD to involve developing countries in issues relating to tax treaties and international tax laws. It has, for example, invited developing countries to serve as observers at some of its meetings. South Africa was awarded OECD observer status in 2004. The OECD has also selected some developing countries to register objections to positions taken by the OECD on its Commentary to its Model Tax Convention. However, these initiatives are unlikely to result in developing countries influencing the core decisions taken by the OECD on tax or other matters on which the OECD countries may take a strong position.[153] With respect to BEPS in developing countries, the OECD has made commitments to support developing countries' revenue authorities.[154] It has, for instance, pledged to help in the funding of capacity development in African tax authorities through initiatives like 'Tax Inspectors without Borders',[155] of which African countries should take advantage. This initiative enables the transfer of tax audit knowledge and skills to tax administrations in developing countries through a 'learning by doing' approach. Tax officials, who may be currently employed or have recently retired, are deployed to work directly with local tax officials on audits involving international tax matters, and to share general audit practices.[156]

G20 initiatives on BEPS in Africa

The G20 acknowledges that many developing countries have limited capacity to implement global BEPS solutions[157] and that this will affect their ability to reap the full benefits of international tax reforms.[158] The G20 countries have, therefore, pledged to work with developing countries to help them build effective tax systems so as to enforce BEPS rules, and to use tax

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152 The acronym BRICS stands for 5 emerging economies (Brazil, Russia, India, China and South Africa) are countries considered to be in a similar stage of newly advanced economic development are the leading emerging economies in the 21st Century.

153 See McIntyre n 142 above at 8.

154 OECD 'Strategy for deepening developing country engagement in the BEPS project' (2014). Available at: www.oecd.org/ctp/strategy-deepeningdeveloping-country-engagement.pdf (last accessed 9 July 2015).

155 OECD 'Tax inspectors without boarders'. Available at: http://www.oecd.org/tax/taxinspectors.htm (last accessed 7 July 2015).

156 *Ibid*.

157 See G20 Development Working Group on domestic resource mobilisation n 117 above.

158 *Ibid*.

data (*eg* audit capacity) effectively to ensure compliance with international norms and standards. The G20 also recognises that the economic development of African countries varies immensely as does the level of development of their tax laws and their administrative capacity to deal with the challenges associated with implementing international tax reforms.[159] Thus, an assessment of how to strengthen tax systems must be undertaken on a case-by-case basis.[160] The G20 recognises that developing economies need regular, proactive engagement in the G20/OECD BEPS process, particularly for those countries that may be more difficult to reach due to geography, capacity, size or other reasons[161] that may impact upon their ability effectively to implement and benefit from the outcomes of the BEPS Action Plan.[162] These countries may require tailored approaches to implement the outcomes of the BEPS Action Plan without undermining the integrity of the international tax system. The African countries in which the G20 reported activity are: Tanzania, Kenya, Uganda, Rwanda and Ethiopia.[163] In these countries measures have been taken to provide support for capacity development with a focus on shaping the fundamental building blocks of tax policy and administration to ensure that their economies can reap the full benefits of international tax reforms and mobilise domestic resources for development. In particular, G20 members have on a voluntary basis, committed themselves to making tax policy and administration experts available, based on the resource needs of the relevant countries. The G20 Development Working Group on BEPS[164] has been actively involved in Africa, partnering with regional tax and economic organisations such as: the ATAF, the African Organisation of English-speaking Supreme Audit Institutions, the East African Community, the Economic Community of West African States, and the West African Economic and Monetary Union.[165] G20 members have also committed to taking practical steps to support regional tax administration fora in fulfilling their role as a bridge between the international tax agenda and developing economies, by facilitating capacity building though providing financial or in-kind support and participating in an advisory or knowledge-sharing capacity. The G20 has also called on the OECD, IMF, UN, and World Bank Group to work together and, in conjunction with regional tax administration fora, to come up with practical

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159 *Ibid*.
160 *Id* at 5.
161 *Id* at 8.
162 *Ibid*.
163 *Ibid*.
164 See G20 Development Working Group on domestic resource mobilisation n 117 above at 15.
165 *Id* at 17.

toolkits to assist developing economies in implementing appropriate BEPS action items, depending on the outcome of each BEPS action item. The toolkits are to be coordinated and developed during 2015 and 2016, depending on when the relevant action items are completed, and are intended to prioritise action items that have the greatest impact on developing economies.[166]

ADDRESSING THE OECD BEPS ACTION PLAN FROM AN AFRICAN PERSPECTIVE

Although the OECD BEPS Action Plan may have been well-intentioned, as explained above it was not drawn up in consultation with developing countries and consequently, does not address their immediate BEPS concerns. Even though BEPS is a global concern, the nature of BEPS concerns is not uniform for all countries. Certain BEPS schemes that work to undermine the European or American tax bases often do not coincide with the African paradigm. The BEPS challenges that African countries (which are mainly capital importing countries) face may be different in nature and scale from those faced by developed countries (mainly capital exporting countries).[167] Since the level of development of most African countries' international tax laws still lags behind that of developed countries, and since many of them have low administrative capacity, most of the OECD 15 Point Action Plans will in all likelihood benefit African countries in the long term, as and when their economies and administrative capacities improve. It should also be noted that the BEPS project does not explore certain practical measures (such as withholding taxes) which may be more suitable for African countries in addressing BEPS. The 'G20 Development Working Group Domestic on Resource Mobilisation for Developing Countries' notes that due to the specific challenges faced by developing countries, the highest priority actions that have the greatest impact for developing economies are:[168]

- Action 4: limit base erosion via interest deductions and other financial payments.
- Action 6: prevent treaty abuse.
- Action 7: prevent the artificial avoidance of PE status.
- Action 10: assure that transfer pricing outcomes are in line with value creation with respect to other high-risk transactions.

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166 *Id* at 6.

167 *Ibid*.

168 See G20 Development Working Group on domestic resource mobilisation n 117 above at 8.

- Action 12: require taxpayers to disclose their aggressive tax planning arrangements.
- Action 13: re-examine transfer pricing documentation.

It must be noted, though, that these Action Plans do not necessarily enjoy top priority in all African countries, given their different levels of economic development and administrative capacity. The above priority concerns are not so different from the responses to the UN Subcommittee of BEPS to its questionnaire about the priority BEPS concerns of developing countries, which emerged as:[169]

- Action 4: excessive interest deductions associated with related party debt.
- Action 6: treaty shopping.
- Action 12: disclosure of aggressive tax planning.
- Action 13: transfer pricing documentation concerns.
- Action 8: transfer pricing of intangibles.
- Action 10: transfer pricing and other high risk transactions.[170]
- Action 5: to a lesser extent, harmful tax practices.

Other concerns related to capacity building and a lack of information since revenue authorities in developing nations struggle to establish, grow and up-skill effective international tax teams.[171]

The ATAF Cross Border Taxation Technical Committee created in 2014 to define the African position on BEPS, has set up Working Parties that are participating in the OECD placing priority on:

- Working Party 1: tax conventions and related questions.
- Working Party 2: tax policy analysis and tax statistics.
- Working Party 6: taxation of multinational enterprises.
- Working Party 11: aggressive tax planning.

ATAF holds the view that the OECD BEPS process notwithstanding, Africa must come up with customised solutions to protect its own tax base, with a customised approach to assist African countries and groups of countries in similar positions to ensure domestic resource mobilisation. This is especially

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169 See UN Committee of Experts 'Responses to questionnaire for developing Countries' n 151 above at 3.

170 *Ibid*; see also Peters '"Developing countries" reactions to the G20/OECD Action Plan' n 151 above at 337.

171 *Ibid*.

so because Africa is fast becoming the investment destination of choice and its economic growth is set to be even faster over the medium term.[172]

In Part 2 of this paper on BEPS in Africa, I shall discuss three OECD BEPS Action items that are of priority to many African countries.

- Action 4: limit base erosion via interest deductions and other financial payments
- Action 6: prevent treaty abuse
- Action 7: prevent artificial avoidance of PE status.

CONLUDING REMARKS

In concluding Part 1 of this article on BEPS in Africa, it is important to note that the development of rules for global taxation should address the concerns of all countries, which must all participate equally in the formulation of the international tax reforms. The rules should be inclusive to ensure they are applied effectively by developed, emerging and developing countries. If the reform rules are set by a few countries, the outcome will be a system that exacerbates global inequality. International cooperation is required to address BEPS. Countries should not look out for their own interests, as this will inadvertently result in double non-taxation.

Since BEPS is a global concern, African countries should associate themselves with the OECD recommendations to address BEPS, as they have much more to lose in an ineffective international corporate tax system in that a large portion of their tax revenue is generated from MNEs that have invested in those countries. A strong voice from Africa from both governments and civil society is needed to comment on BEPS Action items from an African perspective. In this regard, it is important that African countries unite under regional bodies such as the ATAF to participate in the OECD BEPS project and to use the opportunity to shape the issues in the 15 Point Action items to address Africa's concerns. It is also imperative that African countries take advantage of the initiatives taken by international organisations such as the UN, OECD and G20, to capacitate their tax administrations and to help them build effective tax systems so that they can reap the full benefits of international tax reforms.

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[172] See ATAF 'Outcomes document' n 127 above.