ICTD

Literature Review

International Tax

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Introduction

Taxation is an essential function of the modern state. Broadly speaking, international taxation refers to the 'international' elements of national tax policies.[1] Thus, international taxation encompasses the taxation of cross-border economic activity, both foreign direct investment (FDI) from multinational enterprises (MNEs), and foreign portfolio investment (FPI), by national governments. While taxation is fundamentally the right of governments, the transborder nature of international investment can present problems where governments do not coordinate their tax systems. On the one hand, there can be competing claims to the same foreign income by the home and host countries, which can lead to double taxation, which can in turn have a dampening effect on foreign investment.[2] Or, on the other hand, it can lead to the situation where MNEs can exploit gaps in the tax systems of countries to minimise their tax bills, leading to double under taxation.[3] Because neither of these situations is ideal, governments have cooperated to mitigate these problems by agreeing to certain rules, principles and norms around the division of taxing rights over foreign investment. Increasingly also, governments have focused cooperative efforts at mitigating the impacts of tax avoidance and evasion. Resulting from this is an 'international regime' or 'legal order' of principles, norms, standards and 'soft laws' that guide and coordinate national tax policies to overcome these two issues.[4] These rules, though non-binding, are very influential and have set the parameters around how states tax cross border economic activity for roughly a century. Cooperative efforts on international taxation are centred in the core institutions of the regime, namely the Organisation of Economic Cooperation and Development (OECD) and the United Nations' Committee of Experts on International Cooperation in Tax Matters.

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1 Brian J. Arnold and Michael J. McIntyre, International Tax Primer, 2nd ed. (The Hague: Wolters Kluwer Law and Business, 2002), pp.2-3.

2 Martin Hearson and Wilson Prichard, 'China's Challenge to International Tax Rules and the Implications for Global Economic Governance', International Affairs 94, no. 6 (1 November 2018):, p.1291, https://doi.org/10.1093/ia/iiy189.

3 Ibid.

4 Reuven S. Avi-Yonah, 'Introduction: Is There an International Tax Regime? Is It Part of International Law?', in International Tax as International Law (Cambridge University Press, 2009), 1–21, https://doi.org/10.1017/cbo9780511511318.001.

In the literature on international taxation, the international tax regime (ITR), and developing countries marks several important themes and issues. First, a prominent strand of the literature notes that the sets of rules, norms, standards, principles and institutions that make up the ITR have, for the most part, served to benefit and enhance the taxing rights of developed countries. Moreover, even under new, more inclusive arrangements in standards-setting bodies, structural issues remain which present barriers to greater representation of developing countries in the ITR. Second, the issues surrounding allocation of the tax base between developed and developing countries in tax treaties, is a significant issue, although there appears to be some promising signs with respect to treaty cancellations and negotiations that may seek to redress the balance in some specific cases. Third, tax competition, avoidance and evasion appear to disproportionately impact less developed countries. However, many of the international efforts aimed at tackling these appear remain challenging for many less developed countries to implement, due to ongoing capacity constraints in many of these countries' as well as the degree of complexity of the standards.

The review is organised into four sections. The first section establishes the concept of the ITR and introduces the basics of international taxation that underpin the regime, specifically focusing on the core goals of the ITR highlighted above: the eradication of double taxation, tax competition, in addition to transfer pricing, which is a key part of the ITR. The second section goes on to discuss the literature on the main institutions of the ITR, focusing on the OECD and the UN primarily. Section three then turns the focus to several prominent issues identified in the literature that many less developed countries face in international taxation: asymmetry in tax treaty negotiations, persistent tax competition, the role of tax evasion and avoidance, and complexity of international standards. The final section focuses on four key areas where significant reforms and changes are occurring in the ITR: simplified and alternative proposals to transfer pricing, proposals for world tax organisations, a review of recent tax treaty renegotiations and cancellations by developing countries, and finally, a brief examination of current digital taxation work. A final section concludes the literature review.

International Taxation: Core Principles

While there has been disagreement in the literature over whether there is a specific regime[5] relating to international taxation,[6] thinking of international taxation as a governance regime helps to conceptualise the collection of rules, norms, and principles that underpin international taxation, as forming part of a cohesive legal 'order.'[7] Broadly speaking, the institutional origins of the ITR stem from the work of the League of Nations during the 1920s and

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5 Reuven S. Avi-Yonah, 'Introduction: Is There an International Tax Regime? Is It Part of International Law?', in Interntional Tax as International Law (Cambridge University Press, 2009), 1–21. International relations scholar, Stephen Krasner, classically defines an international regime as 'principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area. See: Stephen D Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', International Organization 36, no. 2 (1982): p. 185.

6 See Avi-Yonah, 'Introduction: Is There an International Tax Regime? Is It Part of International Law?' for a discussion of this literature.

7 Allison Christians, 'BEPS and the New International Tax Order', Brigham Young University Law Review 2016 (2016).

1930s.[8] Many of the foundational principles, norms, and indeed, issues, of the ITR that are still in use today can be traced back to soft law (that is, legally non-binding) standards from this period. The original architects sought to achieve the coordination of national tax policies around the elimination of double taxation of foreign investment, while simultaneously preserving tax sovereignty.[9] Literature on the negotiation processes around the creation of these standards notes the outcomes were largely the product of compromises between key capital exporting states, who preferred allocation of taxing rights in their favour – the residence principle, and industrialised capital importing states, who preferred the 'source' principle.[10] As Genschel and Rixen explain, the disagreements between these original negotiators over the two principles prevented a binding, multilateral treaty, and instead resulted in several different 'model conventions' that differed in their scope of residence and source taxation, but which nevertheless rested on the same fundamental principles of international taxation.[11]

Since this period, a complex, multi-layered, highly technical tax governance regime has grown, largely with the help of the OECD.[12] The early monopoly of international tax expertise that the OECD enjoyed, in conjunction with the convergence of core wealthy states around a common set of standards, cemented a set of guidelines, standards and norms of international taxation. [13] The result is, as Genschel and Rixen argue, a resilient, and highly influential regime, that forms the focal point of international tax rules – including bilateral treaties – today.[14] This early dominance of developed country interests in the ITR, has resulted in standards that have reflected the interests of developed countries, that have since been 'globalised' and exported to the rest of the world.[15] Indeed, Christians argues that many international tax dialogues have excluded many less developed countries, which has positioned many of these countries in a 'responsive' role vis-à-vis the international tax regime.[16] The next section below focuses on the core principles, standards and issues that have arisen over the allocation of the tax base in service of eliminating double taxation, before moving on to the problem of tax competition.

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8 Sunita Jogarajan, 'Prelude to the International Tax Treaty Network: 1815-1914 Early Tax Treaties and the Conditions for Action', Oxford Journal of Legal Studies 31, no. 4 (2011): 7, https://doi.org/10.1; Michael J Graetz and Michael M O'hear, 'The "Original Intent" of U.S. International Taxation', Duke Law Journal 46 (1997): 1021–1110; Sol Picciotto, International Business Taxation A Study in the Internationalization of Business Regulation (Cambridge: Cambridge University Press , 1992); Thomas Rixen, 'From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance', Review of International Political Economy 18, no. 2 (May 2011): 197–227, https://doi.org/10.1080/09692290.2010.481921.

9 Phillipp Genschel and Thomas Rixen, 'Settling and Unsettling the Transnational Legal Order of International Taxation', in Transnational Legal Orders (Cambridge University Press, 2015), 154–84, https://doi.org/10.1017/CBO9781107707092.006.

10 Ibid. pp.159-160.; Sunita Jogarajan, Double Taxtion and the League of Nations (Cambridge: Cambridge University Press, 2018); Graetz and O'hear, 'The "Original Intent" of U.S. International Taxation'.

11 Genschel and Rixen, 'Settling and Unsettling the Transnational Legal Order of International Taxation'., pp. 159-60

12 Ibid., pp. 161-4.

13 Ibid.

14 Ibid., pp. 168-171.

15 Allison Christians, 'Global Trends and Constraints on Tax Policy in the Least Developed Countries', University of British Columbia Law Review 40 (11 August 2009),p. 239.

16 Ibid., pp. 239-240; see also Francis Horner, 'Do We Need an International Tax Organization?', Tax Notes International, 8 October 2001

1.1 Eradicating Double Taxation: Concepts of International Taxation

The products of the early international cooperation are a set of concepts that form the backbone of body of rules, standards, and norms in the ITR today.[17] As such, it is important to establish some of the core definitions and concepts of international tax upfront. First, double taxation refers to the problem where income from foreign investment by a corporation is taxed twice – once by the country where the investment takes place, and once again by the country that the corporation's headquarters are located. Second is the definition of residence and source countries. The residence jurisdiction is the jurisdiction where the investor resides – that is, it is the 'home' country of the firm. The source jurisdiction on the other hand, is the country where the investment takes place and where active income from that investment is earned.[18] Third, with respect to taxing rights between residence and source countries, the treaty architecture that emerged from the early period of the ITR established the principle that that source countries would get primary taxing rights over 'active' income realised through investment activities within their jurisdictional borders, while residence countries would get taxing rights over passive income earned from this investment activity.[19]

Turning to approaches to international taxation, to eradicate double taxation, two approaches to foreign taxation are available to governments: worldwide or territorial. In reality, most countries do not have a 'pure' worldwide or 'pure' territorial system in place, however for ease of explanation, it helps to imagine a pure worldwide or territorial system. In a pure worldwide approach, a state will tax an entity on its worldwide income, regardless of where that income is earned. Thus, according to the principle above, active income earned from investment is taxed by the source country, the residence country will also tax active and passive income from that investment once it is repatriated to the residence country.[20] Worldwide systems of taxation are usually accompanied with some form of credit or deduction method for the taxes paid on active income by an entity in a source country.[21] Worldwide systems can incentivise indefinite 'deferral' – that is, using offshore subsidiaries in low tax countries to defer the repatriation of income indefinitely by shifting this income to low or no tax jurisdictions – which can have a detrimental effect on the residence country tax base. In light of these issues of deferral many countries have enacted 'controlled foreign corporation' (CFC) rules to de-incentivise actors[22] from using offshore subsidiaries to divert this income from repatriation back to the residence state. Some countries with this tax system also included 'tax sparing' arrangements in their double tax treaties which enables their MNEs to take full advantage of tax incentives (such as 'tax holidays') offered by source countries. Tax sparing arrangements are essentially an agreement by the

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17 Avi-Yonah, 'Introduction: Is There an International Tax Regime? Is It Part of International Law?'

18 Thomas Rixen, The Political Economy of International Tax Governance (Palgrave Macmillan, 2008)., p.31

19 Reuven S. Avi-Yonah, 'Structure of International Taxation: A Proposal for Simplification', Texas Law Review 74 (1995); Reuven S. Avi-Yonah and Haiyan Xu, 'Evaluating BEPS', Erasmus Law Review 10 (2017): 4; Eric M. Zolt, 'Tax Treaties and Developing Countries ', UCLA School of Law, Law-Econ Research Paper (Los Angeles, 2018)., p. 115.

20 Céline Azémar and Dhammika Dharmapala, 'Tax Sparing Agreements, Territorial Tax Reforms, and Foreign Direct Investment', Journal of Public Economics 169 (1 January 2019): pp. 89–90, https://doi.org/10.1016/j.jpubeco.2018.10.013.

21 Rixen, The Political Economy of International Tax Governance., p. 33.

22 As Arnold notes: while these rules normally apply to multinational corporations, they can be used by wealthy individuals also, see Brian J., Arnold, 'The Evolution of Controlled Foreign Corporation Rules and Beyond', Bulletin for International Taxation, December 2019, 631–48., p. 638.

residence country to offer to credit taxes that would have normally been due in the source country.[23] Many developed countries that had worldwide systems, such as the UK (which has since moved to a territorial system), included these arrangements in their treaties with developing countries.[24]

In contrast, in territorial systems, active income earned by an MNE is taxed by the 'source' country – that is, the jurisdiction where the investment takes place and where the active income is earned – however, 'passive' income earned from dividends from foreign subsidiaries will be exempt from taxation, once it is repatriated back to the country of residence. Territorial systems are thought to make home country MNEs more competitive.[25] Hearson notes that as more OECD countries have shifted towards territorial systems, and residence countries have increasingly exempted tax on foreign-source income, the shift has also made forms of 'tax sparing clauses' in treaties redundant, thereby reducing the effectiveness of tax incentives offered by source countries, which are in turn often put in place to incentivise FDI to source countries.[26] Nevertheless, a study by Azémar and Dharmapala finds no detectable difference in FDI flows under a territorial system, indicating that tax sparing agreements are considered to be important for FDI flows to developing countries.[27] Other empirical literature on the move from worldwide versus territorial systems suggests that the type of tax system in the headquarter country impacts whether an MNE will make headquarter MNEs more sensitive to source country tax rates. [28] A study by Liu found that a shift from worldwide to territorial system in the UK led to a substantial increase in outward FDI to low tax countries.[29] In one of the few studies that directly tests the impacts of developed country tax systems on developing countries specifically, Matheson et al., find territorial system headquartered MNEs to be more sensitive to corporate tax rates in source countries where they have subsidiaries, and may increase the use of profit shifting in source country subsidiaries.[30]

The final concept is permanent establishment (PE), which refers to an MNE subsidiary's presence within the source country, thus establishing the source country's basis for taxation of profits generated by this subsidiary. The OECD defines PE under article 5 of its Model Tax Convention as 'A fixed place of business through which the business of an enterprise is wholly or partly carried out.'[31] Under this definition, PE is typically measured through physical indicators such as place of management, branches, offices, factories, workshops and mines, wells and other places of extraction of natural resources.[32] PE is very

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[23] Azémar and Dharmapala, 'Tax Sparing Agreements, Territorial Tax Reforms, and Foreign Direct Investment'.
[24] Martin Hearson, 'Tax Treaties in Sub-Saharan Africa: A Critical Review', 2013; Azémar and Dharmapala, 'Tax Sparing Agreements, Territorial Tax Reforms, and Foreign Direct Investment'.
[25] Hearson, 'Tax Treaties in Sub-Saharan Africa: A Critical Review'.
[26] Ibid., p.12. See also James R Hines, 'Tax Sparing and Direct Investment in Developing Countries', in International Taxation and Multinational Activity (Chicago: University of Chicago Press, 2000), 39–72.
[27] Azémar and Dharmapala, 'Tax Sparing Agreements, Territorial Tax Reforms, and Foreign Direct Investment'.
[28] Thiess Buettner and Carolin Holzmann, 'Switching from Worldwide to Territorial Taxation: Empirical Evidence of FDI Effects', CESifo Working Paper, January 2019.
[29] Li Liu, 'Where Does Multinational Investment Go with Territorial Taxation? Evidence from the United Kingdom', American Economic Journal: Economic Policy 12, no. 1 (2020): 325–58.
[30] Giorgia Maffini, 'Territoriality, Worldwide Principle, and Competitiveness of Multinationals: A Firm-Level Analysis of Tax Burdens', Working Papers, Working Papers (Oxford: Oxford University Centre for Business Taxation, 2012); Thornton Matheson, Victoria Perry, and Chandara Veung, 'Territorial vs. Worldwide Corporate Taxation: Implications for Developing Countries', 2013; Buettner and Holzmann, 'Switching from Worldwide to Territorial Taxation: Empirical Evidence of FDI Effects'.
[31] OECD, Model Tax Convention on Income and on Capital 2017 , Model Tax Convention on Income and on Capital (Full Version) (Paris: OECD, 2019).
[32] Ibid.

important to the allocation of taxing rights between treaty partners, as the higher the PE threshold of affiliate activity within a treaty, the more limited the source country is in claiming taxing rights on inward investment. Initial analysis of a dataset on over 500 tax treaties by Hearson, found that overall, treaties' PE threshold were becoming more generous to developed countries, though notably, this trend was less prevalent within treaties with OECD countries.[33]

1.2 Double Tax Treaties

Double taxation treaties (DTTs) are bilateral cooperative arrangements between governments that allocate taxing rights between two countries. In addition to eliminating double taxation, they also build administrative cooperation between states through information exchange mechanisms and provide mechanisms for dispute mediation between taxpayers and tax administration – Mutual Agreement Procedures (MAPs). As Picciotto explains, these hard law instruments form the legal 'skeleton' of the international tax regime (ITR).[34] Majority of DTTs are centred upon the various 'model treaties' offered by the OECD and the UN,[35] though there are various treaties offered by regional organisations also.

The literature suggests several core motivations for why developing countries might conclude DTTs: first to attract inward FDI [36]– some studies argue that the expected revenue gains are a powerful incentive for countries to enter into DTTs.[37] Second, to cement administrative cooperation through provisions such as exchange of information provisions included within a DTT. [38] Finally, developing countries may choose to enter into tax treaties in order to signal their viability as a suitable investment location to potential foreign investors.[39]

However, many observers argue that DTTs can be detrimental for developing countries.[40] First, there is a significant strand of literature that critiques the logic, justification, and re-allocative intentions of tax treaties. [41] The most influential argument is the game theoretic formulation advanced by Dagan.[42] This paper argues that in fact, residence countries as capital exporters actually have a strong incentive to unilaterally relieve double taxation, but ultimately prefer cooperation, thus sharing the burdens of double taxation relief with treaty partners. In doing so, capital exporters are able to transfer some of the

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33 Martin Hearson, 'Measuring Tax Treaty Negotiation Outcomes: The ActionAid Tax Treaties Dataset', ICTD Working Paper, February 2016., p.22.

34 Sol Picciotto, 'Is the International Tax System Fit for Purpose, Especially for Developing Countries? ', ICTD Working Paper, 2013., p.8.

35 Oladiwura Ayeymi Eyitayo-Oyesode, 'Source-Based Taxing Rights from the OECD to the UN Model Conventions: Unavailing Efforts and an Argument for Reform - ProQuest', Law and Development Review 13, no. 1 (2020), p.194.

36 Fabian Barthel and Eric Neumayer, 'Competing for Scarce Foreign Capital: Spatial Dependence in the Diffusion of Double Taxation Treaties 1', International Studies Quarterly 56, no. 4 (December 2012): 645–60.

37 Martin Hearson, 'When Do Developing Countries Negotiate Away Their Corporate Tax Base?', Journal of International Development 30, no. 2 (2018): 233–55; Yariv Brauner, 'Tax Treaty Negotiations: Myth and Reality', 2020.

38 Tsilly Dagan, 'The Tax Treaties Myth', New York University Journal of International Law and Politcs 32 (2000)

39 Michael Lang and Jeffrey P. Owens, 'The Role of Tax Treaties in Facilitating Development and Protecting the Tax Base', SSRN Electronic Journal, WU International Taxation Research Paper Series (2014).

40 Kim Brooks and Richard Krever, 'The Troubling Role of Tax Treaties', in Tax Design Issues Worldwide, ed. Geerten M. M. Michielse and Victor Thuronyi (Kluwer Law International, 2015), 159–78; Dagan, 'The Tax Treaties Myth'; Allison Christians, 'Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study', Brooklyn Law Review 71, no. 2 (2005): 639–713; Hearson, 'When Do Developing Countries Negotiate Away Their Corporate Tax Base?'

41 Dagan, 'The Tax Treaties Myth'; Brooks and Krever, 'The Troubling Role of Tax Treaties'.;Christians, 'Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study'.; Charles Irish, 'International Double Taxation Agreements and Income Taxation at Source', The International and Comparative Law Quarterly 23, no. 2 (1974): 292–316.;

42 Dagan, 'The Tax Treaties Myth'.

costs of double tax relief to capital importers, thus Dagan argues that DTT negotiations can have 'less heroic goals' with rather 'cynical consequences' (tax base allocation towards the capital exporter).[43]

Brooks and Krever explain that DTTs constrict source country taxing rights by effectively setting limits on how much source countries can level withholding taxes on dividends, royalties, and interest paid to investors, and restrict source country taxing rights to business income that can be tied to only permanent establishments in their jurisdiction.[44] This is particularly problematic from a developing country perspective because developing countries tend to be source country jurisdictions in bilateral agreements with developed countries. As Vann notes, where investment flows are highly asymmetric between residence and source countries (as they often are in treaties between developed and less developed countries), the constriction of source-based taxing rights ensures an inequitable division of revenue between the countries.[45] Thus Eyitayo-Oyesode argues 'tax treaties are biased against developing countries because the FDI inflows between developed and developing countries are unbalanced.'[46]

In response to these arguments, however, Zolt argues that the allocative reality of DTTs does not necessarily function in zero-sum way advanced above – that is, actual revenues do not automatically transfer from source country to residence country, but rather the revenue collection under DTTs is complicated by issues to do with administrative or capacity constraints, or through the use of profit shifting.[47] Furthermore, Zolt argues that DTTs should not be viewed as agreements on how to divide up the revenues from cross-border economic activity, but rather they should be viewed as a tax incentive tool a developing country may use to 'influence economic decisions regarding cross-border investments.[48]

Finally, another critique of DTTs involves their use as mechanisms to impose key tax standards and principles of the ITR throughout the world. In one paper, focusing on British tax treaty policy, Hearson argues that argues that in addition to facilitating investment opportunities for British firms, DTTs were used as a way of imposing OECD norms on developing country treaty partners.[49]

Turning now to the empirical literature on DTTs, as stated above, one of the key rationales for entering into a bilateral DTT, especially for a developing country is that it is thought to increase FDI inflows. Empirically, older studies find mixed results: some find positive effects,[50] others find no significant

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43 Ibid.p. 939, see also Martin Hearson, Imposing Standards : The North-South Dimension to Global Tax Politics (Ithaca: Cornell University Press, 2021)., p.9

44 Brooks and Krever, 'The Troubling Role of Tax Treaties'., p. 166.

45 Richard J. Vann, 'Current Trends in Balancing Residence and Source Taxation ', Sydney Law School Research Paper (Sydney, 2014)., p.7

46 Eyitayo-Oyesode, 'Source-Based Taxing Rights from the OECD to the UN Model Conventions: Unavailing Efforts and an Argument for Reform'p. 210.

47 Zolt, 'Tax Treaties and Developing Countries '.

48 Ibid.

49 Martin Hearson, 'Transnational Expertise and the Expansion of the International Tax Regime: Imposing "acceptable" Standards', 2018.

50 Bruce A. Blonigen and Ronald B. Davies, 'The Effects of Bilateral Tax Treaties on U.S. FDI Activity', NBER Working Paper, NBER Working Paper Series, 30 October 2000.

effects,[51] while others find positive but unequal distributions across developing country income groups.[52] Taken together the results of these studies do not paint a conclusive picture as to the overall positive effects of tax treaties on FDI for developing countries. More recent analysis by Lejour examines the effects of specific treaty contents – namely the effect of dividend WT rates – and finds that lower rates corresponded to increased FDI stocks, though the authors note this is likely attributed to treaty shopping, as opposed to actual investment.[53] While Egger and Merlo find that treaties led to an initial increase in FDI, though did not lead to increased FDI over time.[54]

Another stand of the literature examines the network of DTTs on FDI, yielding somewhat troubling results. This strand of the literature focuses on DTTs role in exacerbating tax avoidance through 'treaty shopping.'[55] Advancing from the notion of a treaty 'network' allows these analyses to account for the distortive effects of tax avoidance practices through treaty shopping arrangements. For example, controlling for the effects of treaty shopping (the practice of diverting FDI via a third country with a more preferential tax treaty[56]), Petkova et al., distinguish between relevant and irrelevant DTTs, (that is, relevant DTTs which give an investor a significant advantage over domestic tax rules), and find that those that are relevant and neutral have a significant positive effect on FDI flows, while 'irrelevant' treaties have no impact.[57] Supporting these findings, a recent paper by Beer and Loeprick, which analyses the DTT network of Sub-Saharan African countries, finds that DTT conclusion with an investment hub (Mauritius) did not increase FDI inflows for Sub-Saharan African source states, but did have an overall negative impact on revenue throughout the region.[58]

The conclusions that the literature yields with respect to DTTs and developing countries is that the expected FDI benefits may be a powerful rationale for signing DTTs, however the negative impacts of DTTs – the constriction of source-country taxing rights, and the potential exploitation of treaties for tax avoidance, should give some cause for concern for developing countries.

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51 Henry J. Louie and Donald J. Rousslang, 'Host-Country Governance, Tax Treaties, and U.S. Direct Investment Abroad', in The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows (Oxford University Press, 2009), https://doi.org/10.1093/acprof:oso/9780195388534.003.0020; Bruce A. Blonigen and Ronald B. Davies, 'Do Bilateral Tax Treaties Promote Foreign Direct Investment?', in The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows (Oxford University Press, 2009), https://doi.org/10.1093/acprof:oso/9780195388534.003.0017.l

52 Eric Neumayer, 'Do Double Tax Treaties Increase Foreign Direct Investment to Developing Countries?', Journal of Development Studies 43, no. 8 (2007): 1501–19.

53 Arjan Lejour, 'The Foreign Investment Effects of Tax Treaties', CPB Discussion Paper, 2014.

54 Peter Egger and Valeria Merlo, 'Statutory Corporate Tax Rates and Double-Taxation Treaties as Determinants of Multinational Firm Activity ', Finanzarchiv 67, no. 2 (June 2011): 145–70.

55 See for example Maarten Van 't Riet and Arjan Lejour, 'Ranking the Stars Network Analysis of Bilateral Tax Treaties', CPB Discussion Paper, 2017.; Francis Weyzig, 'Tax Treaty Shopping: Structural Determinants of Foreign Direct Investment Routed through the Netherlands', International Tax and Public Finance 20, no. 6 (1 December 2013): 910–37.;Ronald B. Davies, 'Tax Treaties and Foreign Direct Investment: Potential versus Performance', International Tax and Public Finance 11, no. 6 (2004): 775–802.

56 See Vincent Arel-Bundock, 'The Unintended Consequences of Bilateralism: Treaty Shopping and International Tax Policy', International Organization 71, no. 2 (2017): 349–71.

57 Kunka Petkova, Andrzej Stasio, and Martin Zagler, 'On the Relevance of Double Tax Treaties', WU Ietrnational Taxation Research Paper Series (Vienna, 2018).

58 Sebastian Beer and Jan Loeprick, 'Too High a Price? Tax Treaties with Investment Hubs in Sub-Saharan Africa', International Tax and Public Finance 28, no. 1 (1 February 2021): 113–53.

1.3 Transfer Pricing

Transfer pricing is an essential component for defining the corporate tax base.[59] Establishment of affiliates in source countries by an MNE results in intrafirm trade of goods and services within the whole MNE group.[60] How these intra-firm transactions are priced is called 'transfer pricing.' Rules around transfer pricing were necessary because as these subsidiaries are part of the same parent organisation, trade between the entities is not subject to open market forces, in the way that they would be if the trade happened between separate MNEs,[61]creating the risk that companies will exploit transfer pricing to minimise taxation burdens.[62]

To prevent this, tax authorities put in place regulations to adjust transfer prices to ensure that they can collect the appropriate level taxes on economic activity realised in their jurisdiction.[63] The prevailing standard within the ITR, requires authorities to treat subsidiaries as separate entities, meaning that transactions are treated as if they are at 'arm's length' – that is, as if they were priced between separate entities on the open market. In order to enforce the arm's length principle (ALP), 'comparables' – that is, comparable market prices for a given transaction – are sought by tax authorities to correctly determine the appropriate value of intrafirm transactions.[64] The ALP is thought to encourage neutrality between MNEs and 'independent operations', and plays a crucial role in determining the corporate tax base between countries.[65] The ALP forms the backbone of transfer-pricing rules today and has become an important global norm that underpins the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TPGs).[66] It has been strongly endorsed as an international tax norm by the OECD, by its member states, by numerous experts and tax practitioners.[67]

However, there are sharp divisions over the merit of the ALP standard within the literature. Indeed, the ALP often serves as a key core focus point in the literature that critics point to as evidence that the current rules of the ITR are not 'fit for purpose' in today's economy.[68]On the one hand, proponents such as the OECD,[69] argue that the ALP is 'sound in theory since it provides

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59 Joel Cooper et al., 'Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners', Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners (Washington D.C.: Washington, DC: World Bank, 2016).

60 Joel Cooper et al., 'Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners', Transfer Pricing and Developing Economies: A Handbook for Policy Makers and Practitioners (Washington D.C.: Washington, DC: World Bank, 2016), p.2.

61 Ibid.

62 Arnold and McIntyre, International Tax Primer., p. 56.

63 Ibid., pp. 55-56.

64 Picciotto, 'Is the International Tax System Fit for Purpose, Especially for Developing Countries? '.

65 International Monetary Fund, 'Spillovers in International Corporate Taxation', 9 May 2014.significance and policy implications of spillovers in international corporate taxation-the effects of one country's rules and practices on others. It complements current initiatives focused on tax avoidance by multinationals, notably the G20-OECD project on Base Erosion and Profit shifting (BEPS, p.31.

66 Picciotto, International Business Taxation A Study in the Internationalization of Business Regulation. The OECD TPGs endorse five different methods of transfer pricing: comparable uncontrolled price method (CUP), resale price method, cost plus method, transactional net margin method (TNMM), and the transactional profit split method.

67 OECD, 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' (Paris, 2017)., see section B2., p. 38; Fritz Brugger and Rebecca Engebretsen, 'Defenders of the Status Quo: Making Sense of the International Discourse on Transfer Pricing Methodologies', Review of International Political Economy, 2020, https://doi.org/10.1080/09692290.2020.1807386.

68 Picciotto, 'Is the International Tax System Fit for Purpose, Especially for Developing Countries? '; Michael P. Devereux and John Vella, 'Are We Heading towards a Corporate Tax System Fit for the 21 St Century? ', Fiscal Studies 35, no. 4 (2014): 449–75.

69 See chapter on Arm's Length Principle in OECD, 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations'.

the closest approximation of the workings of the open market,' and that it provides 'appropriate levels of income between MNE groups, acceptable to tax administrations,' and that its authoritative status has encouraged widespread international consensus which provides certainty for businesses and tax administrations alike. [70]

On the other hand, there is a substantial body of literature that critiques the ALP. First, the ALP is considered to be onerous for tax administrations to implement. As Ezenagu, Picciotto, Durst, and Cooper et al., note, finding adequate comparables can be difficult, especially for resource-constrained tax administrations such as those in lower income countries.[71] In addition, as Picciotto observes, because of this difficulty in finding suitable comparables, the ALP can invite disagreement between tax authorities and taxpayers, while 'its wide degree of interpretive latitude means that case resolution often depends on negotiation, and its scope for discretionary judgement leaves openings for arbitrariness or corruption.' [72]

The other core criticism of the ALP relates to its role in facilitating harmful tax base eroding profit shifting by MNEs. Avi-Yonah, for example argues that transfer pricing creates an incentive for MNEs to shift profits to low-tax countries.[73] Keuschnigg and Devereux argue that the ALP is a 'flawed benchmark' for taxing MNEs, find that the ALP distorts the investment decisions of MNEs.[74] Perhaps even more crucially for developing countries, their model suggests that while application of the ALP can raise revenue in the residence country, it may cause larger revenue welfare losses in the source country.[75] A recent study by de Mooij and Liu finds that introduction of transfer pricing regulations can lead to the distortion in allocation of capital, and induce spillover effects for other countries.[76] Similarly, a quantitative review of the literature on profit shifting behaviour of MNEs, Heckemeyer and Overresch suggests that transfer pricing more generally, was the dominant mode of profit shifting amongst MNEs.[77]

Despite these critiques, the ALP has remained a core component of international transfer-pricing regulations. One explanation for their resilience that is prominent in the literature, is that the ALP has been successfully defended by a transnational community comprised of tax negotiators, experts and tax professionals mainly from developed countries.[78] A recent study by Brugger and Engebretsen, analyses how this community has utilised a

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70 Ibid., p.38.

71 Alexander Ezenagu, 'Safe Harbour Regimes in Transfer Pricing: An African Perspective', ICTD Working Paper, 2019; Picciotto, 'Is the International Tax System Fit for Purpose, Especially for Developing Countries? '; Cooper et al., 'Transf. Pricing Dev. Econ. A Handb. Policy Makers Pract.';Michael C Durst, 'Making Transfer Pricing Work for Developing Countries', 2010.

72 Picciotto, 'Is the International Tax System Fit for Purpose, Especially for Developing Countries? '. p.23

73 Reuven S. Avi-Yonah, 'A Proposal for Unitary Taxation and Formulary Apportionment (UT + FA) to Tax Multinationals', in Global Tax Governance : What Is Wrong with It and How to Fix It, ed. Peter Dietsch and Thomas Rixen (Colchester: Rowman and Littlefield, 2016), p. 292.

74 Christian Keuschnigg and Michael P. Devereux, 'The Arm's Length Principle and Distortions to Multinational Firm Organization', Journal of International Economics 89, no. 2 (1 March 2013): 432–40.

75 Ibid.

76 Ruud de Mooij and Li Liu, 'At a Cost: The Real Effects of Transfer Pricing Regulations', IMF Economic Review 68, no. 1 (1 March 2020): 268–306.

77 Jost H Heckemeyer and Michael Overesch, 'Multinationals' Profit Response to Tax Differentials: Effect Size and Shifting Channels', Discussion Paper, 2013., p.3.

78 Brugger and Engebretsen, 'Defenders of the Status Quo: Making Sense of the International Discourse on Transfer Pricing Methodologies'; Tim Büttner and Matthias Thiemann, 'Breaking Regime Stability? The Politicization of Expertise in the OECD/G20 Process on BEPS and the Potential Transformation of International Taxation', 2017; Picciotto, 'Is the International Tax System Fit for Purpose, Especially for Developing Countries?.

combination of strategies to both protect the legitimacy of transfer pricing regulations, and 'sideline' other alternatives to the OECD transfer pricing regulations, such as simplified approaches to transfer pricing and more wholesale reforms such as unitary taxation with formulary apportionment, (discussed in section 4).[79]

Moreover, in response to the critiques above, Eden argues that the ALP itself is not the issue, but the real problem is the competitive tax incentives that countries employ to attract inward investment furthermore she advocates returning to the fundamental principles of the ALP to counter issues with complexity.[80] This brings us to the other core issue of the ITR: tax competition between countries.

1.5 Tax Competition

A substantial portion of the international tax literature is concerned with the concept of tax competition.[81] Tax competition, as mentioned in the introduction, plays an important role in the ITR – tax competition effectively enables tax avoidance and evasion by driving states to engage in tax attractive strategies. The basic theory of tax competition, articulated famously by Zodrow and Mieszkowski, posits that in a world with a highly mobile international tax base, countries compete for investment by lowering tax rates, effectively under-cutting each other in the process.[82] Because national tax policies are 'interdependent', the tax policy choices of one country is thought to significantly affect the tax base in other countries.[83] The struggle here is that if states continue to unilaterally pursue this investment attracting tax strategy (cutting statutory rates, implementing preferential regimes), a 'race to the bottom' will ensue between the competing countries.

From the baseline model, numerous scholars have analysed the institutional causes,[84] the impacts of competition on domestic tax systems,[85] the types of states that engage in competitive tax policies,[86] the political rationale for engaging in these policies,[87] the domestic determinants for engaging in tax competition,[88] and proposals for curbing rampant tax competition between

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79 Brugger and Engebretsen, 'Defenders of the Status Quo: Making Sense of the International Discourse on Transfer Pricing Methodologies'.

80 Lorraine Eden, 'David and the Three Goliaths – Defending the Arm's Length Principle', 2020.

81 Philipp Genschel and Peter Schwarz, 'Tax Competition: A Literature Review', Socio-Economic Review 9, no. 2 (April 2011): 339–70; Lyne Latulippe, 'Tax Competition: An Internalised Policy Goal', in Global Tax Governance: What Is Wrong with It and How to Fix It, ed. Thomas Rixen and Peter Dietsch (ECPR Press, 2016), 77–100; Thomas Rixen, 'From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance', Review of International Political Economy 18, no. 2 (May 2011): 197–227; Michael P Devereux, Ben Lockwood, and Michela Redoano, 'Do Countries Compete over Corporate Tax Rates?', 2007; Thierry Madiès, Jean-Jacques Dethier, and The World Bank, 'Fiscal Competition in Developing Countries A Survey of the Theoretical and Empirical Literature', 2010.

82 George R. Zodrow and Peter Mieszkowski, 'Pigou, Tiebout, Property Taxation, and the Underprovision of Local Public Goods', Journal of Urban Economics 19, no. 3 (May 1986): 356–70.

83 Genschel and Schwarz, 'Tax Competition: A Literature Review', April 2011.

84 Rixen, 'From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance'.

85 Philipp Genschel, 'Globalization, Tax Competition, and the Welfare State', Politics & Society 30, no. 2 (2002): 245–75.; Duane Swank and Sven. Steinmo, 'The New Political Econom of Taxation in Advanced Capitalist Democracies', American Journal of Political Science 46, no. 3 (2002): 642–46; Geoffrey Garrett and Deborah Mitchell, 'Globalization, Government Spending and Taxation in the OECD', European Journal of Political Research 39, no. 2 (2001): 145–77.

86 Philipp Genschel, Hanna Lierse, and Laura Seelkopf, 'Review of International Political Economy Dictators Don't Compete: Autocracy, Democracy, and Tax Competition', 2017; Bucovetsky, 'Asymmetric Tax Competition'.

87 Latulippe, 'Tax Competition: An Internalised Policy Goal'.

88 Mark; Hallerberg and Scott Basinger, 'Internationalization and Changes in Tax Policy in OECD Countries: The Importance of Domestic Veto Players', Comparative Political Studies 31, no. 3 (1998): 321–52; Duane Swank, 'Taxing Choices: International Competition, Domestic Institutions and the Transformation of Corporate Tax Policy', Journal of European Public Policy 23, no. 4 (20 April 2016): 571–603.

states.[89] Tax competition is thought to be particularly harmful for less developed countries, which are often very reliant on corporate taxation as a source of revenue, and in these countries, losses from competition are less able to be offset by broadening the tax base.[90] One of the most prominent additions to the general tax competition theory advanced by Bucovetsky, Wilson, and Kanbur and Keen, is that small states are more adept at 'winning' the tax competition game as they are able to more easily substitute the losses incurred from enacting a more competitive tax policy by attracting a greater share of the foreign tax base.[91] Large countries, on the other hand, are thought to suffer more from the effects of tax competition as they will find it more difficult to substitute the losses incurred from lower tax rates. This is known as asymmetric tax competition and is a powerful idea in the tax competition literature.[92] At the extreme end of this argument are tax havens jurisdictions, which as Palan argues, commercialise their tax sovereignty, to attract the increasingly mobile profits of MNEs.[93] By engaging in this behaviour, these jurisdictions facilitate tax avoidance by MNEs.

Empirically, a number of studies suggest that states do engage in strategic tax competition with one another.[94] Altschuler and Goodspeed, and Devereux et al., for example, find that countries tended to engage in strategic rate cutting. [95] Other studies across a range of different taxation areas, have demonstrated that tax competition affects states differently, according to several different variables such as country size,[96] and degree of economic openness (globalisation)[97], and veto players in domestic politics.[98] Another strand of literature suggests that FDI[99] and profit shifting[100] are highly sensitive to tax competition. Finally, it is worth noting that countries often compete through offering other tax incentives to attract inward FDI, known as 'preferential tax regimes' (PTRs) – competition in PTRs is thought to be particularly strong amongst less developed countries (see section 3).[101]While space constraints

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89 OECD, Harmful Tax Competition: An Emerging Global Issue (Paris: OECD Publishing, 1998).

90 Rixen, 'Tax Competition and Inequality: The Case for Global Tax Governance'; Reuven S. Avi-Yonah, 'Bridging the North/South Divide: International Redistribution and Tax Competition', SSRN Electronic Journal, 7 July 2005.

91 S. Bucovetsky, 'Asymmetric Tax Competition', Journal of Urban Economics 30, no. 2 (September 1991): 167–81; John Douglas Wilson, 'Tax Competition with Interregional Differences in Factor Endowments', Regional Science and Urban Economics 21, no. 3 (1 November 1991): 423–51; Ravi Kanbur and Michael Keen, 'Jeux sans Frontieres: Tax Competition and Tax Coordination When Countries Differ in Size', American Economic Review 83, no. 4 (1993): 877–92.

92 John D. Wilson, 'Theories of Tax Competition', National Tax Journal 52, no. 2 (1999): pp.278–279; P. Genschel and P. Schwarz, 'Tax Competition: A Literature Review', Socio-Economic Review 9, no. 2 (1 April 2011): 341

93 Ronen Palan, 'Tax Havens and the Commercialization of State Sovereignty', Source: International Organization 56, no. 1 (2002): 151–76; Thomas Rixen, 'Tax Competition and Inequality: The Case for Global Tax Governance', Global Governance 17, no. 4 (12 August 2011): 447–67.

94 Rosanne Altshuler and Timothy J. Goodspeed, 'Follow the Leader? Evidence on European and US Tax Competition', Public Finance Review 43, no. 4 (12 July 2015): 485–504, Devereux, Lockwood, and Redoano, 'Do Countries Compete over Corporate Tax Rates?'; for a more comprehensive review of the literature, see Genschel and Schwarz, 'Tax Competition: A Literature Review', April 2011.

95 Devereux, Lockwood, and Redoano, 'Do Countries Compete over Corporate Tax Rates?'

96 Joel Slemrod and John D. Wilson, 'Tax Competition with Parasitic Tax Havens', Journal of Public Economics 93, no. 11–12 (1 December 2009): 1261–70,

97 Joel Slemrod and John D. Wilson, 'Tax Competition with Parasitic Tax Havens', Journal of Public Economics 93, no. 11–12 (1 December 2009): 1261–70,

98 Scott Basinger and Mark; Hallerberg, 'Remodeling the Competition for Capital: How Domestic Politics Erases the Race to the Bottom', American Political Science Review 98, no. 02 (2004): 261–76.

99 Ruud de Mooij and Sjef Ederveen, 'Corporate Tax Elasticities: A Reader's Guide to Empirical Findings on JSTOR', Oxford Review of Economic Policy 24, no. 4 (2008): 680–97. And Ernesto Crivelli, Ruud De Mooij, and Michael Keen, 'Base Erosion, Profit Shifting and Developing Countries', 2015.

100 Jost H. Heckemeyer and Michael Overesch, 'Multinationals' Profit Response to Tax Differentials: Effect Size and Shifting Channels', Canadian Journal of Economics 50, no. 4 (1 November 2017): 965–94.

101 S. M.Ali Abbas and Alexander Klemm, 'A Partial Race to the Bottom: Corporate Tax Developments in Emerging and Developing Economies', International Tax and Public Finance 20, no. 4 (5 August 2013): 596–617.

permit a more comprehensive review of the tax competition literature, [102] which is vast, from the brief overview presented, it is clear that core ideas of tax competition appear to be a venerable concept in the literature on the ITR.

Turning to international cooperation, scholars such as Rixen, Dehejia and Genschel, and Holzinger, tell us that tax competition is a difficult area for states to cooperate on.[103] This is because the problem of tax competition is a prisoner's dilemma – the individual incentives to defect (compete) are strong, especially for smaller 'winners' of tax competition. What is therefore needed, according to Rixen, are strong, binding, multilateral institutions with the capacity monitor and punish defectors.[104] Rixen also argues that the decision of the original architects of the ITR to opt for soft law standards and bilateral treaties, resulted in an institutional structure that enabled competition in the ITR, but also that was ill-equipped to handle the problems of tax competition (due to the lack of multilateral treaty).[105]

However, recent work on the introduction of automatic exchange of information by Rixen and Hakelberg, suggests that international cooperation in the area of tax evasion has had positive effects on personal capital income taxes in OECD countries, as increased transparency has reduced the risk of capital flight, thus enabling countries to raise rates.[106] This indicates that the effects of multilateral cooperation around strong standards of financial transparency has the potential to dampen the incentives to engage in tax competition in some cases.[107]

The literature covered in section 1 has highlighted several core issues for developing countries: the constriction of source-based taxing rights through tax treaties, the problems relating to the ALP, and the problem of tax competition. The following review now turns to the institutions of the ITR. In doing so, this review introduces strands of literature on the structural position of institutions in the ITR landscape, and more importantly, engages with debates about the inclusivity of those institutions as they related to standards-setting.

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[102] For a more comprehensive review of the tax competition literature, see: Kimberly A., Clausing, 'The Nature and Practice of Tax Competition ', in Global Tax Governance: What Is Wrong With It and How to Fix It, ed. Peter Dietsch and Thomas Rixen (Rowman and Littlefield, 2016), pp. 33–53., Genschel and Schwarz, 'Tax Competition: A Literature Review', 1 April 2011; Duane Swank, 'Tax Policy in an Era of Internationalization: Explaining the Spread of Neoliberalism', International Organization 60, no. 04 (25 October 2006), https://doi.org/10.1017/S0020818306060280.

[103] Rixen, The Political Economy of International Tax Governance, pp.44-48; Vivek H. Dehejia and Philipp Genschel, 'Tax Competition in the European Union', Politics & Society 27, no. 3 (17 September 1999): 403–30; Katharina Holzinger, 'Tax Competition and Tax Co-Operation in the EU', Rationality and Society 17, no. 4 (15 November 2005): 475–510.

[104] Rixen, The Political Economy of International Tax Governance., pp.44-48

[105] Rixen, 'From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance'., pp. 216-17

[106] Lukas Hakelberg and Thomas Rixen, 'Is Neoliberalism Still Spreading? The Impact of International Cooperation on Capital Taxation', Review of International Political Economy, 2020, https://doi.org/10.1080/09692290.2020.1752769.

[107] Lukas Hakelberg and Thomas Rixen, 'Is Neoliberalism Still Spreading? The Impact of International Cooperation on Capital Taxation', Review of International Political Economy, 2020.

Institutions of International Tax Cooperation

The institutional architecture of international taxation is complex, layered, and highly networked.[108] The cooperative arrangements that characterise the international tax system vary according to institutional type, scope, and membership.[109] There are numerous accounts of the institutional dynamics, and political role of experts in the ITR,[110] however, this section emphasises, primarily the core outputs of the main institutions of international tax cooperation – the UN and the OECD – as well as the influential model tax treaties, and recent tax evasion and avoidance standards that have emerged in the last decade or so of the ITR. This section begins with a discussion the main Model Treaties, then moves on to the other main institution of international taxation – UN Tax Committee, the OECD, the Global Forum on Transparency and Exchange of Information for Tax Purposes, the BEPS initiative, and finally, the OECD/G20 Inclusive Framework on BEPS.

2.1 The Model Treaties

Two model treaties emerged from the early period of tax cooperation and from the League of Nations' work on eradicating double taxation: the Mexico Model and the London Model.[111] Each model treaty favoured allocating taxing rights toward either capital importing source countries (the Mexico Model) or to residence countries (the London Model). Michael Lennard observes that the OECD model represents the descendent of the London Model, while the UN model represents the descendent of the Mexico model.[112] The prevailing wisdom is that capital exporting states, which are usually considered 'residence' states' interests are represented in the OECD Model Double Taxation Convention on Income and Capital (OECD MC) while the UN Model Double Tax Convention between Developed and Developing countries (UN MC) favours greater source-based taxation rights.[113] For a long time, between the 1960s and 1980, the OECD model was the chief model treaty. This, according to Rixen, cemented the dominance of the OECD MC as the key 'focal point' of the tax treaty regime.[114] In 1980, the UN published its MC, which was aimed at strengthening source countries' taxing rights, though at the time it largely mirrored the OECD MC. Subsequent updates have caused greater differentiation between the two models, however.

Since the creation of those two models, double tax treaties have proliferated significantly and now constitute a 'network' of treaties between states, amounting to over 3000 active bilateral tax treaties in existence today.[115] The UN MC differs from the OECD model in a few critical ways, primarily in the definition of what constitutes a 'permanent establishment' and is less

108 Allison Christians, 'Networks, Norms, and National Tax Policy', Washington University Global Studies Law Review 9, no. 1 (2010): 1–37.
109 Christians, 'BEPS and the New International Tax Order'.
110 Leonard Seabrooke and Duncan Wigan, 'Powering Ideas through Expertise: Professionals in Global Tax Battles', Journal of European Public Policy 23, no. 3 (15 March 2016): 357–74, https://doi.org/10.1080/13501763.2015.1115536.
111 Picciotto, 'Is the International Tax System Fit for Purpose, Especially for Developing Countries? '.
112 Michael Lennard, 'The Purpose and Current Status of United Nations Tax Work', Asia-Pacific Tax Bulletin, 2008, 23–30.
113 Ibid.
114 Thomas Rixen, 'Bilateralism or Multilateralism? The Political Economy of Avoiding International Double Taxation', European Journal of International Relations 16, no. 4 (7 December 2010): pp. 602-603., https://doi.org/10.1177/1354066109346891.
115 Picciotto, 'Is the International Tax System Fit for Purpose, Especially for Developing Countries? '.

restrictive/prescriptive on the maximum level of withholding tax that a source country may claim on passive income from investments.[116] Regional models have also proliferated, though they are not yet used as much as the UN or OECD MCs. Moreover, as a report on tax treaties in Sub-Saharan Africa notes, these regional alternatives often do not provide substantially better conditions for withholding tax rates.[117] In one study, West analyses the ATAF models from 2016 and 2019, and finds that these models tend to represent a hybrid of the UN MC and OECD MC models, though they differ among key details such as scope of permanent establishment.[118]

One interesting line of inquiry in the literature sought to compare the adoption of UN versus OECD model articles in bilateral tax treaties. The OECD model has generally been considered to be the more dominant standard. [119] Indeed, Hearson notes that relevant OECD clauses are used roughly 61 per cent of the time indicating the dominance of the OECD model across the overall network of tax treaties.[120] However, in a recent study that uses natural language processing of over 4000 tax treaties, Ash and Marian indicate that the OECD model convention is the most influential standard, especially in the short to medium term, over a longer period however, there was an increasing trend towards alignment with UN model principles in recent years.[121]

The United Nations Tax Committee

The UN's tax body is the United Nations Committee of Experts on International Cooperation in Tax Matters and it was founded by resolution from the UN's Economic and Social Council (ECOSOC). The original resolution passed in 1967, founding the 'Ad Hoc Group of Experts on Tax Treaties Between Developed and Developing Countries' which later evolved into the current Committee of Experts.[122] This Committee was set up to address key issues in the double taxation agreements (DTAs) between developing and developed countries, which culminated in the creation of a Model Convention in 1980. The committee was then reinvigorated by the 2002 Monterrey Consensus on Financing for Development. The UN Tax Committee is thought to be a much more inclusive institution that represents the needs of both developed and developing countries, in contrast to the other main institution of the ITR, the OECD (discussed below).[123] Some observers, argue that the UN Tax Committee, by virtue of its broad membership, has an invaluable role to play.[124] In particular, Chowdhary notes, the UN Tax Committee is the only institutional arrangement in the ITR that comes 'close to a level playing field' for developing

116 Ibid., pp. 14-15; Lennard, 'The Purpose and Current Status of United Nations Tax Work'.
117 Hearson, 'Tax Treaties in Sub-Saharan Africa: A Critical Review'., p.28
118 Craig West, 'Emerging Treaty Policies in Africa – Evidence from the African Tax Administration Forum Models', Bulletin for International Taxation 75, no. 1 (2021).
119 Wim Wijnen and Jan de Goede, 'The UN Model in Practice 1997-2013', Bulletin for International Taxation, March 2014, 118–46; Elliott Ash and Omri Y. Marian, 'The Making of International Tax Law: Empirical Evidence from Natural Language Processing', Legal Studies Research Paper Series, 11 January 2019.; Daurer and Krever, 'Choosing Between the UN and OECD Tax Policy Models: An African Case Study'. Hearson, Imposing Standards : The North-South Dimension to Global Tax Politics.
120 Hearson, Imposing Standards : The North-South Dimension to Global Tax Politics., p.44
121 Ash and Marian, 'The Making of International Tax Law: Empirical Evidence from Natural Language Processing'., p.24
122 Rixen, The Political Economy of International Tax Governance., p. 102.
123 Allison Christians, 'Global Trends and Constraints on Tax Policy in the Least Developed Countries', University of British Columbia Law Review 40 (11 August 2009).
124 Abdul Muheet Chowdhary, 'Making the UN Tax Committee More Effective for Developing Countries', South Centre, February 2021.

countries vis-à-vis international tax standards-setting.[125] This is why there have been several calls to strengthen or increase the role of the UN Tax Committee in international tax matters.[126]

United Nations Tax Committee has had considerable success, given its resource constraints.[127] It has formulated the alternative UN MC that was specifically designed to cater to the needs of developing countries in negotiations with developed countries. Indeed, as Lesage and Lennard emphasise, the bulk of the work by the UN tax committee has focused on maintaining the UN model treaty.[128] Moreover, in 2013 the UN Tax Committee published the Practical Manual on Transfer Pricing for Developing Countries, which was aimed at building capacity for developing country tax administrations in implementing transfer pricing regulations, notably in enforcing the arm's length standard.[129] More recently, the UN Model Convention has made significant progress in the area of services: first, in the inclusion of Article 12a which allows greater source taxing right over 'fees for technical services.' In April 2021, the UN Tax Committee further updated its Model Convention to include a new article 12b, which would afford greater source country taxing rights on income from digital services, which has been seen as a more simplified response to the OECD's Pillar One. This is an important development, Arnold argues, because where source taxing rights had previously been confined to profits realised in the source jurisdiction, by adding in these articles effectively extends the taxing rights of source states to services by allowing 'withholding taxes on consulting, technical and management fees paid to non-resident service providers.'[130]

However, that despite the important work of the UN tax committee, it remains under-funded and under-staffed, compared with the OECD.[131] Indeed, the Committee is comprised of roughly 25 experts nominated by national governments, who act in a personal capacity.[132] Furthermore, some observers note that calls to upgrade and strengthen the role of the UN tax committee has been blocked in the past by the OECD and developed countries.[133] Due to these capacity constraints, as well as the near hegemonic status that the OECD enjoys with respect to international tax standards-setting, the status of the UN Tax Committee is somewhat tenuous in the tax governance space.

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125 Ibid., p.2

126 FACTI, 'Report of the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda', February 2021; Ibid.avi

127 Chowdhary, 'Making the UN Tax Committee More Effective for Developing Countries'.

128 Dries Lesage, 'Global Taxation Governance after the 2002 UN Monterrey Conference', Oxford Development Studies 36, no. 3 (28 September 2008): 281–94; Lennard, 'The Purpose and Current Status of United Nations Tax Work'.

129 United Nations Department of Economic and Social Affairs, 'Practical Manual on Transfer Pricing for Developing Countries' (New York, 2013); Tatiana Falcao, 'Contributing a Developing Country's Perspective to International Taxation: United Nations Tender for Development of a Transfer Pricing Manual', Intertax 38, no. 10 (1 October 2010).

130 Arnold, 'The Evolution of Controlled Foreign Corporation Rules and Beyond'.

131 Sol Picciotto, 'The UN Tax Committee Holds out the Begging Bowl ', International Centre for Tax and Development, 10 April 2017.; see also Christians, 'Global Trends and Constraints on Tax Policy in the Least Developed Countries'., fn. 120.; Martin Hearson, 'Developing Countries' Role in International Tax Cooperation', 2017.; Michael C Durst, Taxing Multinational Business in Lower-Income Countries: Economics, Politics and Social Responsibility (Brighton: Institute for Development Studies, 2019)., p.56.

132 Hearson, 'Developing Countries' Role in International Tax Cooperation'.p. 13; David Spencer, 'The U.N. Tax Committee, OECD, Transfer Pricing, and the Position of India', Journal of International Taxation 23, no. 6 (2012): pp. 59–60.

133 Spencer, 'The U.N. Tax Committee, OECD, Transfer Pricing, and the Position of India'., p. 60

2.3 The OECD

The other core institution of international tax governance is the Organisation for Economic Cooperation and Development (OECD). Founded in 1961 as the successor organisation for the Organisation for European Economic Cooperation (OEEC), the OECD took over much of the core work on double tax treaties, despite the fact that the United Nations was named the successor organisation to the League of Nations in this area.[134] As a result, the OECD's work on double taxation, and the resulting 1963 Draft Double Taxation Convention on Income and Capital, and later the OECD MC is often seen as the 'direct descendant' of the League's double taxation work.[135] The literature on the tax governance space devotes considerable attention to the OECD as an institution. This is because the OECD has gained hegemonic status as the foremost institution in international taxation. Though considered a 'rich country club', the OECD has played a critical role as a network hub, and as a leader in disseminating international tax norms.

In particular, the literature marks out that the OECD's influence derives from its significant resources in terms of technical expertise and its centrality in tax policy networks.[136] In the legal literature, Ault, Cockfield, Christians, and Ring all note that the OECD increasingly uses its soft law mechanisms to drive consensus around key tax norms.[137] Cockfield makes the case that the OECD acts as an informal 'world tax organisation' by successfully taking a lead role in developing international tax principles, and by using peer-review processes to promote compliance amongst member states.[138] While Ring also emphasises the role of the OECD (among other organisations) as key standard-setters in the ITR.[139]

Christians analyses the role of the OECD as a network hub and makes the argument that states use the soft law mechanisms to both create global tax norms and but also to pursue national tax policy aims.[140] Crucially, although the OECD plays a key role as a policy norm entrepreneur, national delegates use the OECD's technical work and research to 'explain and promote' tax policy changes at the national level. In highlighting this dual role of the OECD, both as a site for policymaking, and as a scientific authority, Christians highlights the multifaceted role that the OECD plays at different levels of international tax relations.[141] Genschel and Rixen similarly identify the OECD, in particular the Committee for Fiscal Affairs, as serving as a key 'focal point' for a transnational community of tax experts.[142] Many accounts stress the importance and exclusiveness of this community – often called an 'epistemic community' or

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134 Rixen, The Political Economy of International Tax Governance., pp.96-97;Lennard, 'The Purpose and Current Status of United Nations Tax Work'.

135 Graetz and O'hear, 'The "Original Intent" of U.S. International Taxation'., p.1066

136 J. C. Sharman, 'Seeing Like the OECD on Tax', New Political Economy 17, no. 1 (February 2012): 17–33.

137 Hugh J Ault, 'Reflections on the Role of the OECD in Developing International Tax Norms, 34 Brook', Brooklyn Journal of International Law 34, no. 3 (2009): 757–81; Christians, 'Networks, Norms, and National Tax Policy'; Arthur J Cockfield, 'The Rise of the OECD as Informal "World Tax Organization" Through National Response to E-Commerce Tax Challenges', Yale Journal of Law and Technology 8, no. 1 (2006): 136–87; Diane Ring, 'Who Is Making International Tax Policy? International Organisations as Power Players in a High Stakes World', Legal Studies Research Paper Series (Boston, 2010).

138 Cockfield, 'The Rise of the OECD as Informal "World Tax Organization" Through National Response to E-Commerce Tax Challenges'.

139 Ring, 'Who Is Making International Tax Policy? International Organisations as Power Players in a High Stakes World'.

140 Christians, 'Networks, Norms, and National Tax Policy'.pp.4-5

141 Ibid.

142 Genschel and Rixen, 'Settling and Unsettling the Transnational Legal Order of International Taxation'.

alternatively by Hearson, a 'transnational policy community'.[143] This community acts both at the transnational level in a highly networked, highly socialised space,[144] but may also work to influence national policy also, as Hearson, and Christians argue.[145]

Finally, Sharman, and Porter and Webb argue that its 'function and effectiveness' come from this technical hegemony in tax matters.[146]For Sharman, the rational, technical, and scientific 'self-image' of the OECD's core work obscures its highly political outputs.[147] This is a crucial point, as many observers have argued that the OECD's work generally serves the interests of its wealthy member states, while 'marginalising' poorer countries.[148]

In summary, the OECD is treated as the dominant institution of international tax governance by the literature. It plays a key role in policy entrepreneurship, the OECD and its committees, serves as a focal point for the transnational tax policy community.[149] Although it is constituted by wealthy, developed country member states, recent initiatives have broadened the scope of inclusion for formal participation to developing countries. The following subsections evaluate the institutional efforts in this direction: The Global Forum, BEPS, Inclusive Framework.

2.4 Global Forum on Transparency and Exchange of Information for Tax Purposes

The Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) emerged out of the OECD in 2000. In 2009, the Global Forum was reinvigorated after the G20 announced a 'crackdown' on banking secrecy after several high-profile scandals involving a number of banks in secrecy jurisdictions. This crackdown targeted tax havens by blacklisting non-cooperative jurisdictions, thereby including soft 'punishment' mechanisms to induce compliance.[150] Today, the Global Forum includes 160 members, including all G20 states, key financial centres, as well as many developing countries. Its primary mandates are to facilitate cooperation on fighting offshore tax evasion through using two transparency standards: the exchange of information upon request (EOIR) and common reporting standard (CRS) based on the automatic exchange of information (AEOI).

Early criticisms questioned the whether the regime would be effective. Woodward, for example, argued that the original EOIR regime would induce 'mock compliance' amongst offshore financial centre jurisdictions.[151] While

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143 Hearson, 'Transnational Expertise and the Expansion of the International Tax Regime: Imposing "acceptable" Standards'.; Brugger and Engebretsen, 'Defenders of the Status Quo: Making Sense of the International Discourse on Transfer Pricing Methodologies'.

144 Christians, 'Networks, Norms, and National Tax Policy'.

145 Hearson, 'Transnational Expertise and the Expansion of the International Tax Regime: Imposing "acceptable" Standards'.; Christians, 'Networks, Norms, and National Tax Policy'.

146 Sharman, 'Seeing Like the OECD on Tax'.Tony Porter and Michael Webb, '(PDF) The Role of the OECD in the Orchestration of Global Knowledge Networks' (Saskatoon, 24 May 2007).

147 Sharman, 'Seeing Like the OECD on Tax'. P. 24.

148 Ibid., p.24; Annet Wanyana Oguttu, 'Tax Base Erosion and Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan – The International Centre for Tax and Development (ICTD)', ICTD Working Papers, 2016.; Horner, 'Do We Need an International Tax Organization?', pp. 183-4.

149 Genschel and Rixen, 'Settling and Unsettling the Transnational Legal Order of International Taxation'.

150 Adam Rosenzweig, 'Does Punishment Work (at Least in International Tax)', Jotwell: The Journal of Things We Like (Lots) 2015 (2015).

151 Richard Woodward, 'A Strange Revolution: Mock Compliance and the Failure of the OECD's International Tax Transparency Regime', in Global Tax Governance: What Is Wrong with It and How to Fix It, ed. Thomas Rixen and Peter Dietsch (Colchester: Rowman & Littlefield International , 2016), 103–17.

a study by Johannesen and Zucman argued that the initial G20 crackdown merely resulted in a relocation of deposits to jurisdictions that remained outside of exchange of information agreements.[152]

However, a more recent study by Ahrens and Bothner, which evaluated the effectiveness of the AEOI standard contained in both unilateral measures – notably the United States' Foreign Account Tax Compliance Act (FATCA), and multilateral measures, namely, the Common Reporting Standard (CRS) – show positive impacts of the AEOI standard on reducing the amount of household wealth held in tax havens.[153] Similarly, the aforementioned study by Hakelberg and Rixen notes the success of the AEOI standard, and attributes cooperation on this standard as a key mitigator of tax competition in capital income taxation amongst OECD countries.[154] As of 2020, the CRS has been adopted by roughly 100 countries and features in 4000 bilateral agreements.[155]

However, as Sadiq and Sawyer note, the standards entail high compliance burdens with respect to implementing the exchange of information standards for less developed countries.[156] Although there are significant capacity building efforts by the Global Forum and partnering organisations to assist in the implementation of the standards in less developed countries, recent analysis from the UN and the Tax Transparency Africa report indicates that many less developed countries are still behind in implementation of exchange of information, and therefore have yet to benefit fully from the policy (see section 3).[157]

2.5 The G20/OECD Base Erosion Profit Shifting Initiative

The next substantial cooperative development is the G20/OECD's Base Erosion Profit Shifting (BEPS) initiative. This initiative was a substantial effort aimed at tackling tax avoidance in the global economy. In response to the 2008 financial crisis, growing public outcries over several high-profile corporate tax avoidance scandals involving some of the world's largest multinationals, tax avoidance made it squarely onto the G20 agenda in 2012. The G20 delegated the technical task to the OECD.[158] In 2013, the OECD released the 15-point BEPS Action Plan which culminated in a tight two-year turnaround for all 15 of

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152 Niels Johannesen and Gabriel Zucman, 'The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown1', American Economic Journal: Economic Policy 6, no. 1 (2014): 65–91.l; One of the key problems was that the standard of information exchange was that in exchange for staying off the blacklist, states had to sign a minimum of 12 exchange of information agreements, which resulted in some havens signing bilateral TIEAs with one another to make up the numbers.

153 Leo Ahrens and Fabio Bothner, 'The Big Bang: Tax Evasion After Automatic Exchange of Information Under FATCA and CRS', New Political Economy 25, no. 6 (2019): 849–64.

154 Hakelberg and Rixen, 'Is Neoliberalism Still Spreading? The Impact of International Cooperation on Capital Taxation'.

155 Sanjeev Sharma, 'Cross-Border Tax Information Exchange Is a Game-Changer | International Tax Review', International Tax Review, 18 August 2020, https://www.internationaltaxreview.com/article/b1mzrdlykm5d7l/cross-border-tax-information-exchange-is-a-game-changer.

156 Kerrie Sadiq and Adrian Sawyer, 'Developing Countries and the Automatic Exchange of Information Standard-a "One-Size-Fits-All" Solution? ', Australian Tax Forum 31, no. 1 (2016):pp. 108-109.the Organisation for Economic Cooperation and Development (OECD

157 Global Forum on Transparency and Exchange of Information for Tax Purposes, 'Tax Transparency in Africa 2021 Africa Initiative Progress Report', 2021.; Inter-agency Task Force on Financing for Development, 'Financing for Sustainable Development Report 2021 ', 2021.

158 Ruth Mason, 'The Transformation of International Tax', The American Journal of International Law 114, no. 3 (2020): 366.

the BEPS Action Items to be turned into concrete outputs.[159] These outputs took the form of discretionary reforms and minimum standards, the latter of which all participants in the Inclusive Framework on BEPS (see discussion below) were required to agree to.[160] The fundamental aim for the BEPS project, as defined by the OECD, was to 'align taxation where value is created.' As such, the BEPS initiative, in one sense, represents a critical turn in the international tax governance space where the goals of international tax cooperation shifted towards tackling the issue of tax competition through greater regulation of multinational tax planning practices.

Some scholars argue that the BEPS process fundamentally transformed the international tax landscape. Ruth Mason, for example, argues that across a number of dimensions, the BEPS process has changed the international tax space fundamentally.[161] Mason argues that BEPS has expanded the number of participants, transformed the agenda and the norms of international tax policymaking, implemented 'novel forms of law' and 'intensified the debate' around distribution of taxing rights on cross-border taxation.[162] Similarly, Christensen and Hearson argue that the post financial crisis developments in the ITR, such as the Global Forum, and BEPS, have indicated a 'trend…towards radical, inclusive and enforceable governance.'[163]

Yet, despite these shifts, many observers have been sceptical of the BEPS outcomes. One of the core criticisms of the BEPS project is that that the reform effort constituted a limited, 'patch-up' and reinforcement of existing principles that underpin the ITR, which also give rise to the problem of BEPS in the first place.[164]A 2019 report by the IMF states that the core objective of the BEPS of '"taxing where value is created" is at best an incomplete standard by which to assess international tax arrangements.'[165]Echoing this, Avi-Yonah and Xu argue that one of the fundamental goals of the BEPS project should have been to 'replace the old principles with a new principle,' but the resulting 'patch-up' of existing rules has instead led to 'complex, discretionary, uncertain, costly and contradictory rules,' which will be difficult for governments to implement.[166] In a similar vein, Brauner asserts that the short-term outcomes from the BEPS project would not likely result in a significant change to existing principles and would, as Avi-Yonah and Xu argue, serve to create greater uncertainty around tax treaties.[167]Another critique centres on the lack of inclusiveness in the standards-setting process.[168] Christians argues that the BEPS process 'represents a continuing progression toward a global tax regime guided and

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159 The 15 BEPS Actions are: Action 1 - Tax Challenges Arising from Digitalisation; Action 2 - Neutralising the effects of hybrid mismatch arrangements; Action 3 - Controlled Foreign Companies; Action 4 - Limitation on Interest Deductions; Action 5 - Harmful Tax Practices; Action 6 - Prevention of tax treaty abuse; Action 7 - Permanent Establishment status; Action 8-10 - Transfer Pricing; Action 11 - BEPS Data Analysis; Action 12 - Mandatory Disclosure Rules; Action 13 - Country-by-Country Reporting; Action 14 - Mutual Agreement Procedure; Action 15 - Multilateral Instrument, see: OECD, 'BEPS Actions - OECD BEPS', 2021, https://www.oecd.org/tax/beps/beps-actions/.

160 Mason, 'The Transformation of International Tax'.

161 Ibid.

162 Ibid.

163 Rasmus Corlin Christensen and Martin Hearson, 'The New Politics of Global Tax Governance: Taking Stock a Decade after the Financial Crisis', Review of International Political Economy 26, no. 5 (2019): 1075.

164 Avi-Yonah and Haiyan, 'Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight'.

165 International Monetary Fund, 'Corporate Taxation in the Global Economy', IMF Policy Papers, 10 March 2019. P. 18

166 Avi-Yonah and Haiyan, 'Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight'., p. 208

167 Yariv Brauner, 'Treaties in the Aftermath of BEPS', Brooklyn Journal of International Law 41, no. 3 (2016): 974–1041.

168 Irene Burgers and Irma Johanna Mosquera Valderrama, 'Corporate Taxation and BEPS: A Fair Slice for Developing Countries?', Erasmus Law Review 10, no. 1 (2017); Michael Lennard, 'Base Erosion and Profit Shifting and Developing Country Tax Administrations', Intertax 44 (2016).

policed by its key member states.'[169] Elsewhere, Christians and Shay note that the lack of participation of low-income and developing countries in the creation of BEPS standards, has meant that middle- and lower-income countries which struggle with ongoing resource and capacity constraints will continue to encounter barriers to full participation and implementation in the BEPS process.[170]

2.6 The OECD/G20 Inclusive Framework on BEPS

In direct recognition of the need to include broader participation in the BEPS standards, 2016 saw the creation of the Inclusive Framework on BEPS (IF). The IF now includes 137 members, 66 of which are developing countries, and it also includes 14 member organisations.[171] Ingrained within its design, the IF stipulates that each participating jurisdiction will be on an 'equal footing' with one another.[172] In recognition that the realities of equal participation may be hamstrung by limitations in capacity in some developing countries, the IF has implemented several capacity-building mechanisms aimed at 'lower capacity developing countries' in order to aid in the implementation of BEPS measures.[173] Some of these include policy-focused mechanisms such as toolkits for developing countries through the Platform for Collaboration on Tax (PCT), tailor-made 'induction programmes' on BEPS (41 to date), bilateral support programmes, others include support through the Tax Inspectors Without Borders (TIWB) programmes.[174] The IF often works with regional organisations, such as the African Tax Administration Forum (ATAF) to deliver these capacity building programmes to lower capacity developing countries.[175]

While the IF does represent a step in the right direction in terms of creating an expanded forum within the tax governance space, some argue that the degree of 'inclusivity' encapsulated in the inclusive framework is not inclusive enough. Mason,[176]and Avi-Yonah and Xu[177] remain sceptical about the degree of inclusion for lower income countries participating in the IF, while Mosquera Valderrama argues that significant 'input legitimacy' issues undermine the ability for developing countries to participate in these agenda-setting processes.[178]Similarly, Christians and Apeldoorn, argue that the definition of inclusiveness posited by the architects of the IF – that is, inclusiveness defined as an 'equal footing to directly shape standard setting and monitoring processes' – obfuscates some of the real discrepancies between participating states in resources, capacity, and bargaining strengths.[179] In a recent study that draws on substantial interview data from IF participants and

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169 Christians, 'BEPS and the New International Tax Order'.
170 Allison Christians and Stephen Shay, 'Assessing BEPS: Origins, Standards, and Responses', 2017.
171 OECD, 'About - OECD BEPS', 2019.
172 OECD/G20 Inclusive Framework on BEPS, 'OECD/G20 Inclusive Framework on BEPS Progress Report July 2019-July 2020' (Paris, July 2020).
173 Ibid.
174 Ibid.
175 Ibid.
176 Mason, 'The Transformation of International Tax'.
177 Reuven S. Avi-Yonah and Xu Haiyan, 'Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight', Havard Business Law Review 6, no. 2 (2016): 210.
178 Irma Johanna Mosquera Valderrama, 'International / OECD Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative', 2018.
179 Allison Christians and Laurens van Apeldoorn, 'The OECD Inclusive Framework', Bulletin for International Taxation (Elsevier BV, 15 April 2018).

observers, attendance records and policy documents, Hearson, Christensen and Randriamanalina find that although the number of member states has increased, actual attendance by developing countries at key meetings relating to technical development of standards, remains low. [180] Furthermore, Hearson et al. find that where developing countries do attend, there is often a tendency for delegates to remain 'fairly silent participants.'[181] Nevertheless, despite significant institutional design issues and structural barriers to equal participation, there was some evidence of modest developing country influence across some policy areas in recent years.[182]

Ultimately, what is notable from the literature reviewed in this section is that developing countries face constraints to meaningful participation in the key forums of the ITR. On the one hand, there are formal avenues for participation available to developing countries – the UN tax committee is specifically geared towards the needs of developing countries. Furthermore, the OECD has sought to increase inclusivity of non-OECD countries in its standards through the Global Forum and the Inclusive Framework. On the other hand, developing countries' ability to shape international tax politics is somewhat constrained due to the fact that (i) the UN's influence in international tax matters is constrained due to institutional capacity constraints, and (ii) the efforts at inclusion in the OECD fora have thus far mostly related to the participation in already established standards, and there remain structural barriers to greater participation in new standards-setting. Although the core institutions of the ITR have gotten progressively more inclusive, there remain substantive critiques as to how inclusive these processes really are. As Hearson et al., show, there are mechanisms through which these countries can leverage their influence in these processes.[183] Moreover, this section of the literature review has only canvassed the main, international cooperative institutions in the ITR. There are many regional cooperation forums, that seek to facilitate technical assistance, training and cooperation amongst members.

Persistent Issues for Developing Countries

In the following section, the literature on international tax issues that persistently affect less developed countries is explored. Four key themes in the literature stand out: first relates to the ongoing constraints that tax treaty negotiators face in terms of asymmetries of bargaining power and lack of training, which as some observers note, has led to the ceding of taxing rights towards more developed treaty partners.[184] The second relates to the reliance on corporate income tax of foreign investors that less developed countries often experience. This leads to a difficult dilemma that many less developed countries face with respect to attracting inward investment through the use of competitive tax incentives. Third, relates to the scale and disproportionate impact of corporate tax avoidance on the revenues of less developed countries. Finally, many international standards, especially those

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180 Rasmus Corlin Christensen, Martin Hearson, and Tovony Randriamanalina, 'At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations', December 2020.

181 Ibid., pp. 6-7.

182 Ibid.

183 Ibid., pp. 18-28

184 Hearson, 'When Do Developing Countries Negotiate Away Their Corporate Tax Base?'

that are dedicated to the protection against base eroding profit shifting and tax evasion, are exceedingly complex and difficult to administer.[185]

3.1 Double Tax Treaty Negotiations

As was discussed in section 1, the allocation of the tax base through DTTs is a key issue raised in the literature. There are several studies that predict the likelihood of a country to sign a tax treaty,[186] however, what is of interest here is the important strand of the literature that delves into the negotiations of DTTs that result in these unequal treaty outcomes for developing countries. studies attempt to understand why and when developing countries end up ceding so much of their taxing rights to treaty partners.

The first issue highlighted in the literature on asymmetric tax treaty negotiations speaks to the power differentials between negotiation partners. Irish[187] and Pickering,[188] argue that the diffusion of residence based DTTs may be the result of asymmetries in bargaining power between developed and developing country parties. Irish speculates that the reason for the diffusion of this model is due to greater bargaining strength of developed countries over developing countries, and that the developed countries will most likely have a preference for residence-based treaties.[189] In addition, Hearson finds that large power asymmetries between negotiating parties is more likely to result in even greater inequities over taxing rights, with taxing rights skewing in the favour of the more powerful party.[190]

Another key issue highlighted by Irish is the lack of adequate training and administrative capacity in tax departments of developing countries.[191] Indeed, in country-specific case studies, Quinones-Cruz and Aukonobera mark stark discrepancies between negotiating teams' strength and preparedness in Colombia and Uganda, respectively.[192] In a recent study, Brauner found that amongst non-OECD respondents, there was a self-perceived lack of training prior to joining tax treaty negotiations and that while the majority of negotiators received some training on the OECD MC, only roughly half the respondents had received training on the UN MC. [193]

One result of this lack of adequate training is a perceived lack of awareness on the part of developing country negotiators as to the full extent that the treaty would impact upon their country's future tax policy autonomy. Irish argues that the reason that developing states accepted treaties which favoured greater residence taxing rights was due to a lack of awareness of the full

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[185] Sol Picciotto, 'Indeterminacy, Complexity, Technocracy and the Reform of International Corporate Taxation', Social and Legal Studies 24, no. 2 (2015): 165–84.

[186] Barthel and Neumayer, 'Competing for Scarce Foreign Capital: Spatial Dependence in the Diffusion of Double Taxation Treaties 1'.; Julia Braun and Martin Zagler, 'An Economic Perspective on Double Tax Treaties with(in) Developing Countries', World Tax Journal, October 2014, 242.

[187] Irish, 'International Double Taxation Agreements and Income Taxation at Source'.

[188] Ariane Pickering, 'Why Negotiate Tax Treaties', Papers on Selected Topics in Negotiation of Tax Treaties for Developing Countries (Geneva, May 2013).

[189] Irish, 'International Double Taxation Agreements and Income Taxation at Source'.

[190] Hearson, 'When Do Developing Countries Negotiate Away Their Corporate Tax Base?'

[191] Irish, 'International Double Taxation Agreements and Income Taxation at Source'.

[192] Natalia Quiñones Cruz, 'Colombia', in The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties, ed. Michael Lang, Pasquale Pistone, and Josef Schuch (Cambridge University Press, 2014), 294–310; Festus Akunobera, 'Uganda', in The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties, ed. Michael Lang et al. (Cambridge University Press, 2014), 1083–1100.

[193] Brauner, 'Tax Treaty Negotiations: Myth and Reality'.

extent that DTAs (often inherited from the colonial era) would have on their tax bases. [194] A case study focusing on the Uganda-Netherlands treaty by Jalia Kangave finds support for this contention; Kangave argues that this particular negotiation over a specific article on dividends, which reduced the taxing rights on dividend income for Uganda significantly, perhaps set a precedent for future treaty negotiations that would harm Uganda's taxation rights in treaties with more developed states.[195] Finally, another potential issue highlighted is the lack of transparency around tax treaty negotiations processes. Brauner notes that 'confidentiality is the universal norm' when it comes to tax treaty negotiations.[196] Aside from the anecdotal evidence cited in many of the above studies, there is a distinct ambiguity around tax treaty negotiation processes, which hampers attempts to scrutinise the actual negotiation process.

3.2 Persistent Tax Competition

Many low-income countries still rely heavily on corporate income taxation for revenue, which makes the effects of tax competition particularly acute. [197] One study by Crivelli et al., finds that the effects of tax competition – that is, base spillovers – may be experienced more strongly by developing countries.[198] This is because, as Genschel and Seelkopf point out, due to numerous structural and political factors that influence revenue mobilisation,[199] lower income countries are less able to offset the losses from corporate tax competition with revenue from other taxes such as labour and consumption.[200] This reliance on corporate income tax is thought to impact the calculus of low-income countries in deciding whether to employ competitive tax policies.

Interestingly, Genschel and Seelkopf note that low-income states were less likely to compete over corporate tax rates, indicating that overall, these countries tended to have higher CIT rates than the OECD average.[201] Though they note, in line with the literature below, that there was also a marked tendency for these countries to compete through the use of tax incentives. However, as Durst, Lips and Mosquera Valderrama, and Christians note, in a world where countries compete for inward FDI, low-income governments face a 'dilemma' – where corporate taxes are an essential revenue source for many less developed countries, there is therefore also an incentive to maximise that revenue source through offering tax incentives to attract inward investment.[202]

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194 Irish, 'International Double Taxation Agreements and Income Taxation at Source'.

195 Kangave, 'The Dominant Voices in Double Taxation Agreements: A Critical Analysis of the "Dividend" Article in the Agreement between Uganda and the Netherlands'.

196 Brauner, 'Tax Treaty Negotiations: Myth and Reality'.

197 Phillip Genschel and Laura Seelkopf, 'Did They Learn to Tax? Taxation Trends Outside the OECD', Review of International Political Economy 23, no. 2 (2016): pp. 325-6. Duane Swank, 'The New Political Economy of Taxation in the Developing World', Review of International Political Economy 23, no. 2 (3 March 2016): p. 186.;Crivelli, De Mooij, and Keen, 'Base Erosion, Profit Shifting and Developing Countries'.; Michael Keen and Mario Mansour, 'Revenue Mobilization in Sub-Saharan Africa: Challenges from Globalization', IMF Working Paper Fiscal Affairs Department, July 2009.

198 Crivelli, De Mooij, and Keen, 'Base Erosion, Profit Shifting and Developing Countries'.

199 Giulia Mascagni, Mick Moore, and Rhiannon McCluskey, 'Tax Revenue Mobilisation in Developing Countries: Issues and Challenges', April 2014, https://doi.org/10.2861/58312.

200 Philipp Genschel and Laura Seelkopf, 'Winners and Losers of Tax Competition', in Global Tax Governance: What Is Wrong with It and How to Fix It, ed. Peter Deitsch and Thomas Rixen, 2016, p. 70.

201 Ibid

202 Michael C Durst, Taxing Multinational Business in Lower-Income Countries: Economics, Politics and Social Responsibility (Brighton: Institute for Development Studies, 2019), p.23.Christians, 'Global Trends and Constraints on Tax Policy in the Least Developed Countries'., pp. 9-15.; Wouter Lips and Mosquera Valderrama, 'Global Sustainable Tax Governance in the OECD-G20 Transparency and BEPS Initiatives (Pre-Print Version)', ed. Brokelind C. and Van Thiel S., 1st ed. (IBFD, 2020), section 2 C.

Indeed, there is support for this in the literature on tax incentive competition. In a 2010 review of the literature on PTRs, Madiés and Dethier note that preferential tax regimes (PTRs) – that is, tax attracting incentives – have proliferated amongst developing countries.[203] Others find that low-income countries engaged more heavily in preferential tax regime (PTR) competition than middle income states.[204] A 2004 study by Keen and Simone illustrates that some of the lowest income countries engaged in preferential regime competition.[205] Keen and Mansour also show this trend in a study on corporate income tax competition in Sub-Saharan African countries, and note, crucially, that low-income countries tended to use PTRs than middle income countries in the same region.[206] Moreover, a 2013 study by Abbas et al., reveals that while developing countries appear not to have reduced effective tax rates more than higher income countries, the study reveals that where tax competition is most striking is in preferential tax regimes of developing countries.[207] A more recent study by Mardan, which focuses on thin capitalisation rules, finds that there is a correlation between level of financial development and 'generosity' of thin capitalisation rules, thus the lower the country's financial development, the more generous its thin capitalisation rules towards foreign investors.[208] Genschel and Seelkopf note two core explanations relating to low capacity are notable in the literature for the propensity of these countries to engage in tax incentive competition. First, Keen and Simone suggest that governments in these countries are susceptible to interest group influence by multinationals.[209] The second explanation suggests that corruption plays a significant role in 'targeted tax preference rather than general rate reductions.'[210]

3.3 Tax Avoidance and Tax Evasion

Following on from this, the dual issues of tax avoidance and tax evasion are significant issues for all countries in the global economy though these issues can be particularly acute for developing countries. There is a significant empirical literature on the scale of tax avoidance and tax evasion. However, many estimates tend to suffer from constraints due data availability issues. Nevertheless, different estimates suggest that the impacts of both avoidance and evasion are significant.

Corporate tax avoidance occurs through MNE using a range of legal, though aggressive, tax planning strategies designed to minimise their overall tax liability. The effects of avoidance by corporations using base eroding profit shifting measures has been the subject of many studies in the literature.[211]

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203 Madiès, Dethier, and World Bank, 'Fiscal Competition in Developing Countries A Survey of the Theoretical and Empirical Literature'., pp.2-3.

204 Michael Keen and Alejandro Simone, 'Is Tax Competition Harming Developing Countries More than Developed?', Tax Notes International , 28 June 2004.Abbas and Klemm, 'A Partial Race to the Bottom: Corporate Tax Developments in Emerging and Developing Economies'.Swank, 'The New Political Economy of Taxation in the Developing World'.; Genschel and Seelkopf, 'Winners and Losers of Tax Competition'., p.70

205 Keen and Simone, 'Is Tax Competition Harming Developing Countries More than Developed?'

206 Keen and Mansour, 'Revenue Mobilization in Sub-Saharan Africa: Challenges from Globalization'.

207 Abbas and Klemm, 'A Partial Race to the Bottom: Corporate Tax Developments in Emerging and Developing Economies'.

208 Mohammed Mardan, 'Why Countries Differ in Thin Capitalization Rules_ The Role of Financial Development | Elsevier Enhanced Reader', European Economic Review 91 (January 2017): 1–14.

209 Keen and Simone, 'Is Tax Competition Harming Developing Countries More than Developed?', p.1321.

210 Genschel and Seelkopf, 'Winners and Losers of Tax Competition'., p.70.

211 See Alex Cobham and Petr Jansky, Estimating Illicit Financial Flows: A Critical Guide to the Data, Methodologies, and Findings (Oxford: Oxford University Press, 2020). For a comprehensive review of existing estimates.

There is no consensus as to the best data source to use – firm level data,[212] FDI data,[213] country-by-country report data,[214] and government revenue databases[215] are all common approaches in the literature, and these differences in data and also methodology yield highly varying results, (see table 3.3.1 – a selection of recent estimates). It should be noted that some of the higher estimates used data with broader country coverage in the table below.

Table 3.3.1 Selected Recent Estimates on the Total Scale of Tax Avoidance

Study	Year	Method/Data	Estimate (Worldwide loss of revenue)
OECD[216]	2014	'MNE profits relating to tax differentials'	$100-240 billion
Crivelli, De Mooij, and Keen (IMF) [217]	2015	'Spillovers on tax policy decisions on other countries '(corporate income tax base and corporate income tax rates) IMF data from 173 countries	$650 billion
Cobham and Janský[218]	2018	'Spillovers on tax policy decisions' (corporate income tax base and corporate income tax rates) UNU-WIDER Data set	$500 billion
Janský and Palanský[219]	2019	'FDI approach' (returns to FDI)	$194 billion
Garcia-Bernardo and Jansky[220]	2021	'Misalignment Model' (CbCR data)	$200-300 billion

(Sources: Johannesen and Pirttilä, 2016;[221] Jansky and Palansky, 2019;[222] Cobham and Jansky;[223] Crivelli et al.;[224] Garcia-Bernardo and Janksy;[225] OECD[226])

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[212] See Alex Cobham and Petr Jansky, Estimating Illicit Financial Flows: A Critical Guide to the Data, Methodologies, and Findings (Oxford: Oxford University Press, 2020). For a comprehensive review of existing estimates.
[213] Petr Janský and Miroslav Palanský, 'Estimating the Scale of Profit Shifting and Tax Revenue Losses Related to Foreign Direct Investment', International Tax and Public Finance 26, no. 5 (2019): 1048–1103.; UNCTAD, 'World Investment Report 2015: Reforming International Investment', 2015.
[214] Javier Garcia-Bernardo and Petr Jansky, 'Profit Shifting of Multinational Corporations Worldwide – The International Centre for Tax and Development (ICTD)', March 2021; Clemens Fuest, Felix Hugger, and Florian Neumeier, 'Corporate Profit Shifting and the Role of Tax Havens: Evidence from German Country-By-Country Reporting Data | Publication | CESifo', CESifo Working Paper (Munich, 2021).
[215] Alex Cobham and Petr Janský, 'Global Distribution of Revenue Loss from Tax Avoidance Re-Estimation and Country Results', WIDER Working Paper , March 2017.
[216] OECD, 'Measuring and Monitoring BEPS, Action 11-2015 Final Report', 2015, https://doi.org/10.1787/9789264241343-en.
[217] Crivelli, De Mooij, and Keen, 'Base Erosion, Profit Shifting and Developing Countries'.
[218] Alex Cobham and Petr Janský, 'Global Distribution of Revenue Loss from Corporate Tax Avoidance: Re-Estimation and Country Results', Journal of International Development 30, no. 2 (1 March 2018): 206–32, https://doi.org/10.1002/jid.3348.
[219] Janský and Palanský, 'Estimating the Scale of Profit Shifting and Tax Revenue Losses Related to Foreign Direct Investment'.
[220] Garcia-Bernardo and Jansky, 'Profit Shifting of Multinational Corporations Worldwide – The International Centre for Tax and Development (ICTD)'.
[221] Niels Johannesen and Jukka Pirttilä, 'Capital Flight and Development: An Overview of Concepts, Methods, and Data Sources', vol. 2016, WIDER Working Paper (UNU-WIDER, 2016), https://doi.org/10.35188/UNU-WIDER/2016/138-3., p. 11 for the full comparison table.
[222] Janský and Palanský, 'Estimating the Scale of Profit Shifting and Tax Revenue Losses Related to Foreign Direct Investment'.
[223] Cobham and Janský, 'Global Distribution of Revenue Loss from Corporate Tax Avoidance: Re-Estimation and Country Results'.
[224] Crivelli, De Mooij, and Keen, 'Base Erosion, Profit Shifting and Developing Countries'.
[225] Garcia-Bernardo and Jansky, 'Profit Shifting of Multinational Corporations Worldwide – The International Centre for Tax and Development (ICTD)'.
[226] OECD, 'Measuring and Monitoring BEPS, Action 11-2015 Final Report'.

Although one review of several existing studies by Jansky and Palansky suggests that four out of five studies reviewed indicated that developing countries were not disproportionately impacted by profit shifting compared with developed countries, broadly speaking, the literature on tax avoidance and developing countries indicates that developing countries are nevertheless significantly impacted by tax avoidance.[227] A recent example, Johannesen et al., notes that low levels of development correspond to stronger profit shifting responses from MNEs to tax rates,[228] suggesting, along with Fuest et al., that less developed countries are more susceptible to profit shifting than developed countries.[229] Crivelli et al., Cobham and Jansky,[230] and Garcia-Bernardo and Jansky find that more revenue tended to be lost due to profit shifting, relative to total tax revenue in low-income countries.[231] Supporting this trend, a recent report by the Tax Justice Network estimates that revenue losses for low-income countries lose an equivalent to around 5.5 per cent of their total tax revenue from corporate tax avoidance, as opposed to 1.3 per cent in higher income countries.[232] Johannesen et al. conclude their study suggesting that the impact of these effects for developing countries may in fact lead to policymakers in those countries lowering corporate tax rates in order to make up for weaker enforcement/revenue collection capabilities when it comes to taxation of foreign multinationals.[233]

The other core issue of ‘under taxation’ in the global economy relates to tax evasion. Tax evasion is illegal and generally involves some form of concealment of financial information to escape taxation. Similar to the avoidance literature, evasion estimates yield widely varying estimates according to methodology and data (see table 3.3.2 below). Zucman’s work is perhaps one of the most influential estimates of the amount of wealth held offshore. In a 2015 study, Zucman utilises a method where the differences between assets liabilities for each country are analysed to estimate the total household wealth that is held offshore. Zucman comes up with a total of 6 percent of global wealth being ‘missing’, and an estimate of 8 percent of being held in tax havens. Moreover, the study breaks this down by region, and the findings indicate that developing states lose the most in terms of percentage of total financial wealth: Africa is thought to lose $500 billion, roughly 30 percent of financial wealth, and amounting to $14 billion in tax revenues. Asia is thought to lose $1.3 trillion, that is 4 percent, and $34 billion in revenues, while Latin America loses $700 billion, (22 percent), amounting to $21 billion in revenue.[234] More recently, the aforementioned Tax Justice Network report estimates that roughly $182 billion

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[227] Janský and Palanský, ‘Estimating the Scale of Profit Shifting and Tax Revenue Losses Related to Foreign Direct Investment’.; Garcia-Bernardo and Jansky, ‘Profit Shifting of Multinational Corporations Worldwide – The International Centre for Tax and Development (ICTD)’., p.7.

[228] Johannesen, Tørsløv, and Wier, ‘Are Less Developed Countries More Exposed to Multinational Tax Avoidance? Method and Evidence from Micro-Data’.

[229] Clemens Fuest, Shafik Hebous, and Nadine Riedel, ‘International Debt Shifting and Multinational Firms in Developing Economies’, Economics Letters 113, no. 2 (2011): 135–38.

[230] Alex Cobham and Petr Janský, ‘Global Distribution of Revenue Loss from Corporate Tax Avoidance: Re-Estimation and Country Results’, Journal of International Development 30, no. 2 (1 March 2018): 206–32.

[231] Crivelli, De Mooij, and Keen, ‘Base Erosion, Profit Shifting and Developing Countries’, p. 21.; Garcia-Bernardo and Jansky, ‘Profit Shifting of Multinational Corporations Worldwide – The International Centre for Tax and Development (ICTD)’.

[232] Tax Justice Network, ‘The State of Tax Justice 2020: Tax Justice in the Time of COVID-19’, November 2020., p.4

[233] Johannesen, Tørsløv, and Wier, ‘Are Less Developed Countries More Exposed to Multinational Tax Avoidance? Method and Evidence from Micro-Data’.

[234] Gabriel Zucman, The Hidden Wealth of Nations : The Scourge of Tax Havens (Chicago: University of Chicago Press, 2015).

is being lost to tax evasion every year.[235] Crucially, in this study, the bulk of revenue losses are incurred by higher income countries (roughly $180 billion), while low-income countries are estimated to lose roughly $2.2 billion. [236]

Table 3.3.2 Recent Estimates on the Total Scale of Tax Evasion

Study	Year	Method	Estimate
Henry[237]	2012	Sources and Uses of Capital Inflows; accumulated offshore wealth model; offshore investor portfolio model; estimates of offshore assets at global banks	$21-32 trillion of wealth held in offshore jurisdictions
Zucman[238]	2015	Differences between assets and liabilities	$7.6 trillion hidden wealth held in offshore jurisdictions
Alstadsaeter, Johannesen, & Zucman	2018	Differences between assets and liabilities 3 sources: data from swiss central bank on deposits, equity portfolios, and bonds, as well as mutual fund shares from swiss banks; bilateral data on deposits supplied by BIS; IMF's balance of payments and international investment position data	10 per cent of world GDP
Tax Justice Network[239]	2020	'(i) difference b/w actual deposits and expected deposits in each jurisdiction, (ii) attribution to origin jurisdiction; (ii) combination of existing estimates of total offshore wealth with country shares; (iv) derivation of tax revenue losses[240]'	$182 billion loss in tax revenues globally

(Sources: Johannsen and Pirttilä, 2016;[241] Jansky and Palansky, 2019[242],Henry 2012;[243] Tax Justice Network, 2020,[244]Cobham and Jansky, 2020[245])

In sum, despite the methodological differences, and the inherent data constraints involved in estimating the true cost of tax avoidance and evasion, the literature illustrates that both tax evasion and avoidance are pressing issues for many less developed countries. Numerous studies indicate that tax avoidance is felt more acutely in less developed countries, due in large part to the fact that these countries tend to rely more heavily on corporate income tax than other forms of taxation, and, because of the proportion of revenue to GDP that these losses incur.

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235 Tax Justice Network, 'The State of Tax Justice 2020: Tax Justice in the Time of COVID-19'., p. 39.
236 Ibid., p.39
237 James S. Henry, 'The Price of Offshore Revisited', July 2012.
238 Zucman, The Hidden Wealth of Nations : The Scourge of Tax Havens., p.53.
239 Tax Justice Network, 'The State of Tax Justice 2020: Tax Justice in the Time of COVID-19'.
240 Ibid., pp.40-43
241 See Johannesen and Pirttilä, 'Capital Flight and Development: An Overview of Concepts, Methods, and Data Sources'., p. 11 for a comparison table.
242 Janský and Palanský, 'Estimating the Scale of Profit Shifting and Tax Revenue Losses Related to Foreign Direct Investment'.
243 Henry, 'The Price of Offshore Revisited'.
244 Tax Justice Network, 'The State of Tax Justice 2020: Tax Justice in the Time of COVID-19'.
245 Cobham and Jansky, Estimating Illicit Financial Flows: A Critical Guide to the Data, Methodologies, and Findings.

3.4 Complexity of International Standards for Developing Countries

Finally, the literature marks out key issues of capacity constraints of many less developed countries, in conjunction with increasing rule complexity, make it difficult for many less developed countries to fully participate many of the international standards emerging from the ITR. Indeed, a 2020 report from the UN estimates that low-income countries have one tenth of the staffing capacity of high-income countries in their tax administrations, though notes that there is scope for enhancing capacity for less developed countries through the adoption of advanced technologies to assist in revenue mobilisation.[246] A hurdle for participation in international standards may be a lack of willingness to divert scarce resources to the compliance with onerous international standards. The 2020 Financing for Development Report notes a careful assessment for LDCs' tax administrations must be made as to (i) how suitable the international standards are to their circumstances, (ii) whether the administration has the capacity to fully implement the standard, and (iii) what the 'opportunity costs' may be from prioritising compliance with international standards over other tax policy reforms.[247]

On the ITR more generally, Picciotto, Durst, Büttner and Thiemann, and Avi-Yonah and Xu, have all argued that the rules of the ITR have become increasingly costly, discretionary, complex, indeterminate and/or incoherent.[248] Increasing complexity makes certain existing standards, such as the ALP, difficult for all governments to effectively implement.[249] Picciotto notes that in order to implement transfer pricing rules set out by the OECD or UN based upon the ALP, authorities require highly specialised knowledge on both the transfer pricing methods, and the individual firm's activities.[250] Because the burdens of conducting an assessment, and the search for adequate comparables are difficult, and for a developing country tax authority whose administrative resources may be limited, the task is particularly challenging.[251] Numerous observers, as a result, advocate for more fundamental reforms to simplify transfer pricing regulations, or to abandon the ALP and shift toward unitary taxation of MNEs (some of these methods are discussed in section 4).[252]

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246 Inter-agency Task Force on Financing for Development United Nations, 'Financing for Sustainable Development Report 2020 Inter-Agency Task Force on Financing for Development ' (New York, 2020)., p.40.

247 Ibid., p.44.

248 Avi-Yonah and Haiyan, 'Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight'., p. 208; Büttner and Thiemann, 'DE GRUYTER Breaking Regime Stability? The Politicization of Expertise in the OECD/ G20 Process on BEPS and the Potential Transformation of International Taxation'; Durst, Taxing Multinational Business in Lower-Income Countries: Economics, Politics and Social Responsibility; p. 7; Picciotto, 'Indeterminacy, Complexity, Technocracy and the Reform of International Corporate Taxation'.

249 Sol Picciotto, 'Problems of Transfer Pricing and Possibilities for Simplification', ICTD Working Paper, November 2018.; Mosquera Valderrama, 'International / OECD Output Legitimacy Deficits and the Inclusive Framework of the OECD/ G20 Base Erosion and Profit Shifting Initiative'.Durst, Taxing Multinational Business in Lower-Income Countries: Economics, Politics and Social Responsibility., p.7; International Monetary Fund, 'Spillovers in International Corporate Taxation'., p.31-33.; Ezenagu, 'Safe Harbour Regimes in Transfer Pricing: An African Perspective'., pp.6-10; African Tax Administration Forum, 'ATAF Publishes an Approach to Taxing the Digital Economy', 30 September 2020, https://www.ataftax.org/ataf-publishes-an-approach-to-taxing-the-digital-economy., Martin Hearson, 'Corporate Tax Negotiations at the OECD: What's at Stake for Developing Countries in 2020?' (Brighton: Institute of Development Studies, 5 February 2020), p.2.

250 Picciotto, 'Problems of Transfer Pricing and Possibilities for Simplification'., p.6

251 Ibid.

252 Avi-Yonah, 'A Proposal for Unitary Taxation and Formulary Apportionment (UT + FA) to Tax Multinationals'; Kimberly A Clausing and Reuven S Avi-Yonah, 'Reforming Corporate Taxation in a Global Economy: A Proposal to Adopt Formulary Apportionment', The Hamilton Project, 2007; Picciotto, 'Problems of Transfer Pricing and Possibilities for Simplification'.

Following on from this, recent initiatives aimed at fighting tax avoidance and evasion do not resolve the complexity/capacity dilemma. [253] Sadiq and Sawyer, and Ring, have argued that many less developed countries will face varying degrees of compliance issues with respect to the Global Forum's transparency standards.[254] This appears to be supported by the 2021 UN Financing for Sustainable Development report noted that only eight out of 46 least developed countries (LDCs) had signed up to the Multilateral Convention on Mutual Administrative Assistance and even fewer countries had joined the Multilateral Competent Authority Agreement Common Reporting Standard (for the implementation of automatic exchange of information).[255]

While with respect to BEPS, Burgers and Mosquera Valderrama, and Oguttu provide action by action break downs, assessing their suitability for less developed countries. [256] Burgers and Mosquera argue that the BEPS minimum standards (actions 5, 6, 13 and 14) will be important for developing country economies but will require specific adaptions to cater for issues relating technical capacity constraints.[257] A UN survey also revealed that respondents' priority actions related strongly to transfer pricing, country-by-country reporting, interest deductions, treaty abuse, and data analysis.[258] However, respondents also identified key priorities that were outside the remit of the BEPS Action items relating to encouraging developing countries to adopt a GAAR as well as specific anti-avoidance rules in their domestic law; pursuing work on the taxation of capital gains under domestic law and under tax treaties; rebalancing source versus residence taxation, especially in relation to tax treaties; the treatment of branch profits; the cash economy; and the adverse consequences of the use of tax incentives.[259]

These responses highlight some of the unique challenges for many less developed countries relating to the ITR more generally, which were not part of the BEPS outcomes. Notably, considerable attention is focused on allocation issues, which were not substantively addressed as a part of the BEPS process. Moreover, the BEPS initiative arguably increased the complexity of

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[253] Burgers and Mosquera Valderrama, 'Corporate Taxation and BEPS: A Fair Slice for Developing Countries?'; Irma Johanna Mosquera Valderrama, 'Democratic Legitimacy of BEPS in Countries in South America and the Sub-Saharan African Region', World Tax Journal 3 (26 November 2015), https://doi.org/10.2139/ssrn.2528044; Oguttu, 'Tax Base Erosion and Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan – The International Centre for Tax and Development (ICTD)', p.20; L Wagenaar, 'The Effect of the OECD Base Erosion and Profit Shifting Action Plan on Developing Countries ', Bulletin for International Taxation 69, no. 2 (2015); Michael Lennard, 'Base Erosion and Profit Shifting and Developing Country Tax Administrations', Intertax 44 (2016).; Sadiq and Sawyer, 'Developing Countries and the Automatic Exchange of Information Standard-a "One-Size-Fits-All" Solution? '.the Organisation for Economic Cooperation and Development (OECD;Hugh J., Ault and Brian J., Arnold, 'Protecting the Tax Base of Developing Countries Second Edition Edited By', in Protecting the Tax Base of Developing Countries, ed. Alexander Trepelkov, Harry Tonino, and Dominika Halka, 2nd ed. (United Nations, 2017), p. 5.; Hearson and Prichard, 'China's Challenge to International Tax Rules and the Implications for Global Economic Governance'., p.1293.

[254] Sadiq and Sawyer, 'Developing Countries and the Automatic Exchange of Information Standard-a "One-Size-Fits-All" Solution? '; Diane M Ring, 'Transparency, Disclosure and Developing Countries', Brigham Young University Law Review, no. 6 (2016): 1767–1835.the Organisation for Economic Cooperation and Development (OECD

[255] Inter-agency Task Force on Financing for Development, 'Financing for Sustainable Development Report 2021 '., p.47.

[256] Burgers and Mosquera Valderrama, 'Corporate Taxation and BEPS: A Fair Slice for Developing Countries?'; Oguttu, 'Tax Base Erosion and Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan – The International Centre for Tax and Development (ICTD)'.

[257] Burgers and Mosquera Valderrama, 'Corporate Taxation and BEPS: A Fair Slice for Developing Countries?' Oguttu, 'Tax Base Erosion and Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan – The International Centre for Tax and Development (ICTD)'., p. 27; Oguttu argues that Actions 4 (Limit base erosion via interest deductions and other financial payment), 6 (Prevent treaty abuse), 7 (Prevent the artificial avoidance of PE status), 10 (Assure that transfer pricing outcomes are in line with value creation with respect to other high-risk transactions, 12 (Requiring taxpayers to disclose their aggressive tax planning arrangements), 13 (Re-examining transfer pricing documentation), are the most relevant for African jurisdictions

[258] Carmel Peters, 'Developing Countries' Reactions to the G20/ OECD Action Plan on Base Erosion Profit Shifting', Bulletin for International Taxation June/July (2015).

[259] Ibid.

the existing international tax rules. A 2019 IMF report summarises this view succinctly: 'The BEPS project is not generally regarded as simplifying a system that was already largely incomprehensible to all but the most expert. BEPS implementation, moreover, was seen as creating additional uncertainty for both taxpayers and tax administrations.'[260]

Thus, the existing rules are already seen as exceedingly complex, and difficult to administer, especially around transfer-pricing. Moreover, recent efforts to address tax avoidance and evasion at the international level have resulted in standards that contain onerous compliance costs for resource constrained tax administrations in many low-income countries.

4. Alternatives Systems and Recent Debates

We are now at an interesting moment in the ITR, which is reflected in the discussions in the literature that centre around several key issue areas. The first relates to the viability of the arm's length standard, which as noted earlier, has come under increasing criticism in recent years. The next issue relates to the representativeness of the international institutions of the ITR, and whether the outputs of these institutions are 'fit for purpose' for the issues they seek to resolve.[261] Next, calls to transform the residence-country bias in tax treaties, as evidenced in the recent developments in the UN model tax treaty. This has arisen alongside a growing group of developing countries which are choosing to cancel or renegotiate their tax treaties for better terms.[262] Finally, the work into updating some of the core rules in the ITR to suit the digital economy has revived debates about how inclusive this process has been, and how suitable these rules will be, for less developed countries. This section canvasses some of the main cutting-edge debates and discusses main alternatives to entrenched norms.

4.1 Simplified Approaches to Transfer Pricing and Alternative Systems

The complexity and difficulties in enforcement issues of implementing the (ALP), especially for developing countries, has led some countries to adopt simplification measures in relation to the TPGs.[263] This has led to some changes to the OECD TPGs, with the introduction of 'safe harbours' in 2017 to the OECD guidelines.[264] The OECD defines safe harbours as 'a provision that applies to a defined category of taxpayers or transactions and that relieves eligible taxpayers from certain obligations otherwise imposed by a country's general transfer pricing rules.'[265] Safe harbours are thought to reduce the compliance burdens in applying the ALP to intrafirm transactions, while enhancing administrative efficiencies in tax administrations.[266]

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260 International Monetary Fund, 'Corporate Taxation in the Global Economy'., p.10.
261 Picciotto, 'Is the International Tax System Fit for Purpose, Especially for Developing Countries? '.
262 Will Fitzgibbon, 'Zambia Becomes Second Nation to Tear up Mauritius Tax Deal ', International Consortium of Investigative Journalists, 6 July 2020.; Anthony Deutsch and Terrence Edwards, 'Special Report: In Tax Case, Mongolia Is the Mouse That Roared | Reuters', Reuters, 16 July 2013; Hearson, 'When Do Developing Countries Negotiate Away Their Corporate Tax Base?'
263 Picciotto, 'Problems of Transfer Pricing and Possibilities for Simplification'.
264 Ibid.
265 OECD, 'Revised Section E On Safe Harbours in Chapter IV of the Transfer Pricing Guidelines' (Paris, 2013).
266 Ezenagu, 'Safe Harbour Regimes in Transfer Pricing: An African Perspective'., para. 4.100, p.4

Brazil has also applied an approach to simplification that is based on three of the OECD TPGs, but also applies a fixed profit margin to taxpayers within specified categories, thus getting rid of the need for individual audits.[267] As Picciotto notes, however, while this approach may be practical, it does not account for differences in firms' level of profitability, and it is largely incompatible with the OECD's requirement for individualised evaluation.[268] Moreover, though Brazil's experience has been largely positive, the Brazilian approach to transfer-pricing rules has also come alongside concomitant shifts in Brazil's tax policy which, Picciotto argues, takes the 'pressure off' of the Brazil's transfer-pricing rules.[269] Thus, it is unclear as to how effective Brazil's approach would be in the context of other developing countries with different tax systems, and weaker anti-avoidance rules.

Another proposal by Durst, suggests a modification to the Transactional Net Margin Method (TNMM) in the OECD TPGs.[270] This proposal would require a shared net profit margin which requires the subsidiary to earn a benchmark profit margin, in proportion to the whole MNE group. The difference from the TNMM approach is that rather than base the benchmarking on comparables, which as noted earlier, are often difficult to find, especially in developing country contexts, the 'taxpayers would instead be required to earn profit margins equal to 25 per cent of the global consolidated margin earned by the taxpayer's multinational group; and (ii) the measure of profitability used for purposes of benchmarking under TNMM would be earnings before tax, instead of operating income.'[271]

Finally, another approach aimed at simplifying the administration of existing TPGs is the 'sixth method' which applies to commodity valuation and is used as by many countries with large extractives sectors, many of which are developing countries. Essentially, this method is a simplified version of the first OECD mandated transfer-pricing method: 'comparable uncontrolled price' (CUP) method. It aims to curb transfer mispricing in commodity transactions, by creating a transparent and easy-to-implement standard for tax administrations.[272] The sixth method involves using a benchmark supplied by a relevant commodity exchange to price commodity transactions, thereby simplifying the application of the ALP in commodities transactions by supplying a clear and 'objective' price comparable for intra-MNE trade.[273] However, as Readhead, Grondona, and Picciotto note, while the sixth method can provide much needed simplicity for developing country tax administrations in the regulation of commodities-based transfer pricing, there are risks of abuse.[274] The sixth method was endorsed as a CUP method under the OECD's BEPS

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267 Picciotto, 'Problems of Transfer Pricing and Possibilities for Simplification'.
268 Ibid.
269 Ibid.
270 Michael C Durst, 'Developing Country Revenue Mobilisation: A Proposal to Modify the "Transactional Net Margin" Transfer Pricing Method', ICTD Working Paper, 2016.
271 Ibid., p.11
272 Alexandra Readhead, 'Natural Resource Charter Case Study Special Rules for Commodity Sales: Zambia's Use of the "Sixth Method"', 2017.
273 Picciotto, 'Problems of Transfer Pricing and Possibilities for Simplification'., p. 24.; Veronica Grondona and Andres Knobel, 'Transfer Pricing in Argentina 1932-2015', ICTD Working Papers, January 2017., pp. 17-19.; Veronica Grondona, 'Transfer Pricing: Concepts and Practices of the "Sixth Method" in Transfer Pricing', May 2018.
274 In particular, where the administration allows companies to seek a downward adjustment to the benchmark prices, based on the quality of the commodity, if tax administrations lack the capacity to verify the quality of exports, transfer mispricing can occur. Readhead, 'Natural Resource Charter Case Study Special Rules for Commodity Sales: Zambia's Use of the "Sixth Method"'; Grondona, 'Transfer Pricing: Concepts and Practices of the "Sixth Method" in Transfer Pricing'; Picciotto, 'Problems of Transfer Pricing and Possibilities for Simplification'.

initiative (Action 10), but this version requires an accompanying extensive comparability analysis which, as Picciotto and Readhead note, reduces its core goal of simplicity, thus removing a core incentive to utilise this alternative approach.[275]

Unitary Taxation with Global Formulary Apportionment

One of the most prominent alternatives to the current transfer pricing regime that is predicated upon the ALP, is that of unitary taxation with formulary apportionment (UT+ FA herein). UT+FA has been a significant feature of the reform agendas propounded by academics[276] and NGOs such as the Tax Justice Network.[277] There is a vast literature on the benefits, drawbacks, and various policy design options of worldwide FA.[278] Essentially, UT+FA entails taxing an MNE on its worldwide income, and then allocating taxable income to relevant jurisdictions by a formula, based upon some percentage of worldwide profits.[279]

Proponents such as Rixen, Picciotto, Avi-Yonah and Clausing argue that UT + FA would mitigate the problems of abuses of transfer-pricing under the ALP approach.[280] While another argument for UT+FA is to simplify the complex rules of transfer pricing under ALP.[281] Initial assessments of the impacts of a shift to UT with FA, that the distributional effects of FA could be considerable.[282] Cobham and Loretz find that if apportionment is based upon tangible assets or number of employees would benefit low-income countries significantly.[283]

However, Avi-Yonah and Clausing and Altshuler and Grubert, and Neilson et al., also warn of potential drawbacks from FA proposals.[284] Altschuler and Grubert highlight potential distortionary effects under FA, while Neilsen et al., warn that there may be a propensity of FA to increase the prospects of tax competition,

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275 Readhead, 'Natural Resource Charter Case Study Special Rules for Commodity Sales: Zambia's Use of the "Sixth Method"'; Picciotto, 'Problems of Transfer Pricing and Possibilities for Simplification'.

276 Rixen, 'Tax Competition and Inequality: The Case for Global Tax Governance'.; Avi-Yonah, 'A Proposal for Unitary Taxation and Formulary Apportionment (UT + FA) to Tax Multinationals'.

277 Tax Justice Network, 'Ending Multinational Tax Avoidance through Unitary Taxation', 2017.

278 Sol Picciotto, 'Taxing Multinational Enterprises as Unitary Firms ', ICTD Working Paper, 2016; Independent Commission for the Reform of International Corporate Taxation, 'A Roadmap to Improve Rules for Taxing Multinationals', February 2018.; Kerrie Sadiq, 'Unitary Taxation - the Case for Global Formulary Apportionment - IBFD', Bulletin for International Taxation 55, no. 7 (July 2001); Rixen, 'Tax Competition and Inequality: The Case for Global Tax Governance'; Tax Justice Network, 'Ending Multinational Tax Avoidance through Unitary Taxation'; Alex Cobham and Simon Loretz, 'International Distribution of the Corporate Tax Base: Implications of Different Apportionment Factors under Unitary Taxation', ICTD Working Paper, November 2014; Kimberly Clausing, 'Lessons for International Tax Reform from the US State Experience under Formulary Apportionment ', ICTD Research Report 2, March 2014; Clausing and Avi-Yonah, 'Reforming Corporate Taxation in a Global Economy: A Proposal to Adopt Formulary Apportionment'.

279 Sadiq, 'Unitary Taxation - the Case for Global Formulary Apportionment - IBFD'.

280 Rixen, 'Tax Competition and Inequality: The Case for Global Tax Governance'; Picciotto, 'Is the International Tax System Fit for Purpose, Especially for Developing Countries? '; Clausing and Avi-Yonah, 'Reforming Corporate Taxation in a Global Economy: A Proposal to Adopt Formulary Apportionment'.

281 Willard Taylor quoted in Reuven S Avi-Yonah and Ilan Benshalom, 'Formulary Apportionment: Myths and Prospects-Promoting Better International Policy and Utilizing the Misunderstood and Under-Theorized Formulary Alternative ', World Tax Journal 3, no. 3 (October 2011): p.376.;

282 Michael P. Devereux and Simon Loretz, 'The Effects of EU Formula Apportionment on Corporate Tax Revenues', Fiscal Studies 29, no. 1 (1 March 2008): 1–33; Cobham and Loretz, 'International Distribution of the Corporate Tax Base: Implications of Different Apportionment Factors under Unitary Taxation'; James R. Hines, 'Income Misattribution under Formula Apportionment', European Economic Review (North-Holland, 1 January 2010); International Monetary Fund, 'Corporate Taxation in the Global Economy'.

283 Cobham and Loretz, 'International Distribution of the Corporate Tax Base: Implications of Different Apportionment Factors under Unitary Taxation'.

284 Rosanne Altshuler and Harry Grubert, 'Formula Apportionment: Is It Better than the Current System and Are There Better Alternatives?', National Tax Journal 63, no. 4 (5 January 2010): 1154–84; Clausing and Avi-Yonah, 'Reforming Corporate Taxation in a Global Economy: A Proposal to Adopt Formulary Apportionment'.

especially if apportionment is based upon mobile production factors.[285]Aside from the technical and distributive impacts, Avi-Yonah and Clausing point out that there will likely be problems in administering and reaching political agreement over such a proposal at the international level.[286] Furthermore, if an FA proposal were to be considered at the international level, then there would likely be divergences of opinion as to how the (upon which factors) the apportionment would take place.[287] There are several different ways that apportionment could take place, namely on sales, value added, employment, and payroll, all of which affect the degree of distribution of the tax base between different low, middle, and high-income countries.[288]Difficulties in achieving political agreement on FA notwithstanding, there are tentative projections that suggest that FA could benefit developing countries significantly, particularly if apportionment is determined by employment.[289]

4.2 Proposals for an International Tax Organisation

In the literature, there have been numerous calls for a 'World Tax Organisation' that would function to mitigate enforcement problems, and to improve the representativeness of institutions to include low and middle-income countries in the decision-making process. [290]

One proposal by Horner argues for the creation of an ITO in order to better accommodate the needs of developing countries into international tax governance. Horner argues that a fundamental re-conceptualisation of tax rules would have to take place so that the needs of those 'last to the table' in international commerce (i.e. low-income countries) would not find the agenda dominated by those 'first to the table' (i.e. wealthy countries), as has been the case in the OECD, for example.[291]Another approach by Thuronyi argued for the creation of a multilateral treaty to replace bilateral treaties in existence, which would be administered by an 'appropriate' multilateral organisation.[292] In contrast, a more minimalist approach offered by Sawyer, who suggests that states could cooperate by creating 'binding rulings and APAs that encompass business and income with cross-border implications.'[293]

In recent years, the ITR has demonstrated a marked shift towards greater cooperation, in a way that more actively attempts to regulate and harmonise

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285 Søren Bo Nielsen, Pascalis Raimondos-Møller, and Guttorm Schjelderup, 'Company Taxation and Tax Spillovers: Separate Accounting versus Formula Apportionment', European Economic Review (North-Holland, 1 January 2010).

286 Clausing and Avi-Yonah, 'Reforming Corporate Taxation in a Global Economy: A Proposal to Adopt Formulary Apportionment'.

287 Cobham and Loretz, 'International Distribution of the Corporate Tax Base: Implications of Different Apportionment Factors under Unitary Taxation'.

288 International Monetary Fund, 'Corporate Taxation in the Global Economy'.Cobham and Loretz, 'International Distribution of the Corporate Tax Base: Implications of Different Apportionment Factors under Unitary Taxation'.

289 International Monetary Fund, 'Corporate Taxation in the Global Economy'. This paper notes that advanced economies tend to benefit more if the apportionment is based upon payroll, value added or sales, and less so if apportioned on the basis of employment.; Cobham and Loretz, 'International Distribution of the Corporate Tax Base: Implications of Different Apportionment Factors under Unitary Taxation'.

290 Vito Tanzi, 'Is There a Need for a World Tax Organization?', in The Economics of Globalization, ed. Assaf Razin and Efraim Sadka (Cambridge: Cambridge University Press, n.d.), 173–86.Jorge Garcia-Arias, 'The Systemic Approach to International Financing for Development and the Need for a World Tax and Financial Organization', European Journal of Development Research 25, no. 1 (8 November 2013): 60–77.

291 Horner, 'Do We Need an International Tax Organization?'

292 Victor Thuronyi, 'International Tax Cooperation and a Multilateral Treaty', Brooklyn Journal of International Law, vol. 26, 2001.

293 Adrian J Sawyer, 'Is an International Tax Organisation an Appropriate Forum for Administering Binding Rulings and APAs?', EJournal of Tax Research 2, no. 1 (2004).

tax policy across countries. This is characterised by Hearson and Christensen as a 'sovereignty constraining' shift and has been exemplified in the exchange of information regimes in the ITR since the financial crisis.[294] Key here minimum standards from the BEPS project, the continued use of 'peer review,'[295] and the use of white, grey and blacklists by tax organisations as mechanisms to ensure cooperation and compliance with multilateral standards.[296] As Moreover, recent proposals that involve harmonisation, such as the Multilateral Instrument (MLI) which simultaneously harmonises signatories' tax treaties, as well as the current G20/OECD Pillar 2 proposal demonstrate a move towards more multilateral, binding, international tax 'order' that monitor compliance with 'global' standards.[297] Arguably, these moves towards a more binding, multilateral arrangements point to an interesting shift away from policy autonomy in the name of curbing harmful tax competition appears to be taking place.

However, lack of what 'input legitimacy' in international standards has motivated several calls to upgrade, or at least significantly empower, the UN as an international tax body.[298] Notable examples include, the G77,[299] and various UN and non-UN commissions, the Zedillo report,[300] the Stiglitz Commission,[301] the High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (FACTI panel),[302] and the Mbeki Commission on illicit financial flows from Africa.[303] These widespread calls highlight serious calls to reform the institutional architecture to increase inclusivity, encourage greater representation and access for developing countries, and ultimately fix governance gaps created by a lack of coordination within the existing institutional architecture of the ITR.[304]

4.3 Renegotiations and Cancellation of Tax Treaties

In response to the asymmetries in existing DTTs, there have been several examples of tax treaty renegotiations, and cancellations in the last two decades. More recently, several developing states – Argentina, Malawi, Mongolia, Rwanda, South Africa, and Zambia have cancelled or renegotiated some of their existing tax treaties.[305] Uganda suspended tax treaty

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[294] Christensen and Hearson, 'The New Politics of Global Tax Governance: Taking Stock a Decade after the Financial Crisis'.

[295] Christians, 'BEPS and the New International Tax Order'.

[296] Jason Sharman, 'The Bark Is the Bite: International Organizations and Blacklisting ', Review of International Political Economy 16, no. 4 (2009): 573–96; Alex Cobham, 'Blacklisting the EU: Paradise Lost? - Tax Justice Network', Tax Justice Network, 2017, https://www.taxjustice.net/2017/11/27/blacklisting-the-eu-paradise-lost/

[297] Christians, 'BEPS and the New International Tax Order'., p.1642

[298] Cockfield, 'The Rise of the OECD as Informal "World Tax Organization" Through National Response to E-Commerce Tax Challenges'; Avi-Yonah and Haiyan, 'Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight'.; Tove Ryding, 'An Intergovernmental UN Tax Commission – Why We Need It and How We Can Get It - Eurodad' (Brussels, 2020).

[299] G77, 'Statement On Behalf of Group of 77 and China: International Cooperation in Tax Matters after the Adoption of the Resolution by the Economic and Social Council', G77, July 2012, https://www.g77.org/statement/getstatement.php?id=120727.

[300] United Nations, 'Report of the High-Level Panel on Financing for Development', 2001.

[301] United Nations, 'Recommendations of the Commission of Experts of the President of the General Assembly on Reforms of the International Monetary and Financial System ':, 2009.

[302] FACTI, 'Report of the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda'., p.42.

[303] 'Illicit Financial Flows Iff Report of the High Level Panel on Illicit Financial Flows from Africa', 2016.

[304] FACTI, 'Report of the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda'.

[305] Deutsch and Edwards, 'Special Report: In Tax Case, Mongolia Is the Mouse That Roared | Reuters'; Hearson, 'When Do Developing Countries Negotiate Away Their Corporate Tax Base?'

negotiations to and reviewed its existing treaties with a view to renegotiating them to better protect its interests.[306] While several developed countries, such as the Netherlands and Ireland have engaged in reviews of their tax treaty regimes.[307]

Qualitative case-study work reveals that several drivers for renegotiations and cancellations. In a 2013 report based upon extensive field research, Hearson finds that a key driver for states in Africa to cancel or renegotiate their treaties was to mitigate the effects of treaty shopping.[308] Though Hearson also found that some states sought renegotiation of treaties that had been inherited from the colonial era.[309] Bruggen, in a case study of Thailand's approach to renegotiation, argues that several factors contributed to the decision to renegotiate, namely that over time, and as Thailand's economy grew, so too did the expertise, negotiation capacity of its tax treaty negotiators.[310] A 2016 paper by Hearson and Kangave that reviews Uganda's decision to suspend and review its tax treaty processes, recommends renegotiation over protection against treaty shopping and stronger permanent establishment rules.[311] However, the authors point out that the menu of model treaty options – namely the OECD MC, the UN MC, and regional alternatives produced by COMESA and the EAC – do not provide strong enough models to base renegotiations off of, highlighting the problems that these alternative models pose in meeting the needs of low income treaty negotiators.[312] Contrastingly, however, West argues that regional treaties, namely the ATAF models, provide the grounds for basing treaty negotiations and renegotiations in the future, and argues that these treaties also provide the seeds of greater regional tax cooperation in the future.[313]

In terms of mitigating treaty shopping, the IMF suggests that the MLI could offer a way for treaty partners to implement safeguards in the form of principle purpose tests and limitation of benefits provisions, however, this report is quick to note that this depends entirely upon treaty partners.[314] Furthermore, other sticking points for developing countries such as permanent establishment definition, withholding tax rate maximums and service fees do not fall under the purview of the MLI and therefore need to be renegotiated on an ad hoc basis.[315] Thus, although there are promising signs that developing states are increasingly demanding a reconsideration of taxing rights in their double tax treaties, there is still some way to go in ameliorating the challenges that low and middle income countries face.

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306 Martin Hearson and Jalia Kangave, 'A Review of Uganda's Tax Treaties and Recommendations for Action Working Paper', ICTD Working Paper, March 2016; Brooks and Krever, 'The Troubling Role of Tax Treaties'.
307 Hearson, 'When Do Developing Countries Negotiate Away Their Corporate Tax Base?'
308 Hearson, 'Tax Treaties in Sub-Saharan Africa: A Critical Review'.
309 Ibid.
310 Edwin van der Bruggen, 'Tax Treaty Renegotiations by Developing Countries: A Case Study Using Comparative Analysis to Assess the Feasibility of Achieving Policy Outcomes', Asia-Pacific Tax Bulletin, July 2002, 255–72.
311 Hearson and Kangave, 'A Review of Uganda's Tax Treaties and Recommendations for Action Working Paper'.
312 Ibid.
313 West, 'Emerging Treaty Policies in Africa – Evidence from the African Tax Administration Forum Models'.
314 International Monetary Fund, 'Corporate Taxation in the Global Economy'.
315 Ibid.

4.4 Digital Taxation

Finally, the digitalisation of the economy and the tax challenges and opportunities that arise for tax authorities is a topic that has been taking up increasing international attention since the 1990s.[316] The problem of digitalisation for corporate taxation, as Devereux and Vella note, is that it exacerbates already existing allocation issues due to the internationalisation of businesses – businesses are now truly global in operation, and thus it is increasingly difficult to satisfactorily allocate profits amongst countries.[317] Moreover, increasing digitalisation of the economy has made it easier for corporations to shift profits to low-tax jurisdictions, thus exacerbating the already wide-spread problem of BEPS.[318] In response to the challenges posed by digital business models, as has been noted in section 2, the UN has introduced new provisions into its Model Treaty. While at the national level, a range of tax solutions have proliferated at the unilateral level. These include digital service taxes (DSTs), withholding taxes on digital transactions, diverted profits taxes, bit-based taxes (based upon bandwidth used by MNEs), and some countries have implemented social media taxes (notably in African countries like Uganda) and VATs on the supply of electronic services to MNEs. [319]

For developing countries, the challenges faced by digital taxation are particularly acute, as articulated by the UN,[320] the IMF,[321] Rukundo[322] and Li, because developing countries rely substantially upon VAT and CIT for revenue, and digitalisation of the economy poses significant threats to these particular types of taxation.[323] Essentially, capital importing countries will be net losers in the global distribution game, unless rules and definitions that formulate the basis of source taxation rights (for example the definition of permanent establishment) are updated.[324] Rukundo argues for multilateral solutions to resolve these tax challenges, but also argues that the challenges for developing countries are more specific and therefore may be best addressed through regional cooperation, which may be more sensitive to developing countries tax needs. [325]

As such, although the unified approach offered by the OECD[326] represents a big shift towards re-imagining tax rules to cope with digital businesses, fundamental questions for developing countries will remain as to whether the standards developed will yield substantial benefits, given that the standards

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316 Arthur J Cockfield, 'BEPS and Global Digital Taxation', Tax Notes International, 15 September 2014.

317 Michael P Devereux and John Vella, 'Implications of Digitalization for International Corporate Tax Reform', 2017; Jinyan Li, 'Protecting the Tax Base in a Digital Economy', Osgoode Legal Studies Research Paper, 2018.

318 Devereux and Vella, 'Implications of Digitalization for International Corporate Tax Reform'.

319 Mustapha Ndajiwo, 'The Taxation of the Digitalised Economy: An African Study', ICTD Working Paper (Brighton, June 2020), p. 24.

320 United Nations, 'Committee of Experts on International Cooperation in Tax Matters Fifteenth Session Tax Challenges in the Digitalized Economy: Selected Issues for Possible Committee Consideration 1', 2017., pp.7-8.

321 International Monetary Fund, 'Spillovers in International Corporate Taxation'.

322 Solomon Rukundo, 'Addressing the Challenges of Taxation of the Digital Economy: Lessons for African Countries', ICTD Working Paper, July 2020.

323 Ibid., p.7

324 Li, 'Protecting the Tax Base in a Digital Economy'.

325 Rukundo, 'Addressing the Challenges of Taxation of the Digital Economy: Lessons for African Countries'.

326 The OECD proposal contains two pillars. Pillar 1 contains three elements. 'Amount A' constitutes a taxing right based upon significant market presence, thus moving away from physical presence conceptualisations of permanent establishment. Amount B enables jurisdictions to claim fixed returns on distribution and marketing activities that take place physically in a jurisdiction. Finally, Amount C relates to 'binding and effective dispute prevention and resolution mechanisms relating to all elements of the proposal, including any additional profit where in-country functions exceed the baseline activity compensated under Amount B.'

are likely to be complex and difficult to administer for capacity constrained tax authorities. A recent study by Lammers argues this point, suggesting the revenue effects of Amount A – a reconceptualization of PE based on significant market presence – for developing countries is likely to be modest, while the effects of Amount B rest significantly on what the parameters will be with respect to marketing and services.[327] In another paper, Ndajiwo also highlights the issues to do with complexity of the OECD proposals, and critiques the reliance of the Amount C – binding and effective dispute resolution mechanism – proposal on the ALP, which, as noted above is difficult to implement for capacity constrained lower income countries.[328] Moreover, Pillar II, the 'GLOBE' proposal, as Devereux et al. noted in 2020, much of the success of the proposal heavily depends on the participation of all or as many jurisdictions to avoid the 'leakage' problem related to tax competition, while others note that is not invulnerable to MNEs 'gaming' the proposed policy.[329]

In addition, as Christians has observed, outside of a core group of countries, the negotiations around the proposals reverted back to a discussion between the 'great powers' of international taxation, while marginalising developing country voices in the process.[330] In addition to this, as Hearson argues, the fast pace of the consensus building process within the work on digital taxation has demonstrated barriers to meaningful participation in the policy process due to lack of coalition building and caucusing amongst developing countries within the IF, capacity constraints and the position of these countries at an early stage of policy development.[331]

5. Conclusion

The goal of this review of the literature and topics has been to introduce some of the key issues in the literature on international taxation, as they relate to developing countries. It has covered four core areas – basics in international taxation, the institutions of the international tax regime, key issues for developing countries, and new and alternative debates in taxation. The list of topics covered here is by no means exhaustive, and due to space constraints, the amount of detail is somewhat limited. Nevertheless, the hope is that from this review, a sense of some of the most pressing issues in international tax governance have been gained. The literature reveals some key consistencies. Less developed countries are often in the position of being 'rule takers' in the ITR, by virtue of the fact that they have until recently, not participated in the main standards-setting processes within the main institution of tax governance. Second, and because of this, international tax standards tend to be very complex and overly burdensome to implement, and do not reflect

327 Jeroen Lammers, 'Less Is More: Can Developing Countries Gain Revenue By Giving up Taxing Rights? By ', CBS Law Research Paper (Copenhagen, 19 June 2020).

328 Ndajiwo, 'The Taxation of the Digitalised Economy: An African Study'., pp. 13-14.

329 Michael P Devereux et al., 'The OECD Global Anti-Base Erosion ("GloBE") Proposal' (Oxford, 2020)., p.2. Mindy Herzfeld, 'Tax Games, the G-7 Agreement, and the Biden Budget', Tax Notes International, 14 June 2021, https://www.taxnotes.com/tax-notes-today-federal/tax-reform/tax-games-g-7-agreement-and-biden-budget/2021/06/14/76lgq?highlight=globe.

330 Allison Christians, 'Can Developing Countries Do Better than the Unified Approach? – The International Centre for Tax and Development (ICTD)', International Centre for Tax and Development, August 2020, https://www.ictd.ac/blog/developing-countries-unified-approach-digital-economy-tax/.

331 Martin Hearson, 'Corporate Tax Negotiations at the OECD: What's at Stake for Developing Countries in 2020', Summary Brief Paper , 2020.

the specific needs of lower income countries. Third, less developed countries struggle significantly with the impacts of tax competition, tax avoidance and evasion, and there appears to be a consensus that these impacts are felt more acutely in these countries than in developed countries. Fourth, although double tax treaties have been highly asymmetric between lower income countries and developed country partners, there appears to be a growing movement towards cancellation or renegotiation of tax treaties to redress some of these issues. Finally, although many of the institutions of international tax governance have become more inclusive, there are still barriers to participation which need to be addressed.

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