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The Global Schoolyard Bully: The Organisation for Economic Co-operation and Development's Coercive Efforts to Control Tax Competition

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Alexander Townsend, Jr.

Abstract

This Comment seeks to analyze the OECD's effort to curb tax competition. Section I of this Comment provides background information of the emergence of international taxation and the remedial measures historically enacted to address global fiscal issues, notably double taxation. This section will also outline the OECD's emergence and role in international taxation issues. Furthermore, this section will discuss globalization and its contribution to the growth of preferential tax regimes, thus facilitating the OECD's remedial effort. Section II analyzes the OECD's reports, "Harmful Tax Competition: An Emerging Global Issue" ("1998 Report") and "Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices" ("2000 Report"), which are the focal points of the OECD's effort. Section III of this Comment argues that the OECD's effort to curb tax competition breaches international taxation principles by trespassing on the fiscal authority of individual nations. Additionally, this effort deviates from traditional measures utilized to remedy international fiscal issues, specifically double taxation, and will likely result in stifling global economic development. This Comment concludes that the OECD's effort to curb tax competition amounts to a monopolistic endeavor that economically discriminates against developing nations.

COMMENT

THE GLOBAL SCHOOLYARD BULLY: THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT'S COERCIVE EFFORTS TO CONTROL TAX COMPETITION

*Alexander Townsend, Jr.**

[T]he Organisation for Economic Co-operation and Development's (OECD) effort to stamp out tax competition . . . is designed in effect to create a tax cartel and, if the OECD succeeds, our nation will face the risk of higher taxes and a weakened economy while developing nations will be hamstrung in their attempts to promote economic growth Tax competition is a strong factor in both maintaining and increasing the vibrancy of economies across the globe The OECD is even trying to impose its will on nations that are not members of the organization, calling for draconian sanctions against so-called tax havens. This is troubling on several levels. Sovereign nations should be free to determine their own tax policies . . . and it hardly seems right for us to participate in a campaign to force other nations to change their tax laws.¹

INTRODUCTION

The United States Sherman Antitrust Act attempts to limit an enterprise from being able to acquire or maintain monopoly power.² Two elements illustrate monopoly power: possessing a monopoly in a certain market and willfully acquiring or maintaining that monopoly.³ Contextual analysis of this anticompeti-

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1. Letter from Rep. Richard K. Armey, Congress of the United States, House of Representatives, to Lawrence Summers, United States Department of Treasury, *TAX NOTES TODAY*, Sept. 7, 2000.

2. 15 U.S.C. § 2 (1994). "Every person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce . . . shall be deemed guilty of a felony" *Id.*

3. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (stating that threshold questions are whether monopoly exists in relevant market and whether an-

tive conduct seeks to determine whether such conduct is exclusionary without any valid reason.⁴

Numerous historical cases have focused on and analyzed abuses of monopoly power under the Sherman Antitrust Act.⁵ For example, Microsoft recently was found engaging in anticompetitive, exclusionary conduct in maintaining its monopoly in the personal computer operating system market.⁶ Additionally, American Telephone and Telegraph ("AT&T") was found practicing anticompetitive conduct in long distance telephone service.⁷ The Aluminum Company of America ("ALCOA") was also found engaging in anticompetitive conduct in establishing and maintaining its monopoly in the aluminum industry.⁸

Although there is no international equivalent to the Sherman Antitrust Act,⁹ the conduct constituting monopolistic be-

ticompetitive methods are utilized to maintain or establish that monopoly); *see also* *United States v. AT&T Co.*, 524 F. Supp. 1336, 1347-48 (D.D.C. 1981) (asserting that rebuttable presumption of monopoly power arises through existence of dominant market share maintained by barriers to entry to such market); *S. Pac. Communications Co. v. AT&T Co.*, 740 F.2d 980, 1001-02 (D.C. Cir. 1984) (approving rebuttable presumption standard of monopoly existence set forth in *AT&T Co.*, 524 F. Supp. at 1347-48).

4. *See Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 483 (1992) (stating that liability is determined on whether legitimate reasons justify corporate action).

5. *See* Thomas A. Piraino, Jr., *Identifying Monopolists' Illegal Conduct Under The Sherman Act*, 75 N.Y.U. L. REV. 809, 810 (2000) (noting significant antitrust cases against Aluminum Co. of America, IBM, AT&T, and Standard Oil Co. identifying monopolistic conduct and establishing principles underlying antitrust regulation).

6. *See United States et al. v. Microsoft Corp.*, 84 F. Supp. 2d 9, 19-24 (1999) (finding that Microsoft's dominant market share of personal computer operating system dissuaded consumers from using another manufacturer's operating system and induced independent software vendors to write software applications "first and foremost" for Microsoft's product).

7. *See United States v. AT&T Co.*, 552 F. Supp. 131, 140-42 (D.D.C. 1982) (outlining consent decree, that AT&T agreed to, separating Bell operating companies from AT&T after acknowledging AT&T's monopolistic conduct in leveraging their dominance in long distance service to control market for local phone services).

8. *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 431-44 (2d Cir. 1945) (determining that ALCOA, because of their inherent experience, trade connections, and personnel, engaged in exclusive contracts with suppliers and unfair pricing that unfairly excluded competitors from aluminum market).

9. *See* Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1502-03 (1998) (stating that international agreement regarding national antitrust laws is non-existent, but may be in line for future consideration); *see also* John T. Soma & Eric K. Weingarten, *Multinational Economic Network Effects and the Need for an International Antitrust Response from the World Trade Organization: A Case Study in Broadcast-Media and News Corporation*, 21 U. PA. J. INT'L ECON. L. 41, 42-43 (2000) (stating that increase in international transactions yield current nation-based antitrust regulation inefficient,

havior in the preceding cases is similar to the Organisation for Economic Co-operation and Development's¹⁰ ("OECD") effort¹¹ to curb tax competition.¹² Many nations around the world provide favorable tax rates to individuals and corporations to induce investment.¹³ The OECD seeks to reform the tax systems of these tax competitive nations and curb the resulting movement of capital into these jurisdictions.¹⁴ At least one commentator notes that because the members of the OECD are among the most industrialized nations in the world, wielding significant economic power in the form of goods, services, and capital,¹⁵ these

causing need to establish global cooperative antitrust regulation); Nina Hachigian, *Essential Mutual Assistance in International Antitrust Enforcement*, 29 INT'L LAW. 117, 117-18 (1995) (stating that businesses are becoming more international, causing need for new international focus in antitrust enforcement).

10. See Organisation for Economic Co-operation and Development ("OECD"), *About OECD*, at <http://www.OECD.org/about.htm> [hereinafter OECD site] (defining Organisation for Economic Co-operation and Development ("OECD") and identifying its member nations). The Organisation for European Economic Co-operation ("OEEC") was formed shortly after World War II to assist Europe with economic recovery. *Id.* Following completion of this effort, the Organisation for Economic Co-operation and Development ("OECD") emerged in 1961 as successor to the OEEC to focus on global economic development. *Id.* Currently, the OECD is comprised of 29 countries: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *Id.*

11. See OECD, *HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 9* (1998) [hereinafter 1998 REPORT] (stating need for governments to cooperatively identify tax havens and other harmful tax regimes and provide guidelines to eliminate these practices); see also OECD, *TOWARDS GLOBAL TAX CO-OPERATION: PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICES* (2000) [hereinafter 2000 REPORT] (identifying harmful tax practices and publishing defensive measures to counter practices of these jurisdictions).

12. See Julie Roin, *Competition and Evasion: Another Perspective on International Tax Competition*, 89 GEO. L.J. 543, 546 (2001) (noting that tax competition occurs when one nation attracts foreign investment within its borders by offering more favorable tax treatment on income generated from such investments than taxpayer's resident nation); see also Karen B. Brown, *Harmful Tax Competition: The OECD View*, 32 GEO. WASH. J. INT'L L. & ECON. 311, 314 (1999) (noting that tax competition occurs when nations provide special tax benefits, such as low or no tax rates, to certain types of income, such as income generated from foreign investment).

13. See 1998 REPORT, *supra* note 11, at 13-14 (noting that targeted jurisdictions typically have no or low tax rates that induce investment of foreign capital).

14. See *id.* at 17 (stating that intention of effort is to address issues raised by tax practices that distort location of capital and services).

15. See OECD site, *supra* note 10 (stating that two-thirds of world's goods and services are produced by OECD member nations); see also James Salzman, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769, 776 (2000) (stating that OECD allows for

nations are leveraging such dominant economic influence to force smaller developing nations to alter their respective tax laws, thus extending the OECD's monopoly into the area of taxation and continuing its domination of the global economy.¹⁶

This Comment seeks to analyze the OECD's effort to curb tax competition. Section I of this Comment provides background information of the emergence of international taxation and the remedial measures historically enacted to address global fiscal issues, notably double taxation. This section will also outline the OECD's emergence and role in international taxation issues. Furthermore, this section will discuss globalization and its contribution to the growth of preferential tax regimes, thus facilitating the OECD's remedial effort. Section II analyzes the OECD's reports, "Harmful Tax Competition: An Emerging Global Issue" ("1998 Report") and "Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices" ("2000 Report"), which are the focal points of the OECD's effort. Section III of this Comment argues that the OECD's effort to curb tax competition breaches international taxation principles by trespassing on the fiscal authority of individual nations. Additionally, this effort deviates from traditional measures utilized to remedy international fiscal issues, specifically double taxation, and will likely result in stifling global economic development. This Comment concludes that the OECD's effort to curb tax competition amounts to a monopolistic endeavor that economically discriminates against developing nations.

wealthy, industrialized governments to coordinate domestic and international policies); Arthur J. Cockfield, *Tax Integration Under NAFTA: Resolving the Conflict Between Economic and Sovereignty Interests*, 34 STAN. J. INT'L L. 39, 44 (1998) (stating that OECD's largest member, United States, accounts for one-third of total global capital market); United States Census Bureau, *U.S. International Trade in Goods and Services Highlights*, at <http://www.census.gov/indicator/www/ustrade.html> (Feb. 21, 2001) (indicating that U.S. exports increased in 2000 to over US\$1,068,400,000,000, more than any other nation).

16. See George M. Melo, *Taxation in the Global Arena: Preventing the Erosion of National Tax Bases or Impinging on Territorial Sovereignty?*, 12 PACE INT'L L. REV. 183, 205 (2000) (asserting OECD's utilization of tax and non-tax measures to combat harmful tax competition results from power inequality between economically powerful OECD nations and economically weaker developing nations); see also Brown, *supra* note 12, at 314-15 (noting that OECD nations unilaterally seek to alter tax policies of developing nations to continue dominance of their multinational corporations); Mitchell B. Weiss, *International Tax Competition: An Efficient or Inefficient Phenomenon?*, 16 AKRON TAX J. 99, 126-28 (2001) (asserting that OECD's effort against tax competition will result in global tax "cartel," thus strengthening OECD's current dominance in global economy).

I. THE CONFRONTATION: TAXATION AND THE OECD IN THE FACE OF GLOBAL CHANGE

Historically, fiscal legislation was a national issue with exclusively domestic implications.¹⁷ Increasing transnational economic relations, however, challenged this nation-centered approach by introducing the potential for double taxation.¹⁸ This resulted in a cooperative effort between nations and multinational organizations, such as the OECD, to establish remedial principles and guidelines.¹⁹ Currently, the OECD seeks to address the growing issue of tax competition, which is facilitated by another trend: globalization.²⁰

A. National Fiscal Sovereignty

Experts agree that the authority to tax is fundamental to any government because inherent in this authority is a sovereign's ability to effectively govern its territory.²¹ A nation's fiscal system

17. See Stephen G. Utz, *Tax Harmonization and Coordination in Europe and America*, 9 CONN. J. INT'L L. 767, 767-68 (1994) (stating that traditional tax policy was based on national economic systems that rarely affected each other).

18. See OECD, *1992 Model Double Tax Convention*, available at <http://www.oecd.org/daf/fa/treaties/treaty.htm> (defining international double taxation as imposition of taxes by two or more nations against same income generated by single taxpayer in foreign country). A taxpayer could be subjected to taxation by his or her resident country and by a foreign country where such income was generated. *Id.*; see also ARNOLD A. KNECHTLE, *BASIC PROBLEMS IN INTERNATIONAL FISCAL LAW* 10, 34-42 (W.E. Weisflog trans., Kluwer 1979) (noting that multiple taxation, or double taxation, had emerged as most notable fiscal problem of increasing economic relations between nations); ADRIAN OGLEY, *THE PRINCIPLES OF INTERNATIONAL TAX: A MULTINATIONAL PERSPECTIVE* 1-2 (1993) (noting that increase in international trade resulted in problem of double taxation).

19. See FREDERICK BASSINGER & MICHEL GLAUTIER, *A REFERENCE GUIDE TO INTERNATIONAL TAXATION* 160 (1987) (noting that OECD and United Nations ("U.N.") published model agreements to aid nations in their respective negotiations to eliminate double taxation).

20. See Roman Terrill, *What Does 'Globalization' Mean?*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 217, 218 (1999) (defining globalization as diminished economic significance of national borders and governments brought about by increased trade, technological innovations, and increased cross-border capital flow primarily proliferated by multinational corporations). Unlike the previous cross-border transactions of internationalization, globalization emphasizes an increase of private cross-border transactions at the expense of diminished governmental involvement in national economic affairs. *Id.*

21. See *M'Culloch v. Maryland*, 4 Wheat. 316, 428 (1819) (stating that authority to tax is essential to very existence and operation of government); see also BASSINGER & GLAUTIER, *supra* note 19, at xi (acknowledging that historically governments stressed importance of revenue for raising and maintaining armies, and obtaining allegiance of its subjects and that weakened sovereigns lost control when ability to tax ceased); FRAN-

provides revenue for the establishment and improvement of national defense systems and necessary public services infrastructure.²² Thus, tax policy is an effective method for governments to address their nation's basic structural needs.²³

A nation's taxing authority exists only within its jurisdiction, and within its jurisdiction a nation uses its authority to levy and collect taxes from individuals and entities.²⁴ Historically, a nation's geographic boundaries defined its jurisdiction and the extent of its authority.²⁵ Thus, scholars traditionally view taxation as a national right due to its national importance and its jurisdictional emergence.²⁶

B. *Internationalization and Its Impact on Traditional Taxation*

The proliferation of cross-border economic activities introduced new problems to nations drafting their respective fiscal legislation.²⁷ Internationalization²⁸ made people question the traditional notion of absolute domestic fiscal sovereignty.²⁹ As a result, a cooperative approach to address internationalization

CES HILLIARD, *THE LAW OF TAXATION* vi (Fred B. Rothman & Co., 1997) (1875) (stating that taxation is means of support for political government).

22. See HILLIARD, *supra* note 21, at 9-12 (stating that governments levy taxes to maintain military and public services).

23. See Reuven Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1626 (2000) (asserting that tax policies approved by nation's citizens reflect society and quality of life that citizens prefer); see also Cockfield, *supra* note 15, at 50 (stating importance of tax legislation as policy tool used to satisfy specific needs of each nation's citizens).

24. See *R.R. v. Pa.*, 15 Wall. 300, 319 (1872) (stating that taxation authority is confined to subjects within national jurisdiction); see also Utz, *supra* note 17, at 772 (stating that most nations claim authority to tax people, property, and transactions within their borders).

25. See BASSINGER & GLAUTIER, *supra* note 19, at xi (stating that jurisdiction extended to "geographical boundaries," which defined nation's territory under international norms).

26. See Utz, *supra* note 17, at 772 (stating that nations tax based on traditional legal norms regarding sovereigns and their authority over people and entities within their borders); see also BASSINGER & GLAUTIER, *supra* note 19, at x, xi (stating that historically, taxation authority is national in character).

27. See KNECHTLE, *supra* note 18, at 9 (stating that proliferating international trade spawned tax competition and multiple taxation).

28. See THOMAS C. FISCHER, *THE UNITED STATES, THE EUROPEAN UNION, AND THE "GLOBALIZATION" OF WORLD TRADE: ALLIES OR ADVERSARIES?* 4 (2000) (defining internationalization as increased economic interactivity between nations in their free-standing capacities).

29. See RUTSEL SILVESTRE J. MARTHA, *THE JURISDICTION TO TAX IN INTERNATIONAL LAW: THEORY AND PRACTICE OF LEGISLATIVE FISCAL JURISDICTION* 11 (1989) (stating that

emerged.³⁰

1. Double Taxation

Critics assert that increased economic activities between nations has altered domestic fiscal legislation.³¹ Geographic jurisdictional boundaries failed to address fiscal issues associated with the increasing number of persons and firms generating foreign-based income from transactions in other countries.³² Consequently, nations modified their jurisdictional reach to enable taxation of persons and entities via an appropriate fiscal attachment:³³ personal, territorial, or functional.³⁴

Taxpayers extending their operations into other jurisdictions, however, potentially subjected themselves to double taxation.³⁵ A taxpayer's country of residence claimed authority to tax the taxpayer's foreign-sourced income, while the country in

internationalization of trade and increasing mobility of persons and capital resulted in assessment of impact of international law in fiscal law).

30. See THE PUBLIC INTERNATIONAL LAW OF TAXATION: TEXT, CASES AND MATERIALS 126-43 (Asif H. Qureshi ed., 1994) [hereinafter PUBLIC INTERNATIONAL LAW] (noting importance of Vienna Convention, OECD, and U.N. in facilitating negotiations among nations and resulting execution and interpretation of subsequent treaty agreements).

31. See MARTHA, *supra* note 29, at 11 (stating that increased cross-border direct investment and trade and increased number of people living abroad were contributing factors to need for fiscal reform); see also BASSINGER & GLAUTIER, *supra* note 19, at xii (noting that expansion of international trade altered tax strategies adopted by nations in effort to deter or encourage foreign investment); KNECHTLE, *supra* note 18, at 9-10 (stating that increased cross-border movements established need to modify tax systems to address new fiscal issues).

32. See KNECHTLE, *supra* note 18, at 36 (asserting that nations sought to extend authority because of taxpayers generating increasing amounts of global income outside reach of traditional territorial sovereignty).

33. See *id.* at 35 (noting that fiscal attachment is legal relationship giving rise to taxation authority); see also Robert L. Palmer, *Toward Unilateral Coherence in Determining Jurisdiction to Tax Income*, 30 HARV. INT'L L.J. 1, 4 (1989) (stating that nations exercise jurisdictional enforcement of taxation based on specific relationships, such as personal or economic, between themselves and potential taxpayers).

34. See MARTHA, *supra* note 29, at 43-46 (defining types of fiscal authority). Personal sovereignty refers to State authority over its own citizens. *Id.* at 43. Territorial sovereignty refers to State authority over all persons and entities within its territory. *Id.* at 45. Functional sovereignty refers to situations where events occur in "stateless" domains, such as seas or oceans. *Id.*

35. See Palmer, *supra* note 33, at 5-6 (noting that taxpayers generating income in foreign countries were caught between nation of residence, seeking to tax its citizen, and nation of income source, seeking to tax based on its economic relationship to generated income); see also Julie Roin, *Rethinking Tax Treaties in a Strategic World with Disparate Tax Systems*, 81 VA. L. REV. 1753, 1759 (1995) (noting that taxpayer-resident nation and income-source nation debated over taxing authority of generated income).

which the income was generated also claimed authority to tax revenue.³⁶ Additionally, situations arose where a third country claimed taxing authority if a taxpayer maintained citizenship in one country, resided in a second country, and transacted business in a third country.³⁷

Absent an agreement to alleviate double taxation, few international transactions would occur, because the excessive tax burden would render most transactions economically unfeasible.³⁸ Remedying double taxation requires the cooperation of multiple nations.³⁹ Consequently, internationalization challenged the traditional notion of absolute fiscal sovereignty.⁴⁰

2. Questioning Absolute Fiscal Authority

Historically, international law and fiscal law developed independently of each other.⁴¹ Internationalization, however, spawned an academic debate regarding the effect of international considerations on national fiscal sovereignty.⁴² Some scholars believe that nations could no longer develop their respective fiscal legislation in a vacuum and were limited because

36. See OGLEY, *supra* note 18, at 31 (explaining debate that arose among nations over authority to tax specified income).

37. See Roin, *supra* note 35, at 1759 (stating that country of residence, country of citizenship, and country where income is derived can all feasibly claim authority to tax such income); see also BASSINGER & GLAUTIER, *supra* note 19, at 151 (stating that taxpayers could face triple taxation: taxes from country of citizenship, residence country, and country where income is generated).

38. See Roin, *supra* note 35, at 1760 (stating that taxpayers would be unable to retain enough profit to make international transactions economically worthwhile).

39. See Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939, 941 (2000) (noting that conventional account of double taxation redress emphasizes mutual cooperation among nations); see also Robert Thornton Smith, *Tax Treaty Interpretation by the Judiciary*, 49 TAX LAW. 845, 845-46 (1996) (explaining intention of double taxation treaties and mechanism by which contracting nations agree to remedial scheme); PUBLIC INTERNATIONAL LAW, *supra* note 30, at 126-27 (noting that effective remedial double taxation treaties require negotiation among various nations).

40. See Utz, *supra* note 17, at 767 (stating that nineteenth-century-based nation-centered tax systems needed to account for global economic integration).

41. See MARTHA, *supra* note 29, at 11 (stating that this development resulted from international lawyers lacking interest in fiscal matters and concurrently diminishing role of analytical study of international law).

42. See *id.* (noting that emergence or increase of certain economic activity highlights previously undeveloped area of law); see also TIMO VIRENKENTTA, *TAX INCENTIVES IN DEVELOPING COUNTRIES AND INTERNATIONAL TAXATION: A STUDY ON THE RELATIONSHIP BETWEEN INCOME TAX INCENTIVES FOR INWARD FOREIGN INVESTMENT IN DEVELOPING COUNTRIES AND TAXATION OF FOREIGN INCOME IN CAPITAL-EXPORTING COUNTRIES* 43 (1991) (noting that extent of national fiscal sovereignty became subject of controversy).

of the increasing effect national tax systems had on international economic relations.⁴³

Subsequently, most commentators acknowledged the global economic impact of a nation's tax system.⁴⁴ Most scholars, however, concluded that no international law limits the authority of nations to prescribe their respective fiscal legislations.⁴⁵ Scholars yield significant influence as a source of international law, and so their concurrence regarding state sovereignty became determinant on the legal outcome.⁴⁶ Consequently, nations maintained their autonomous role in developing fiscal legislation and have refused to relinquish their authority.⁴⁷

43. See MARTHA, *supra* note 29, at 11-14 (noting emerging academic debate regarding limitations international considerations placed on fiscal legislation); *see also* Utz, *supra* note 17, at 770 (noting common belief that domestic taxes affect international business and are not independent of competitive condition in other countries, thus domestic models must accordingly be transnational).

44. See MARTHA, *supra* note 29, at 12-18 (noting that commentators have identified resulting international implications of state legislation); *see also* Palmer, *supra* note 33, at 20 (asserting that modifications in nation's fiscal policy can negatively affect fiscal policy of another nation, causing subsequent change in such nation's policy).

45. See MARTHA, *supra* note 29, at 16 (noting that no prohibition from international law appears to be axiom for fiscalists); *see also* KNECHTLE, *supra* note 18, at 34 (stating that state's fiscal sovereignty is unlimited over persons and objects within its jurisdiction); PUBLIC INTERNATIONAL LAW, *supra* note 30, at 24 (stating acceptance of nation's right to tax pursuant to their respective jurisdiction is not limited by international law).

46. See PUBLIC INTERNATIONAL LAW, *supra* note 30, at 23 (noting that writings of experts had determinative role as source of law in international law); *see also* Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICK. J. INT'L L. 287, 291-94, 309-11 (1999) (noting that reformation and development of international law was largely impacted by works of Alberico Gentili, Hugo Grotius, Thomas Hobbes, John Locke, Francisco de Vitoria, Richard Zouche, and other scholars); John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions is Changing the Character of "International" Law*, 42 U. KAN. L. REV. 605, 614-18 (1994) (acknowledging influential contributions of Hugo Grotius, Francisco Suarez, Vattel, and other scholars in development of international law).

47. See Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 167-68 (1999) (stating that international relations are based on still-prevailing notion that nations are independent actors engaging in international transactions); *see also* Cockfield, *supra* note 15, at 54 (alleging that national desire to maintain tax sovereignty has been factor in difficulties encountered in attempted European tax harmonization); Robert A. Green, *The Future of Source-Based Taxation of the Income of Multinational Enterprises*, 79 CORNELL L. REV. 18, 64 (1993) (asserting that eliminating tax competition by harmonizing tax rates would be very difficult to accomplish because it would require countries surrendering great deal of fiscal sovereignty); Avi-Yonah, *supra* note 23, at 1629 (asserting that countries are hesitant to give up their right to establish national tax rates since such right is fundamental to their sovereignty); BASSINGER & GLAUTIER, *supra*

3. Emergence of International Taxation

Mounting fiscal problems of internationalization, most notably double taxation, required immediate remedial measures.⁴⁸ Adhering to the principle that authority to tax exists at the national level, it became necessary for nations to devise a cooperative multinational approach that would be acceptable to all affected nations.⁴⁹ Thus, the area of international taxation emerged.⁵⁰

Scholars describe international taxation as a misleading term, because no body of international statutory fiscal law exists.⁵¹ Nations maintain unequivocal authority regarding tax legislation within their respective jurisdictions.⁵² Thus, international taxation refers to the interaction of conflicting tax systems and the methods by which problems resulting from this interac-

note 19, at xi (asserting that . . . nations jealously protect their right to tax persons and objects within their jurisdiction).

48. See OGLEY, *supra* note 18, at 1 (noting that during early part of twentieth century, double taxation became more significant and was subject of numerous studies by League of Nations and other multinational organizations); see also Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal For Simplification*, 74 TEX. L. REV. 1301, 1303 (1996) (stating that League of Nations sought to eliminate growing problem of double taxation in 1920s).

49. See BASSINGER & GLAUTIER, *supra* note 19, at 159-60 (stating that countries sought to resolve double taxation via negotiated agreements); see also Arthur J. Cockfield, *Balancing National Interests in the Taxation of Electronic Commerce Business Profits*, 74 TUL. L. REV. 133, 143 (1999) (noting that negotiated agreements represent compromise among various nations to address fiscal issues).

50. See Avi-Yonah, *supra* note 48, at 1303 (noting that "coherent international tax regime" was developed in 1920s following League of Nations study of ways to avoid international double taxation).

51. See BASSINGER & GLAUTIER, *supra* note 19, at xii (defining international taxation as structure-less legal development arising from expansion of international trade); see also Benjamin R. Hartman, *Coercing Cooperation From Offshore Financial Centers: Identity and Coincidence of International Obligations Against Money Laundering and Harmful Tax Competition*, 24 B.C. INT'L & COMP. L. REV. 253, 280 (2001) (acknowledging failure of consensus among nations that resulted in lack of international customary guidelines regarding taxation); Adrian J. Sawyer, *A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries—Have New Zealand Taxpayers Been "Short-Changed"?*, 32 VAND. J. TRANSNAT'L L. 1345, 1349 (1999) (noting that adherence to national sovereignty yields differing fiscal legislation among nations).

52. See Roin, *supra* note 12, at 597 (asserting that nations consider fiscal policy sovereign right and attempts to achieve international uniformity in fiscal policy infringes on such sovereign right); Damian Laurey, *Reexamining U.S. Tax Sparing Policy with Developing Countries: The Merits of Falling in Line with International Norms*, 20 VA. TAX REV. 467, 471 (2000) (noting nations' adherence to sovereign right to tax income generated within its jurisdiction); Palmer, *supra* note 33, at 4 (asserting that nations have unequivocal discretion in structuring and enforcing their fiscal policies).

tion are addressed.⁵³

A system of international treaty agreements arose, which even today, remains the framework of international taxation.⁵⁴ Multiple nations could negotiate the terms of an agreement and, upon completion, expect full compliance by all signatory nations.⁵⁵ This allows for remedial measures to international fiscal issues without usurping the fiscal sovereignty of each nation.⁵⁶

Academics, nations, international organizations, and regulatory bodies commonly acknowledge treaties as being very effective in preventing double taxation.⁵⁷ Signatory nations could agree on a maximum tax level and how the total tax should be allocated among each signatory nation.⁵⁸ Typically, the resident country allows for an exemption or a credit to the taxpayer for tax paid on income in another country.⁵⁹

53. See BASSINGER & GLAUTIER, *supra* note 19, at xii (asserting that concept of international taxation is system of conflict rules used to address international fiscal issues and preserve national sovereignty); see also KNECHTLE, *supra* note 18, at 61 (stating that international taxation is merely system of conflict rules to remedy fiscal issues by use of multilateral treaties).

54. See PUBLIC INTERNATIONAL LAW, *supra* note 30, at 127 (asserting that international taxation policies are defined in multilateral treaties); see also Hartman, *supra* note 51, at 280 (noting that negotiating bilateral treaties is only international tax practice accepted by nations); Alvin C. Warren, Jr., *Income Tax Discrimination Against International Commerce*, 54 TAX L. REV. 131, 140 (2001) (acknowledging that international tax regime is composed solely of bilateral treaties).

55. See PUBLIC INTERNATIONAL LAW, *supra* note 30, at 126-27 (asserting that valid treaty is binding on signatory nations and must be adhered to in good faith).

56. See *id.* (stating that all signatories to agreement must consent to and comply with its terms); see also Benvenisti, *supra* note 47, at 185 (stating that international treaty agreements require national ratification); John F. Avery Jones, *Are Tax Treaties Necessary?*, 53 TAX L. REV. 1, 3 (1999) (stating that treaty characteristic is nations' desire to maintain sovereignty through negotiating position); Cockfield, *supra* note 49, at 143 (stating that tax treaties merely modify existing national tax rules); Hartman, *supra* note 51, at 254 (asserting that global financial issues, including fiscal policy, traditionally focus on consensual agreement among nations).

57. See Dagan, *supra* note 39, 942-44 (stating that comments by American Law Institute and OECD among others emphasize importance and effectiveness of treaties to prevent double taxation and eliminate consequential barriers to trade, thus facilitating international trade and investment); see also Thornton Smith, *supra* note 39, at 845 (stating that in 1921 League of Nations recognized importance of treaties in eliminating double taxation); Jones, *supra* note 56, at 2-3 (stating that success of tax treaties is illustrated by treaty proliferation during last 50 years).

58. Ogley, *supra* note 18, at 31.

59. See *id.* at 32-35 (noting that treaty structure dictates method used between signatory nations to prevent double taxation); see also Thornton Smith, *supra* note 39, at 845-46 (noting that residence jurisdiction grants exemption or credit to taxpayer for tax paid on foreign-source income).

Tax treaties are also used to prevent tax evasion.⁶⁰ These agreements generally provide for mutual assistance between the signatory nations on information sharing and enforcement.⁶¹ Additionally, these agreements include resolution methods for tax disputes to address international enforcement issues.⁶² Nations entering into these arrangements contribute to the intangible benefits of improved foreign relations and increased clarity for non-resident investors of another country's tax system and administration.⁶³

Unlike the widespread use and beneficial results of double taxation treaties, tax evasion treaties have not been as successful.⁶⁴ Developing countries refused to enter into tax evasion treaties because of the unilateral harm they receive due to decreased tax revenue and resulting lack of offsetting investments.⁶⁵ Some developing nations have requested agreements calling for tax-sparing arrangements,⁶⁶ which would enable developing countries to maintain desirable levels of tax revenue

60. See Dagan, *supra* note 39, at 984 (stating that tax treaties provide mechanism for international cooperation against tax evasion); see also Thornton Smith, *supra* note 39, at 845 (stating that main purposes of tax treaties are to alleviate double taxation and to prevent tax evasion).

61. See Dagan, *supra* note 39, at 985 (stating that collection and information assistance helps resident country collect taxes from income generated in other signatory countries by making resident country aware of generated income and requiring source countries to enforce resident country tax laws).

62. See PUBLIC INTERNATIONAL LAW, *supra* note 30, at 347 (stating that international agreements provide for mechanisms to settle tax disputes that arise between national tax authorities or between tax authority and taxpayer).

63. See Dagan, *supra* note 39, at 986 (stating that treaties show good faith of contracting countries and can clarify tax rules and provide administrative assistance, which may increase desirability of investments by non-residents).

64. See *id.* (noting success of double tax agreements while tax evasion agreements have not been as effective).

65. See *id.* (stating reluctance of developing countries to enter into treaties with developed nations because of diminished revenues that result from decreased non-resident investment because developing nation imposes another country's tax rate); see also Laurey, *supra* note 52, at 471 (acknowledging developing nations' reluctance to enter into traditional tax evasion treaties with developed nations because developing nations receive much smaller reciprocal benefit as lower amounts of income are generated by their companies in developed nations compared with much greater income generated by companies of developed nations investing in developing nations).

66. See Dagan, *supra* note 39, at 993 (explaining tax-sparing arrangements). Tax-sparing arrangements provide residents of developed nations with credits against taxes that would have been payable to developing country for income generated in that developing country but is waived because of developing country's special treatment given to such income. *Id.* These agreements between nations allow for developing nations to maintain appeal for non-resident investment because of favorable tax treatment. *Id.*; see

and non-resident investment.⁶⁷ This request is not often recognized by the United States, the most prolific treaty nation.⁶⁸

C. OECD

Formed in an effort to represent the concerns of its member nations, the OECD is rapidly transforming itself into a global consultant.⁶⁹ In the area of international taxation, the OECD made a major contribution to the alleviation of double taxation with its Model Double Tax Convention of 1977⁷⁰ ("OECD Model"), which served as a template for subsequent treaties.⁷¹ Additionally, the OECD has addressed an increasing range of issues within the area of international taxation.⁷²

1. Background

As the successor to the Organisation for European Economic Cooperation,⁷³ ("OEEC") the OECD's mission is to strengthen the economies of its member countries, improve the

also BASSINGER & GLAUTIER, *supra* note 19, at 160 (asserting that tax-sparing agreements are important fiscal policy for developing countries).

67. See Dagan, *supra* note 39, at 993-94 (stating that tax-sparing arrangements would make treaties more beneficial to developing nations); see also Laurey, *supra* note 52, at 470, 483 (noting that tax-sparing provisions facilitate ability of developing nations to implement tax holiday, whereby tax on income generated by foreign investments are reduced or eliminated, thus attracting foreign capital).

68. See Dagan, *supra* note 39, at 993-94 (stating that although some developed countries have agreed to tax-sparing arrangements, United States has consistently refused to grant such assistance); see also Roin, *supra* note 12, at 547 (acknowledging that U.S. Senate rarely ratifies treaties containing tax-sparing provisions); Laurey, *supra* note 52, at 471 (noting that United States has deemed tax-sparing provisions inconsistent with its main tax policy of alleviating double taxation); Brown, *supra* note 12, at 321 (asserting that economically weak developing nations are supported by foreign aid and debt obligations from developed nations in lieu of tax-sparing assistance).

69. See OECD site, *supra* note 10 (noting OECD's initial focus on economic development of its member nations).

70. See OECD, *Model Tax Convention*, available at <http://www.OECD.org/daf/fa/treaties/treaty.htm> (explaining OECD Model Tax Convention ("OECD Model") structure and purpose in alleviating double taxation).

71. See PHILIP BAKER, *DOUBLE TAXATION CONVENTIONS AND INTERNATIONAL TAX LAW* 4 (1994) (stating that OECD Model was basis for negotiating double taxation agreements); see also Thornton Smith, *supra* note 39, at 845 (stating that OECD Model has served as principal basis for treaty negotiations among developed nations); BASSINGER & GLAUTIER, *supra* note 19, at 160-61 (noting model agreements developed by OECD contributed to proliferation of treaty agreements).

72. See OECD site, *supra* note 10 (stating that OECD has addressed transfer pricing, e-commerce, and corruption, among other issues).

73. See *id.* (stating that OEEC was formed under Marshall Plan to administer North

efficiency of market systems, and contribute to free trade expansion between both industrialized and developing nations.⁷⁴ Initially focusing on its member countries and their respective policies, the OECD has altered its focus to advising emerging market economies and analyzing the impact of the increasing interaction of various policies across the world.⁷⁵ Ultimately, the OECD aims to increase its membership and broaden its scope to interconnect various economies into a unified global economic system.⁷⁶

The OECD also plays an important role in non-economic issues.⁷⁷ By providing a venue for the governments of industrialized nations to meet, the OECD plays a significant role in structuring global governance by promulgating legislative instruments.⁷⁸ As a prolific research institution, the OECD provides data, forecasts, and policy options addressing various social concerns.⁷⁹ The OECD maintains an interdisciplinary approach in addressing these non-economic issues, however, by focusing on the economic impacts of these various areas.⁸⁰

American aid for European reconstruction following World War II and was renamed OECD in 1961 following memberships of United States and Canada).

74. See *id.* (noting that OECD acts as facilitator and liaison for developing global economy); see also Barbara Crutchfield George et al., *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 487-88 (2000) (acknowledging OECD member nations' intention to collectively assist developing nations' economic development and building global free trade).

75. See OECD site, *supra* note 10 (noting OECD's change in operational focus to include concerns of developing nations and interaction of policies of OECD member nations with those of developing nations). The OECD endeavors to analyze how economic and social policies will interact to perhaps facilitate growth via globalization or stifle growth due to protectionism. *Id.*

76. See *id.* (stating that OECD seeks to create more prosperous and increasingly knowledge-based world economy).

77. See Salzmann, *supra* note 15, at 773 (asserting that OECD has important role in shaping non-economic policy on global basis).

78. See *id.* at 779-80 (stating that OECD enacts binding and non-binding international legal instruments that are highly influential); see also Warren, *supra* note 54, at 133 (noting that non-binding OECD Model serves as influential template for international tax treaties).

79. See Salzmann, *supra* note 15, at 777 (stating that OECD's research addresses issues regarding the environment, agriculture, education, and employment).

80. See *id.* (stating that common among OECD activities in varied fields is focus on economic impact).

2. OECD's Role in International Taxation

International tax policy is among the issues addressed by the OECD.⁸¹ For example, multilateral treaties, primarily based on the OECD Model, alleviate double taxation problems.⁸² Furthermore, the OECD analyzes, and consults on, a variety of additional global fiscal issues.⁸³

a. Entrance Into International Taxation

The OECD introduced its first OECD Model agreement for multilateral tax treaties in draft form in 1963 and subsequently updated and published it in 1977.⁸⁴ The OECD Model facilitated the treaty process by standardizing treaty structure and content, which contributed greatly to the proliferation of the tax treaty network.⁸⁵ The expanded treaty network facilitated global economic agreements and promoted growth in international trade.⁸⁶

At first, the OECD Model did not receive unanimous acceptance.⁸⁷ For example, in 1977, the United States Treasury developed its own model agreement that reflected U.S. interests.⁸⁸ Additionally, the United Nations ("U.N.") developed yet another

81. See OECD site, *supra* note 10 (asserting OECD's focus on international economic issues, including taxation, to facilitate growth of global market place).

82. See Warren, *supra* note 54, at 133 (stating that OECD Model serves as foundation for most treaty negotiations); see also Jones, *supra* note 56, at 2 (stating that most modern tax treaties are based on OECD Model).

83. See OECD site, *supra* note 10 (listing various international fiscal issues, such as transfer pricing, corruption, and statistical analysis, that OECD addresses).

84. See BAKER, *supra* note 71, at 2 (noting that OECD initially released draft form of OECD Model in 1963 and added further modifications to final version, released in 1977); see also OECD site, *supra* note 10 (noting that 1977 model agreement is foundation for Model Tax Convention, which has subsequently been updated in 1992, 1994, 1995, 1997, and 2000).

85. See OGLE, *supra* note 18, at 2, 36 (stating that most developed countries approved of uniform treaty structure, which eased and facilitated international agreements).

86. See Barry J. Rodger, *Competition Policy, Liberalism and Globalization: A European Perspective*, 6 COLUM. J. EUR. L. 289, 313-14 (2000) (stating that OECD cooperation recommendations in 1960's spawned current framework and initiatives for agreements improving international trade).

87. See BASSINGER & GLAUTIER, *supra* note 19, at 160-61 (noting subsequent emergence of alternate model treaties from U.N. and United States).

88. See BAKER, *supra* note 71, at 4 (stating that although it was later withdrawn in 1992, United States Treasury drafted its own model in 1977, later amended in 1981, which targeted taxation of U.S. citizens); see also BASSINGER & GLAUTIER, *supra* note 19, at 167 (stating that U.S. model agreement revolved around nationality principle, which

model agreement in 1980.⁸⁹ The OECD Model, however, gained widespread acceptance and has become the dominant model for treaty arrangements.⁹⁰

b. OECD's Increasing Influence in International Taxation

In addition to addressing double taxation, the OECD analyzes a variety of other global taxation issues.⁹¹ Annually, the OECD publishes statistics on tax revenues generated in OECD member countries.⁹² OECD initiatives also include recommendations on fighting corruption and implementing transfer-pricing policies.⁹³ Recently, the OECD shifted its focus to harmful tax practices facilitated by globalization.⁹⁴

D. *Globalization and Increasing Tax Competition*

Globalization is transforming international economic relations.⁹⁵ The increased mobility of information and capital alters the way business and finance transactions are conducted.⁹⁶

taxed based on country of citizenship regardless of residence, thus conflicting with OECD Model's residence principle).

89. See BASSINGER & GLAUTIER, *supra* note 19, at 160-61 (stating that unlike residence-based OECD Model, U.N. model emphasized principle of taxation at source of generated income).

90. See KEES VAN RAAD, *NONDISCRIMINATION IN INTERNATIONAL TAX LAW* 3 (1986) (noting that most existing tax treaties are based on OECD Model); see also Cockfield, *supra* note 49, at 143 (stating that most important and influential treaty models include OECD Model); Warren, *supra* note 54, at 133 (stating that OECD Model serves as generally accepted framework for treaty negotiations); Jones, *supra* note 56, at 2 (stating that most modern tax treaties conform to OECD Model).

91. See OECD site, *supra* note 10 (noting various fiscal areas addressed by OECD).

92. *Id.*

93. See *id.* (explaining focus on corruption and transfer pricing). Transfer pricing involves transactions between segments of a multinational entity, whereby one segment pays for goods or services provided by another segment. *Id.* These transactions should be commensurate with similar transactions between independent entities to ensure that the multinational entity's tax base is fairly apportioned. *Id.*

94. See *id.* (stating that globalization proliferates spread of harmful tax competition that requires cooperative redress).

95. See GLOBALIZATION OF SERVICES: SOME IMPLICATIONS FOR THEORY AND PRACTICE 1 (Yair Aharoni & Lilach Nachum eds., 2000) [hereinafter GLOBALIZATION OF SERVICES] (acknowledging vast shift in global economy resulting from globalization); see also Rodger, *supra* note 86, at 289-90 (stating that globalization is marked by free markets and increasing proliferation of global trade).

96. GLOBALIZATION OF SERVICES, *supra* note 95. See Terrill, *supra* note 20, at 218 (noting that globalization eases ability of businesses to seek and obtain cheaper methods of operation, partly through better tax rates, thus enhancing global economic efficiency).

Moreover, globalization has contributed to the proliferation of the tax competition that the OECD seeks to curb.⁹⁷

1. Globalization

While internationalization marked a fundamental change for trade since the Middle Ages, post World War II globalization is having a far greater impact on the world.⁹⁸ Globalization emphasizes global perspectives while minimizing those of individual nations; it stresses the interdependence of national interests.⁹⁹ Consequently, a substantial shift away from public interests to private interests occurs.¹⁰⁰ This shift results from a unified effort between businesses and governments to globalize the world economy.¹⁰¹

Globalization affects many areas of international law.¹⁰² For example, cross-border mergers and acquisitions complicate the traditional regulatory schemes of competition law.¹⁰³ Global en-

97. See 1998 REPORT, *supra* note 11 (asserting that globalization enables nations to develop tax policies that induce investment from non-resident taxpayers).

98. See FISCHER, *supra* note 28, at 3-4 (asserting that internationalization allowed for individual nations to conduct global economic affairs in their independent national capacities, while globalization is causing blending of such independent capacities); see also Roin, *supra* note 12, at 544 (noting that although taxation of income from cross-border transactions has historically been problematic, globalization is greatly exacerbating these problems through inability to track taxpayer's income generated abroad).

99. See FISCHER, *supra* note 28, at 4 (noting that globalization results in diminished independent national interests, causing national interdependence at expense of national independence); see also Rodger, *supra* note 86, at 312 (asserting that primary contributors to globalization trend are private multinational enterprises).

100. See FISCHER, *supra* note 28, at 4 (noting resulting shift from national interests to business related interests); see also Terrill, *supra* note 20, at 219 (acknowledging that globalization is causing diminished governmental ownership and participation within national economies).

101. See FISCHER, *supra* note 28 at 6 (asserting that initiatives to liberalize global trade marketplace are made at behest of multinational businesses and result in collaborations between businesses and national governments to facilitate globalized trade); see also Utz, *supra* note 17, at 769 (stating national legislation that maintains and fosters multinational enterprises perpetuates trend toward globalization).

102. See Edith Brown Weiss, *The Rise or the Fall of International Law?*, 69 FORDHAM L. REV. 345, 348 (2000) (noting globalization's affect on establishment of international regimes addressing issues in human rights, arms control, and environmental protection); see also Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT'L LAW 191, 212-13 (2000) (stating that globalization affects traditionally domestic matters, such as bank loans to underprivileged individuals, intellectual property, and food safety).

103. See Rodger, *supra* note 86, at 313 (stating that transnational mergers can cause competition problems due to disagreements and uncertainty among multiple enforcement authorities); see also Hachigian, *supra* note 9, at 117-18 (stating that commerce is

vironmental problems are spawning multi-national agreements that serve as influential legal instruments.¹⁰⁴ Additionally, criminal and civil law are affected by an increasing international impact on state jurisdictional authority.¹⁰⁵ International taxation is similarly affected, as demonstrated by globalization's impact on tax competition.¹⁰⁶

2. Increasing Tax Competition

Since World War II, the demand for financial services in developing jurisdictions has grown significantly.¹⁰⁷ High taxation and increased regulation in developed nations encouraged individuals and corporations to seek more favorable locations to deposit their funds and transact business.¹⁰⁸ Recognizing the impact this trend has upon their national economies, tax haven¹⁰⁹

increasingly occurring across many nations and domestic competition laws are requiring more international focus).

104. See Weiss, *supra* note 102, at 351-52 (noting that global environmental issues have proliferated multilateral agreements, initiated in part by OECD, U.N. Environment Programme, and U.N. Food and Agriculture Organization).

105. See Andrew L. Strauss, *A Global Paradigm Shattered: The Jurisdictional Nihilism of the Supreme Court's Abduction Decision in Alvarez-Machain*, 67 TEMP. L. REV. 1209 (1994) (stating that globalization provides new impetus to enhance international laws allocating state jurisdictional authority for enforcing domestic criminal and civil laws).

106. See OGLEY, *supra* note 18, at 15 (stating that globalization results in competitive tax policies that governments adopt to raise revenue and attract investment); see also Utz, *supra* note 17, at 770 (stating that globalization contributes to conditions that foster tax competition); Avi-Yonah, *supra* note 23, at 1575 (stating that globalization-enabled mobility of capital results in international tax competition).

107. See ANTHONY SANFIELD GINSBERG, *TAX HAVENS* 3, 7 (1991) (illustrating proliferation of tax haven jurisdictions offering financial services to foreign taxpayers).

108. See *id.* (noting that multinational corporations favor using tax havens as way to conduct more efficient and profitable world trade); see also BASSINGER & GLAUTIER, *supra* note 19, at 227-28 (stating that governments of high tax jurisdictions desire high levels of social welfare and government spending, thus requiring businesses and high net worth individuals to incur higher burden of social welfare costs through higher taxes).

109. See GINSBERG, *supra* note 107, at 3 (stating that no precise definition for tax haven exists, but three types of jurisdictions have been classified as such: (1) those that have no or very low taxes; (2) those where taxes are levied on internal events and no taxes, or insignificant taxes, are levied on foreign source income; or (3) those that grant special treatment to certain entities or operations); see also J. Mukadi Ngoy, *The Paradox of Tax Havens: Consequences of the Subjective Approach*, 12 J. INT'L TAX 34, 36-38 (2001) (claiming that tax haven moniker has typically been applied to small or poor countries whose tax policies have threatened interests of larger industrialized nations); cf. BASSINGER & GLAUTIER, *supra* note 19, at 228 (noting that industrialized nations can also be characterized as tax havens due to significant benefits yielded by their respective tax systems).

governments have attempted to attract this capital by providing favorable tax rates for non-resident monetary deposits.¹¹⁰ As a result, these jurisdictions greatly depend on the income from financial services and the products of more industrialized nations.¹¹¹

Globalization facilitates the trend towards financial tax havens.¹¹² The connection of regional markets through networked computers and high-speed telecommunications increases the mobility of capital and financial flows between nations.¹¹³ Previously remote tax regimes are now readily accessi-

110. See GINSBERG, *supra* note 107, at 6 (stating that tax haven jurisdictions are not economically advanced due to lack of natural resources, capital, and labor, which in turn, contributes to insignificant agricultural or industrial economy); see also Robert W. McGee, *Principles Of Taxation For Emerging Economies: Lessons From The U.S. Experience*, 12 DICK. J. INT'L L. 29, 49-50 (1993) (commenting that developing economies have difficulty competing economically with developed economies and must adopt tax systems that promote economic growth and development); BASSINGER & GLAUTIER, *supra* note 19, at 228 (stating that decision to become tax haven generally results from government decisions to attract investment because lack of resources render these countries economically underdeveloped); Laurey, *supra* note 52, at 483 (opining that developing nations seek to attract foreign capital with tax benefits because their respective uneducated workforce and poor infrastructure often fail to induce such foreign investment); Weiss, *supra* note 16, at 108 (noting that some nations seek capital from taxpayers of high-tax nations by providing tax-exempt opportunities, relaxed tax enforcement, and eliminating tax withholding requirements for foreign investors); Charles I. Kingson, *The Coherence of International Taxation*, 81 COLUM. L. REV. 1151, 1161-62 (1981) (asserting that developing nations must design tax incentives to attract foreign investment due to lack of natural incentives, such as bountiful resources, compared with larger more developed nations); Brown, *supra* note 12, at 321 (noting that lack of productive natural resources of economically weak developed nations result in foreign aid and debt support from developing nations, thus hindering ability for internal economic development, which constrains input on global economic affairs). Developed nations prefer to assist developing nations by providing financial aid and debt. *Id.* This increases developing nations' dependence on developed nations and limits developing nations' input on global economic affairs. *Id.*

111. See BASSINGER & GLAUTIER, *supra* note 19, at 228, 236 (stating that because of their lack of natural resources, economies of developing countries depend more on revenue from banking and finance than economies of developed countries, and developing nations also depend on manufactured products of developed nations); see also OGLEY, *supra* note 18, at 8 (noting significant increase in financial sectors of tax haven jurisdictions); Weiss, *supra* note 16, at 130 (acknowledging that greater capital mobility, enabled by globalization, is reducing world's income gap by allowing developing nations to grow economically at rate similar to wealthy, industrialized nations).

112. See GINSBERG, *supra* note 107, at 7 (stating that roughly fifty percent of international monetary transfers flow through tax havens).

113. See GLOBALIZATION OF SERVICES, *supra* note 95 (asserting that technological advances have virtually eliminated barriers to moving capital abroad, thus inducing nations to adopt favorable tax rates to attract such capital and investment); see also OGLEY, *supra* note 18, at 89 (noting developments in telecommunications, characteristic of

ble; communication improvements allow for the spreading and sharing of tax planning techniques between regions.¹¹⁴ The result is lost revenue for high tax jurisdictions.¹¹⁵

While an exact figure of lost revenue by industrialized nations is nearly impossible to ascertain, a frequently cited study by British poverty-fighting organization, Oxfam International,¹¹⁶ places the annual figure at US\$50,000,000,000.¹¹⁷ The OECD places the amount of foreign direct investment flowing into Caribbean and South Pacific countries, generally considered low tax jurisdictions, at more than US\$200,000,000,000 between 1985 and 1994, representing a rate of growth exceeding that of total outbound foreign direct investment from industrialized nations.¹¹⁸ Consequently, members of the OECD have sought to contain the proliferation of favorable tax regimes.¹¹⁹

II. *THE BULLY: OECD'S ASSAULT ON TAX COMPETITION*

As a response to the concerns and requests of its member nations, the OECD undertook an affirmative effort to address the issue of tax competition.¹²⁰ The OECD issued its 1998 Re-

globalization, result in increased financial flows that lead to significant tax competition); Weiss, *supra* note 16, at 99 (asserting explosive impact of technological innovations on growing issue of international tax competition, such as increased mobility of capital).

114. See OGLE, *supra* note 18, at 11 (stating that simultaneous improvements in transportation and communication encouraged establishment and utilization of tax havens).

115. See *id.* (noting national tax authorities seeking to protect tax bases, or group of taxpayers subject to taxing jurisdiction of particular nation); see also 1998 REPORT, *supra* note 11, at 7 (asserting that tax competition facilitates erosion of tax revenue in industrialized nations).

116. See Oxfam International, *What is Oxfam International?*, at <http://www.oxfam.org> (defining Oxfam International as group of non-governmental organizations seeking to analyze and combat global poverty and injustice).

117. See Arthur J. Cockfield, *Transforming the Internet Into a Taxable Forum: A Case Study in E-Commerce Taxation*, 85 MINN. L. REV. 1171, 1234 (2001) (noting that Oxfam International Study estimates cost of tax competition to developed nations at US\$50,000,000,000).

118. See 1998 REPORT, *supra* note 11, at 17 (stating that rate of direct investment into Caribbean and South Pacific countries well exceeds growth rate of overall outbound foreign direct investment from seven most industrialized nations ("G7 nations")).

119. See *id.* at 67-71 (suggesting adoption of proposed defensive measures to curb tax competition).

120. See *id.* at 3 (stating that OECD seeks to develop measures to counter distorting effects of harmful tax competition); see also Edmund W. Granski Jr., *International Wealth Management Initiatives*, N.Y.L.J., Apr. 2, 2001, at 9 (stating that OECD seeks to develop

port, discussing the impact of globalization, identifying jurisdictions engaging in harmful tax competition, and establishing a preliminary framework to counteract the resulting effects of these jurisdictions.¹²¹ Subsequently, the OECD issued its 2000 Report, which updated the work being done with jurisdictions seeking to cooperate with the OECD and published defensive measures that member countries could adopt to counteract uncooperative jurisdictions.¹²²

*A. Harmful Tax Competition: An Emerging Global Issue—
The 1998 Report*

In 1998, the OECD published the results of its study, which identifies the causes and effects of harmful tax competition.¹²³ The 1998 Report identifies jurisdictions engaging in harmful tax competition in both OECD member countries and non-member countries.¹²⁴ Furthermore, it proposes various defensive measures to aid affected countries in curbing the effects of tax competition.¹²⁵

measures to counter effects that harmful tax competition has on national tax bases of its member countries).

121. See 1998 REPORT, *supra* note 11, at 3, 73-78 (outlining background of OECD effort). In 1996, the OECD commissioned its Committee on Fiscal Affairs ("Committee") to analyze potential solutions and derive a global cooperative framework to counteract tax competition. *Id.* at 3. In January of 1998, the Committee-created Special Sessions on Tax Competition presented their findings in the 1998 Report. *Id.* The OECD ministers subsequently endorsed the 1998 Report in April of 1998. *Id.* Luxembourg and Switzerland abstained during the approval process. *Id.* at 73-78. Luxembourg abstained on the grounds that bank secrecy and information exchange provisions should not be factors in identifying harmful regimes and that the OECD's effort lacked effective consultations with non-member countries. *Id.* Switzerland abstained because of the 1998 Report's failure to factor in non-tax aspects constituting harmful tax competition and the 1998 Report's subjective comparisons on tax rates, thus infringing on territorial sovereignty. *Id.*

122. 2000 REPORT, *supra* note 11.

123. See 1998 REPORT, *supra* note 11, at 14 (stating that globalization facilitates harmful tax competition by allowing taxpayers to exploit developing tax policies by diverting financial capital, which can induce potential distortion in trade and investment).

124. See *id.* at 8 (stating that both OECD member countries and non-member countries are identified as harmful tax regimes); see also David E. Spencer, *Stepping Up The Pressure On Tax Havens: An Update*, 12 J. INT'L TAX'N 26, 29 (2001) (stating that 1998 Report has great impact by addressing harmful tax practices in both OECD member countries, non-member countries, and their dependencies).

125. See 1998 REPORT, *supra* note 11, at 67-71 (enumerating tactics that could be adopted as part of unified effort to curb tax competition); see also David E. Spencer, *OECD Report Cracks Down On Harmful Tax Competition*, 9 J. INT'L TAX'N 26, 32 (1998)

1. Background of the 1998 Report

The OECD initiated its study to determine the extent of global tax competition.¹²⁶ Focusing on geographically mobile activities,¹²⁷ the Committee on Fiscal Affairs ("Committee") examined provisions in various tax systems across the world.¹²⁸ The Committee aimed to determine which tax systems had characteristics intended mainly to divert capital from higher tax jurisdictions.¹²⁹

The study specifically notes the beneficial effects of globalization, such as facilitating tax system reform that focuses on base-broadening and rate reductions.¹³⁰ Moreover, globalization encourages reassessment of domestic tax systems to reduce governmental spending and induce investment.¹³¹ Additionally, expansion of financial markets facilitate capital flows for increased global welfare.¹³²

The 1998 Report also emphasizes the negative impact of globalization and its impact on tax competition, including the increased ability to move mobile capital into lower tax jurisdictions.¹³³ This raises the potential for political pressure in coun-

(noting that 1998 Report lists unilateral and bilateral defensive measures to address harmful tax practices).

126. See 1998 REPORT, *supra* note 11, at 8 (stating that harmful tax competition dislocates financial and service activities, erodes national tax bases of other countries, distorts trade and investment patterns, and diminishes fairness and social acceptance of tax systems); see also Granski, *supra* note 120, at 9 (asserting that 1998 Report intended to develop understanding of how tax competitive jurisdictions affect location of financial and service activities).

127. See 1998 REPORT, *supra* note 11, at 8 (stating that 1998 Report focuses on financial and service activities).

128. See *id.* at 8 (stating that 1998 Report examines general income tax provisions and specific taxes levied on certain types of income).

129. See *id.* at 14 (stating that such harmful tax systems induce distortions in trade and investment patterns, which may adversely affect tax bases of other countries).

130. See *id.* at 13 (stating that globalization has been driving force behind tax reforms).

131. See *id.* (stating that globalization has improved fiscal climate for financial investment).

132. See *id.* at 14 (stating that cross-border capital flows have improved global welfare and standards of living due to more efficient allocation and utilization of resources).

133. See *id.* at 16 (identifying effects of capital dislocation). The 1998 Report lists the harms caused from this capital movement as follows:

1. distorting financial and, indirectly, real investment flows;
2. undermining the integrity and fairness of tax structures;
3. discouraging compliance by all taxpayers;

tries to lower their tax rates to attract investments, which could result in the erosion of tax bases of other countries.¹³⁴ The 1998 Report states that this distortion of capital flows will hinder the expansion of global economic growth.¹³⁵

The 1998 Report, however, does not distinguish between beneficial and harmful jurisdictions.¹³⁶ Instead, the OECD merely suggests that the criteria be analyzed in the context of whether a nation shifts investment activity to its jurisdiction solely to exploit tax benefits.¹³⁷ Additionally, the presence and level of activities in the host country must be commensurate with the amount of investment or income generated by such activities.¹³⁸ Furthermore, an assessment should be made as to whether tax benefits are the primary motivation for the location of an activity.¹³⁹

The OECD seeks to promote and maintain the economic growth brought about by cross-border trade and investment.¹⁴⁰ Consequently, the OECD asserts that the distortion of capital

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4. re-shaping the desired level and mix of taxes and public spending;
 5. causing undesired shifts of part of the tax burden to less mobile tax bases, such as labor, property and consumption; and
 6. increasing the administrative costs and compliance burdens on tax authorities and taxpayers.

Id.; see also Spencer, *supra* note 124, at 29 (noting 1998 Report's emphasis on globalization and technology contributing to tax competition).

134. See 1998 REPORT, *supra* note 11, at 14 (asserting that eroding tax base would constrain country outlays for national defense, education, and other public services); see also Spencer, *supra* note 125, at 31 (noting 1998 Report's assertion that governments are encouraged to divert financial and service activities to their respective countries).

135. See 1998 REPORT, *supra* note 11, at 8-9 (asserting that competition for economic activities, where tax is not influential, is essential for optimal global economic growth); see also Spencer, *supra* note 125, at 31 (noting that 1998 Report asserts that distortion of trade and investment patterns reduce global welfare).

136. See 1998 REPORT, *supra* note 11, at 8 (acknowledging that no distinction between beneficial and harmful jurisdictions was attempted); see also Melo, *supra* note 16, at 198 (acknowledging OECD's failure to discern between beneficial tax competition and harmful tax competition).

137. See 1998 REPORT, *supra* note 11, at 34-35 (stating that investment does not contribute to any business activity specific to jurisdiction).

138. See *id.* at 35 (stating that disproportionate amount of investment raises pre-emption of harmful preferential tax regime).

139. See *id.* at 35 (stating that tax systems induced investments).

140. See *id.* at 8-9 (commenting that cross-border trade and investment is main engine behind global economic growth); see also Spencer, *supra* note 124, at 29 (noting OECD's intention to promote global economic growth through increased cross-border trade and investment and decreased tax influenced distortion of capital flows and service activities).

flow induced by tax competition must be addressed, as it is becoming an increasing problem.¹⁴¹ The OECD opines that an international cooperative effort is required because of the inherently global nature of tax competition.¹⁴²

2. Tax Competition

The 1998 Report asserts that detrimental tax practices can take the form of tax havens or harmful preferential tax regimes.¹⁴³ Although some criteria for identifying both are similar, specific provisions vary enough to allow a jurisdiction to be classified as either a tax haven or one that has a harmful preferential tax regime.¹⁴⁴ The two are distinguished throughout the 1998 Report.¹⁴⁵

a. Tax Havens

Generally, tax havens are jurisdictions with nominal tax rates, or no tax rates, that fail to generate significant revenue.¹⁴⁶ The 1998 Report enumerates specific criteria for identifying tax havens: the jurisdiction imposes no or only nominal taxes; the jurisdiction lacks policy of effective exchange of information;¹⁴⁷ the jurisdiction lacks transparency;¹⁴⁸ and the jurisdiction has no

141. See 1998 REPORT, *supra* note 11, at 9 (stating that Committee believes harmful tax competition is already posing problems for governments and will increase in importance).

142. See *id.* at 10 (stating that global effort will yield more effective results).

143. See *id.* at 8 (noting common significant difference between tax havens and harmful preferential tax regimes is amount of revenue generated by tax system); see also Spencer, *supra* note 124, at 28 (claiming that OECD seeks to reform tax systems in both harmful preferential tax regimes and tax havens).

144. See 1998 REPORT, *supra* note 11, at 22-34 (noting that harmful preferential tax regimes can have provisions in tax legislation that give preferential treatment to specific class of taxpayers, while tax havens primarily offer no, or very low, taxes to all types of income).

145. See *id.* at 20-21 (stating that 1998 Report maintains distinction because of relevance to application of counter-measures against these jurisdictions); see also Spencer, *supra* note 125, at 31 (noting that 1998 Report distinguishes between tax haven jurisdiction and harmful preferential tax regimes).

146. See 1998 REPORT, *supra* note 11, at 21 (stating that tax havens do not generate significant revenue from tax systems and also have reduced regulatory and administrative constraints).

147. See *id.* at 22-23 (noting that tax havens typically have legislative or administrative policies that create strict bank secrecy rules).

148. See *id.* (stating that other jurisdictions would not readily be able to ascertain operation of legislative, legal, or administrative provisions of tax haven jurisdiction).

requirement of “substantial activities.”¹⁴⁹

OECD nations subjectively analyzed these factors in determining whether a jurisdiction offers itself as a place to be used by non-residents to evade their domestic tax authorities.¹⁵⁰ Essentially, these jurisdictions allow non-resident taxpayers to hold passive investments, book paper profits, and hide their affairs from discovery by their resident-country taxing authorities.¹⁵¹ The 1998 Report, however, does not state what tax rate would be considered nominal and characteristic of a tax haven.¹⁵²

b. Harmful Preferential Tax Regimes

Harmful preferential tax regimes occur in non-haven countries that derive significant revenue from their respective tax policies, but whose tax systems have features sufficient to classify them as engaging in harmful tax competition.¹⁵³ The four main factors in identifying a harmful preferential tax regime are: no or low effective tax rates;¹⁵⁴ ring-fencing;¹⁵⁵ lack of transparency;¹⁵⁶ and lack of effective exchange of information.¹⁵⁷ The 1998 Report lists additional criteria to be analyzed upon

149. *See id.* (stating that activity fails to add value to tax haven jurisdiction and is purely tax driven).

150. *See id.* (stating that tax havens offer investors incentives to attract financial and service activities that allow non-resident taxpayers to escape resident-country tax authorities); *see also* Spencer, *supra* note 125, at 32 (noting that 1998 Report focused on jurisdictions whose tax systems intend to provide method for non-residents to escape taxation in their resident country).

151. *See* 1998 REPORT, *supra* note 11, at 22 (stating that tax havens induce purely tax driven activities).

152. *Id.* at 22-25. The 1998 Report does not enumerate the tax rate or range of tax rates indicative of tax havens. *Id.*; *see also* Spencer, *supra* note 125, at 32 (noting that 1998 Report does not propose tax rate to identify tax havens); Melo, *supra* note 16, at 197 (commenting on failure of OECD to propose tax rate considered harmful).

153. *See* 1998 REPORT, *supra* note 11, at 20-21 (stating that harmful preferential tax regimes typically have tax rates that generate revenue, the level of which is significantly lower than revenue generated by another country's tax regime).

154. *See id.* at 26 (stating that tax rate may be low or zero because either it is very low itself in comparison with other nations, most notably nations of OECD, or because of country's determination of applicable tax base for that rate, essentially isolating different types of income and subjecting it to favorable tax rates).

155. *See id.* (stating that ring-fencing results when low rates are fully or partially insulated from domestic economy and applicable only to non-residents).

156. *See id.* at 28 (stating that such regimes fail to clearly identify administrative practices against taxpayer and fails to make details of regime available to tax authorities of other countries).

157. *See id.* at 29-30 (stating that regime could be restrained from exchange of information due to statutory secrecy laws or administrative policies or practices).

confirmation of the four previous criteria,¹⁵⁸ but fails to propose a specific tax rate that would be considered part of a harmful preferential tax regime.¹⁵⁹

3. OECD's Response to Tax Competition

Asserting that governments need to proactively counter the impact and spread of tax havens and harmful preferential tax regimes, the 1998 Report lists 19 recommendations ("Recommendations"), which countries may adopt to counteract the negative impacts of the tax systems of these jurisdictions.¹⁶⁰ The

158. *See id.* at 30-34 (listing additional criteria for identifying harmful preferential tax regimes). The following are among the additional analytical factors:

1. An artificial definition of the tax base;
2. Failure to adhere to international transfer-pricing principles;
3. Foreign source income exempt from tax;
4. Negotiable tax rate or tax base;
5. Existence of secrecy provisions;
6. Access to a wide network of tax treaties;
7. Regime which are promoted as tax minimisation vehicles; and
8. The regime encourages purely tax driven operations or arrangements.

Id.

159. *See id.* at 25-35 (failing to suggest appropriate tax rate as benchmark to identify harmful tax practices). Similar to the lack of a tax rate for identifying tax havens, the 1998 Report fails to enumerate a tax range indicative of harmful preferential tax regimes. *Id.*; *see also* Spencer, *supra* note 125, at 32 (noting 1998 Report's failure to identify tax range characteristic of harmful preferential tax regimes).

160. *See* 1998 REPORT, *supra* note 11, at 37, 67-71 (reasoning that Recommendations are necessary because governments of developed nations cannot afford continued erosion of their tax bases). The 19 Recommendations are:

- I. Recommendations concerning domestic legislation and practices
 1. Recommendation concerning Controlled Foreign Corporations (CFC) or equivalent rules: that countries that do not have such rules consider adopting them and that countries that have such rules ensure that they apply in a fashion consistent with the desirability of curbing harmful tax practices.
 2. Recommendation concerning foreign investment fund or equivalent rules: that countries that do not have such rules consider adopting them and that countries that have such rules consider applying them to income and entities covered by practices considered to constitute harmful tax competition.
 3. Recommendation concerning restrictions on participation exemption and other systems of exempting foreign income in the context of harmful tax competition: that countries that apply the exemption method to eliminate double taxation of foreign source income consider adopting rules that would ensure that foreign income that has benefited from tax practices deemed as constituting harmful tax competition do not qualify for the application of the exemption method.

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4. Recommendation concerning foreign information reporting rules: that countries that do not have rules concerning reporting of international transactions and foreign operations of resident taxpayers consider adopting such rules and that countries exchange information obtained under these rules.
 5. Recommendation concerning rulings: that countries, where administrative decisions concerning the particular position of a taxpayer may be obtained in advance of planned transactions, make public the conditions for granting, denying or revoking such decisions.
 6. Recommendation concerning transfer pricing rules: that countries follow principles set out in the OECD's 1995 Guidelines on Transfer Pricing and thereby refrain from applying or not applying their transfer pricing rules in a way that would constitute harmful tax competition.
 7. Recommendation concerning access to banking information for tax purposes: in the context of counteracting harmful tax competition, countries should review their laws, regulations and practices which govern access to banking information with a view to removing impediments to the access to such information by tax authorities.
- II. Recommendations concerning tax treaties
8. Recommendation concerning greater and more efficient use of exchanges of information: that countries should undertake programs to intensify exchange of relevant information concerning transactions in tax havens and preferential tax regimes constituting harmful tax competition.
 9. Recommendation concerning the entitlement to treaty benefits: that countries consider including in their tax conventions provisions aimed at restricting the entitlement to treaty benefits for entities and income covered by measures constituting harmful tax practices and consider how the existing provisions of their tax conventions can be applied for the same purpose; that the Model Tax Convention be modified to include such provisions or clarifications as are needed in that respect.
 10. Recommendation concerning the clarification of the status of domestic anti-abuse rules and doctrines in tax treaties: that the Commentary on the Model Tax Convention be clarified to remove any uncertainty or ambiguity regarding the compatibility of domestic anti-abuse measures with the Model Tax Convention.
 11. Recommendation concerning a list of specific exclusion provisions found in treaties: that the Committee prepare and maintain a list of provisions used by countries to exclude from the benefits of tax conventions certain specific entities or types of income and that the list be used by Member countries as a reference point when negotiating tax conventions and as a basis for discussions in the Forum.
 12. Recommendation concerning tax treaties with tax havens: that countries consider terminating their tax conventions with tax havens and consider not entering into tax treaties with such countries in the future.
 13. Recommendation concerning co-ordinated enforcement regimes (joint audits; co-ordinated training programmes, etc.): that countries consider undertaking co-ordinated enforcement programs (such as simultaneous examinations, specific exchange of information

projects or joint training activities) in relation to income or taxpayers benefiting from practices constituting harmful tax competition.

14. Recommendation concerning assistance in recovery of tax claims: that countries be encouraged to review the current rules applying to the enforcement of tax claims of other countries and that the Committee pursue its work in this area with a view to drafting provisions that could be included in tax conventions for that purpose.
- III. Recommendations to intensify international co-operation in response to harmful tax competition

15. Recommendation for Guidelines and a Forum on Harmful Tax Practices: that the Member countries endorse the Guidelines on harmful preferential tax regimes set out [below] and establish a Forum to implement the Guidelines and other Recommendations in this Report.

Recommendation 15 Guidelines For Dealing With Harmful
Preferential Tax Regimes in Member Countries

- i. To refrain from adopting new measures, or extending the scope of, or strengthening existing measures, in the form of legislative provisions or administrative practices related to taxation, that constitute harmful tax practices as defined in Section III of Chapter 2 of the [1998] Report.
- ii. To review their existing measures for the purpose of identifying those measures, in the form of legislative provisions or administrative practices related to taxation, that constitute harmful tax practices as defined in Section III of Chapter 2 of the [1998] Report. These measures will be reported to the Forum on Harmful Tax Practices and will be included in a list within 2 years from the date on which these Guidelines are approved by the OECD Council.
- iii. To remove, before the end of 5 years from the date on which the Guidelines are approved by the OECD Council, the harmful features of their preferential tax regimes identified in the list referred to in paragraph 2. However, in respect of taxpayers who are benefiting from such regimes on 31 December 2000, the benefits that they derive will be removed at the latest on the 31 December 2005. This will ensure that such particular tax benefits have been entirely removed after that date. The list referred to in paragraph 2 will be reviewed annually to delete those regimes that no longer constitute harmful preferential tax regimes.
- iv. Each member country which believes that an existing measure not already included in the list referred to in paragraph 2, or a proposed or new measure of itself or of another country, constitutes a measure, in the form of legislative provision or administrative practice related to taxation, that might constitute a harmful tax practice in light of the factors identified in Section III of Chapter 2 of the [1998] Report, may request that the measure be examined by the Member countries, through the Forum on Harmful Tax Practices, for purposes of the application of paragraph 1 or for inclusion in the list referred to in paragraph 2. The Forum may issue a non-binding opinion on that question.
- v. To co-ordinate, through the Forum, their national and treaty responses to harmful tax practices adopted by other countries.
- vi. To use the Forum to encourage actively non-member countries to associate themselves with these Guidelines.

Recommendations focus on encouraging and providing guidance to harmful tax jurisdictions to enact or reform their tax legislation and practices.¹⁶¹ Additionally, the Recommendations encourage harmful jurisdictions to alter treaty arrangements with OECD member nations.¹⁶² OECD countries are encouraged to terminate existing treaties with tax havens, or those countries that have dependencies that are tax havens, and not to enter into treaties with such countries until the harmful tax features are removed.¹⁶³

The 1998 Report also established a Forum¹⁶⁴ to implement the Recommendations and consult jurisdictions with harmful preferential tax regimes seeking to reform their respective tax systems.¹⁶⁵ The Committee mandated the Forum to establish a

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16. Recommendation to produce a list of tax havens: that the Forum be mandated to establish, within one year of the first meeting of the Forum, a list of tax havens on the basis of the factors identified in section II of Chapter 2.
 17. Recommendation concerning links with tax havens: that countries that have political, economic or other links with tax havens ensure that these links do not contribute to harmful tax competition and, in particular, that countries that have dependencies that are tax havens ensure that the links that they have with these tax havens are not used in a way that increase or promote harmful tax competition.
 18. Recommendation to develop and actively promote Principles of Good Tax Administration: that the Committee be responsible for developing and actively promoting a set of principles that should guide tax administrations in the enforcement of the Recommendations included in this report.
 19. Recommendation on associating non-member countries with the Recommendation: that the new Forum engage in a dialogue with non-member countries using, where appropriate, the fora offered by other international tax organizations, with the aim of promoting the Recommendations set out in this Chapter, including the Guidelines.

Id.

161. *See id.* at 39 (stating that Recommendations are divided into three categories: those concerning domestic legislation; those concerning tax treaties; and those facilitating international cooperation); *see also* Spencer, *supra* note 125, at 32 (stating that some Recommendations address domestic fiscal legislation and practice).

162. *See* 1998 REPORT, *supra* note 11, at 39, 46 (stating that certain Recommendations ensure that tax treaties do not promote effects of harmful tax competition); *see also* Spencer, *supra* note 125, at 32 (stating that some Recommendations address bilateral tax treaties).

163. *See* 1998 REPORT, *supra* note 11, at 50 (stating that although treaty reform is to be decided by each affected country, cooperative efforts can increase credibility of such action).

164. *See id.* at 54 (stating that Forum is subsidiary body of Committee, created solely to focus on remedial work against harmful tax competition).

165. *See id.* (stating that Forum is responsible for overseeing implementation of

list of tax havens and countries with harmful preferential tax regimes.¹⁶⁶ Additionally, the Committee instructed the Forum to engage in a dialogue with cooperative non-member countries to promote the 1998 Report's Recommendations.¹⁶⁷ The Recommendations set forth a deadline when identified harmful features of these regimes are to be eliminated.¹⁶⁸

B. Towards Global Tax Co-operation: Progress in Identifying and Eliminating Harmful Tax Practices—The 2000 Report

In June 2000, the Forum presented the OECD Ministers with a progress report ("2000 Report") on the implementation of the Recommendations.¹⁶⁹ Particularly, the 2000 Report identifies OECD member countries with harmful preferential tax regimes, provides an update on consultations conducted with non-member countries, and specifies proposals for further work.¹⁷⁰ Additionally, the 2000 Report identifies jurisdictions that met the criteria for being tax havens.¹⁷¹ The 2000 Report enumerates various defensive measures that OECD member countries

1998 Report's Recommendations and engaging in dialogue with non-member countries).

166. *See id.* at 54-55 (noting that Forum is responsible for identifying harmful preferential tax regimes and tax havens by utilizing criteria from 1998 Report); *see also* Granski, *supra* note 120 (stating that Forum is established to implement guidelines of 1998 Report); *see also* Spencer, *supra* note 124, at 30 (noting Forum's responsibility to conduct ongoing evaluation of preferential tax regimes, analyze effectiveness of Recommendations and identify tax havens).

167. *See* 1998 REPORT, *supra* note 11, at 54-55 (noting that Forum is avenue for discussion on harmful preferential tax regimes, which will assist harmful tax competitive jurisdictions to meet Recommendations of 1998 Report).

168. *See id.* (noting proposed deadlines for jurisdictional compliance). The 1998 Report suggested that harmful preferential tax regimes remove their respective harmful features by April 2003. *Id.* A special "grandfather provision" allows for regimes with features benefiting taxpayers on December 31, 2000 to have these features removed by December 31, 2005. *Id.* Additionally, a "standstill provision" precludes a country from adopting new features or broadening existing features. *Id.*

169. *See* 2000 REPORT, *supra* note 11, at 6 (stating that some OECD member countries are working to reform harmful tax practices and tax havens may commit to follow 1998 Report Recommendations); *see also* Spencer, *supra* note 124, at 30 (noting 2000 Report's summary of Forum's work in identifying harmful preferential regimes in OECD member countries, identifying tax havens, and summarizing consultations with non-member countries).

170. *See* 2000 REPORT, *supra* note 11, at 12 (stating that comprehensive list also contains OECD regimes that may not be harmful).

171. *See id.* at 16-17 (stating that list merely reflects results of study, not intended to provoke retaliation).

could adopt against uncooperative jurisdictions.¹⁷²

1. Preferential Regimes

The 2000 Report identifies the process by which the individual tax policies of OECD member countries were analyzed.¹⁷³ This process identifies OECD member countries with harmful

172. *Id.* at 25. The proposed defensive measures are:

- a) To disallow deductions, exemptions, credits, or other allowances related to transactions with Uncooperative Tax Havens or to transactions taking advantage of their harmful tax practices.
- b) To require comprehensive information reporting rules for transactions involving Uncooperative Tax Havens or taking advantage of their harmful tax practices, supported by substantial penalties for inaccurate reporting or non-reporting of such transactions.
- c) For countries that do not have Controlled Foreign Corporation or equivalent (CFC) rules, to consider adopting such rules, and for countries that have such rules, to ensure that they apply in a fashion consistent with the desirability of curbing harmful tax practices (Recommendation 1 of the 1998 Report).
- d) To deny any exceptions (e.g. reasonable cause) that may otherwise apply to the application of regular penalties in the case of transactions involving entities organised in Uncooperative Tax Havens or taking advantage of their harmful tax practices.
- e) To deny the availability of the foreign tax credit or the participation exemption with regard to distributions that are sourced from Uncooperative Tax Havens or to transactions taking advantage of their harmful tax practices.
- f) To impose withholding taxes on certain payments to residents of Uncooperative Tax Havens.
- g) To enhance audit and enforcement activities with respect to Uncooperative Tax Havens and transactions taking advantage of their harmful tax practices.
- h) To ensure that any existing and new domestic defensive measures against harmful tax practices are also applicable to transaction with Uncooperative Tax Havens and to transactions taking advantage of their harmful tax practices.
- i) Not to enter into any comprehensive income tax conventions with Uncooperative Tax Havens, and to consider terminating any such existing conventions unless certain conditions are met (Recommendation 12 of the 1998 Report).
- j) To deny deductions and cost recovery, to the extent otherwise allowable, for fees and expenses incurred in establishing or acquiring entities incorporated in Uncooperative Tax Havens.
- k) To impose 'transactional' charges or levies on certain transactions involving Uncooperative Tax Havens.

Id.

173. *See id.* at 10-16 (outlining review process of tax systems and policies of OECD member countries).

preferential tax schemes.¹⁷⁴ Furthermore, the 2000 Report provides an update on consultations conducted with non-member countries and specifies the plan for further work with these countries.¹⁷⁵

a. OECD Member Countries

The Forum requested that each member country perform a self-review of its tax systems in relation to the harmful preferential tax regime criteria.¹⁷⁶ Simultaneously, the Forum conducted abstract¹⁷⁷ cross-country reviews, followed by a peer review process that consisted of extensive questionnaires requiring responses to specific regime questions and more general questions about the harmful tax regime criteria.¹⁷⁸ The Forum evaluated the responses and data from these review processes.¹⁷⁹

The 2000 Report identifies forty-seven potentially harmful preferential tax regimes in member countries.¹⁸⁰ These regimes are identified as potentially harmful, however, even though an accurate assessment of the regime's harmful effects have not been determined.¹⁸¹ As a result, the list of regimes includes jurisdictions whose tax systems may not actually be harmful under their particular circumstances.¹⁸²

The Forum intends to develop guidelines, known as application notes,¹⁸³ on applying the harmful tax regime criteria in an

174. *See id.* at 12-14 (identifying nations and regimes as potentially harmful).

175. *See id.* at 22-23 (asserting that non-member nations will have to play important role in implementation of OECD initiatives).

176. *See id.* at 9-10 (requesting all OECD member nations to analyze their tax systems to identify existence of harmful tax policies or practices).

177. *See id.* (stating that reviews were intended to be objective without prior knowledge of specific nation being assessed).

178. *See id.* (noting that OECD member countries answered questionnaires in writing and results were discussed at Forum meetings).

179. *See id.* at 10 (noting that review process lasted from November 1999 through May 2000).

180. *See id.* at 12-14, 22-23 (identifying specific harmful nations and regimes). The OECD member countries with harmful preferential tax regimes are: Australia, Belgium, Canada, Finland, Germany, Greece, Hungary, Iceland, Ireland, Italy, Korea, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and United States. *Id.*

181. *See id.* at 12 (stating that further work will allow OECD member countries to determine harmful extent, if any, of certain regimes).

182. *See id.* (stating that harm of certain regimes depends upon application in specific circumstances).

183. *See id.* at 15 (stating that application notes will illustrate problematic features

objective manner, equally applicable to any potentially harmful regime.¹⁸⁴ These application notes will assist member countries in determining whether their tax systems are, or could be, harmful and the procedure for removing the harmful features of such regimes.¹⁸⁵ Such assistance is intended to allow harmful jurisdictions to meet the deadlines for compliance, which will be verified by the Forum.¹⁸⁶

b. Non-Member Countries

The Committee states that non-member countries must have a key role in the efforts against harmful tax competition.¹⁸⁷ Citing the global nature of harmful tax competition, the Committee seeks to include non-member jurisdictions by encouraging non-members to familiarize themselves with the 1998 Report and to adopt its features.¹⁸⁸ Additionally, the Committee plans to hold regional seminars to assist with and facilitate the removal of harmful features in the tax systems of non-member jurisdictions.¹⁸⁹

2. Review of Tax Havens

The 2000 Report identifies thirty-five jurisdictions as tax havens, because they meet the criteria described in the 1998 Report.¹⁹⁰ The OECD requests that such jurisdictions make adjust-

of various tax regimes based upon criteria outlined in 1998 Report and cross-country reviews).

184. *See id.* (stating that application notes would be provided without reference to specific regimes).

185. *See id.* at 15-16 (asserting that tax systems will be analyzed with respect to application notes to determine degree of harm of tax policies).

186. *See* 1998 REPORT, *supra* note 11, at 54-55 (noting deadlines for compliance by harmful jurisdictions); *see also* Spencer, *supra* note 124, at 34 (noting 2000 Report's schedule and review process to monitor compliance by advance commitment and scheduled commitment jurisdictions).

187. *See* 2000 REPORT, *supra* note 11, at 22 (stating that non-member countries need to be included in effort because they are either affected by or have harmful tax practices); *see also* Spencer, *supra* note 125, at 29 (noting OECD's recognition that tax competition is inherently global issue requiring input and cooperation of non-member countries).

188. *See* 2000 REPORT, *supra* note 11, at 22 (stating that working with non-member economies would facilitate removal of harmful tax practices).

189. *See id.* (noting that seminars will allow OECD to better understand concerns of non-member countries).

190. *See id.* at 17 (listing tax havens). The jurisdictions identified as tax havens are: Andorra, Anguilla, Antigua and Barbuda, Aruba, Bahamas, Bahrain, Barbados, Belize,

ments to their respective fiscal policies to conform with the Recommendations of the 1998 Report.¹⁹¹ Any tax haven jurisdiction that fails to comply will be deemed uncooperative and may be subject to defensive measures by the OECD member countries.¹⁹²

a. Identification of Tax Havens

During the evaluation process, the Forum requested that these jurisdictions submit relevant information about their specific tax systems.¹⁹³ The Forum analyzed this information and, based on this analysis, produced jurisdiction reports.¹⁹⁴ In many cases, jurisdictions with harmful practices provided input and agreed to the provisions of the jurisdiction reports.¹⁹⁵ Based on these procedures, the Forum made technical evaluations¹⁹⁶ of the jurisdictions meeting the tax haven criteria and these evaluations are the basis for the preliminary list of identified tax havens.¹⁹⁷

The preliminary list excluded a number of jurisdictions, however, if they made an advance commitment¹⁹⁸ to eliminate

British Virgin Islands, Cook Islands, Commonwealth of Dominica, Gibraltar, Grenada, Guernsey/Sark/Alderney, Isle of Man, Jersey, Liberia, Liechtenstein, Maldives, Marshall Islands, Monaco, Montserrat, Nauru, Netherlands Antilles, Niue, Panama, Samoa, Seychelles, St. Lucia, St. Christopher & Nevis, St. Vincent and the Grenadines, Tonga, Turks & Caicos, U.S. Virgin Islands, and Vanuatu. *Id.*

191. See 1998 REPORT, *supra* note 11, at 67-71 (requesting that tax havens adopt CFC rules, foreign investment fund rules, and exchange of information policies among other things).

192. See 2000 REPORT, *supra* note 11, at 18-19 (asserting that tax havens failing to comply with OECD effort will be included in list of uncooperative tax havens and potentially subjected to defensive measures).

193. See *id.* at 10 (stating that information would enable application of tax haven criteria to jurisdiction's specific situations).

194. See *id.* (noting jurisdiction reports act as summary of information provided to and analyzed by OECD working groups).

195. See *id.* (stating that input and participation of all jurisdictions was encouraged).

196. See *id.* at 11 (stating that technical evaluations solely identified jurisdictions containing tax haven criteria, notwithstanding evidence that some jurisdictions meet higher standards of transparency, openness, and exchange of information, and that such jurisdictions possess superior internal financial regulation).

197. See *id.* at 16-17 (enumerating identified tax havens).

198. See *id.* at 16 (characterizing advance commitment jurisdictions). Advance commitments are high-level political commitments from tax haven jurisdictions acquiescing to requests of OECD, including a standstill, whereby jurisdictions agree not to introduce new harmful tax practices and not to continue existing harmful tax practices. *Id.* Such jurisdictions, in conjunction with the Forum, will formulate a compliance

the harmful features of their tax systems and comply with the Recommendations of the 1998 Report.¹⁹⁹ In furthering a cooperative effort between the OECD and the listed jurisdictions, the Forum will continue to solicit commitments from these jurisdictions.²⁰⁰ Alternatively, jurisdictions that failed to make advance commitments can still demonstrate their interest in cooperating with the OECD by making "scheduled commitments," agreements occurring after the release of the preliminary list of identified tax havens.²⁰¹

Acknowledging the efforts of advance commitment and scheduled commitment tax havens, the Committee will continue to consult with these cooperative jurisdictions to complete the information process.²⁰² The 2000 Report asserts that this work will entail developing a multilateral agreement for exchange of information, evaluating the transitive assistance²⁰³ that jurisdictions will require, and encouraging such jurisdictions to consult with existing worldwide organizations to improve tax administration and enforcement.²⁰⁴ The Committee also intends to work with other international organizations to address the potential

plan, illustrating procedures and timetables for reform. *Id.* Jurisdictions must complete "concrete and significant action" within the first year of their respective commitments. *Id.*

199. See Spencer, *supra* note 124, at 34 (noting 2000 Report's assertion of excluding jurisdictions that made public political commitments to eliminate harmful features of their tax systems and comply with 1998 Report).

200. See 2000 REPORT, *supra* note 11, at 18 (stating that solicitations will continue through July 2001).

201. See *id.* at 19 (characterizing scheduled commitment jurisdictions). Scheduled commitments require jurisdictions, in conjunction with the Forum, to develop plans for procedure and timetables for reformation. *Id.* This plan is required within six months of the stated commitment. *Id.* Similar to advance commitment jurisdictions, scheduled commitment jurisdictions must agree to a standstill and must complete "concrete and significant action" within the first year of commitment. *Id.*

202. See *id.* at 20-21 (noting OECD's intention to assist jurisdictions with compliance and to further obtain additional information).

203. See *id.* (stating that jurisdictions complying with tax reform principles of 2000 Report may encounter reductions in certain financial and service activities that need to be addressed).

204. See *id.* (citing Caribbean Community, Commonwealth Association of Tax Administrators, Inter-American Centre of Tax Administrators, Intra-European Organization of Tax Administrations, and Organization for Economic Cooperation as examples of international organizations that could be utilized by reforming nations); see also Spencer, *supra* note 124, at 35 (noting OECD's intention to continue dialogue with cooperative jurisdictions to provide model mechanism for exchange of information, examine types of additional assistance cooperative jurisdictions will need, and create multilateral framework for consultations with cooperative jurisdictions).

adverse economic effects that cooperative jurisdictions may encounter in the transition process of reforming their tax policies.²⁰⁵

b. Defensive Measures Against Non-Cooperative Tax Havens

Jurisdictions from the preliminary list that failed to make an advance commitment or fail to make a scheduled commitment will be deemed uncooperative and included in the OECD List of Uncooperative Tax Havens.²⁰⁶ This list, originally scheduled for completion by July 31, 2001,²⁰⁷ will also include any advance commitment jurisdiction or scheduled commitment jurisdiction that has failed to meet its respective deadlines for eliminating the harmful features of its tax systems due to a failure to act in good faith with respect to its commitments.²⁰⁸ The Committee encourages its member countries to refer to this uncooperative list to identify jurisdictions against which retaliatory measures should be undertaken.²⁰⁹

Recognizing that a multilateral cooperative effort may better curb harmful tax practices than any unilateral effort, the Committee recommends a general scheme wherein member countries can implement a unified approach.²¹⁰ This scheme would facilitate the use of defensive measures by member countries against jurisdictions that do not reform their harmful tax

205. See 2000 REPORT, *supra* note 11, at 20-21 (stating that international organizations are encouraged to render assistance to jurisdictions reforming their tax systems); see also Spencer, *supra* note 124, at 35 (noting 2000 Report's assertion that international organizations are encouraged to assist in design of economic assistance programs).

206. See 2000 REPORT, *supra* note 11, at 18 (asserting that tax havens failing to comply with OECD effort will be included on list of uncooperative tax havens); see also Granski, *supra* note 120, at 9 (stating that OECD will publish list of uncooperative tax havens).

207. See Michael M. Phillips, *Accord is Reached by U.S. and Allies on Tax Havens*, WALL ST. J., June 28, 2001, at A4 (noting that OECD has changed its release date for list of uncooperative tax havens from July 2001 to November 2001).

208. See 2000 REPORT, *supra* note 11, at 19 (stating that failure to act in good faith to adhere to self-imposed timetable will result in inclusion on uncooperative tax haven list).

209. See *id.* at 26 (noting that uncooperative list should be used to implement defensive measures in lieu of preliminary list).

210. See *id.* at 24 (stating that OECD's objective is to coordinate joint effort because of limitations that exist with unilateral effort); see also Spencer, *supra* note 124, at 35 (noting OECD's assertion that coordinated effort of OECD member countries will likely be more successful than unilateral approach).

system.²¹¹ Each member country has discretion to implement or not implement the defensive measures and adoption would be pursuant to their domestic legislation or executed tax treaties.²¹² Additionally, each member country may enforce any defensive measure in proportion to the alleged harm done by a particular jurisdiction.²¹³

The defensive measures enumerated in the 2000 Report contain some of the defensive measures from the 1998 Report as well as additional measures recommended by the Forum.²¹⁴ The Committee plans to evaluate these measures, approve its final recommendations, and implement an applicable defensive strategy.²¹⁵ Subsequently, cooperating countries can adopt any of the Committee's recommended measures to implement against uncooperative jurisdictions.²¹⁶

III. THE OECD'S COERCIVE AND DEVIANT EFFORT TO COUNTERACT TAX COMPETITION

The OECD's 1998 and 2000 Reports addressing tax competition mark a coercive and intrusive solution that deviates from traditional fiscal remedies.²¹⁷ The substantive provisions of these reports are vague and subjectively reflect the exclusive interests of the OECD.²¹⁸ Furthermore, success of the OECD's efforts will result in hindering future global economic growth.²¹⁹

211. See 2000 REPORT, *supra* note 11, at 24 (stating that facilitated defensive measures are important to prevent uncooperative jurisdictions from gaining advantage over cooperative jurisdictions); see also Spencer, *supra* note 124, at 35 (noting OECD's assertion of facilitated ability to take counteractive measures with general framework).

212. See 2000 REPORT, *supra* note 11, at 24 (noting that OECD will not implement defensive measures against uncooperative jurisdictions, as adopting measures will be up to individual nations).

213. See *id.* (noting that affected nations are impacted differently by harmful tax competition and may respond proportionally).

214. See *id.* at 24-25 (stating that potential measures from 1998 Report were adopted for further study by Committee).

215. See *id.* (noting that defensive measures will be finalized after further review).

216. See *id.* (noting that affected nations will be able to adopt any finalized measures they choose to utilize against uncooperative nations).

217. See *supra* note 56 and accompanying text (noting that treaties are traditional method to address international fiscal issues because of ability to resolve common issues of multiple nations without usurping their national fiscal sovereignty).

218. See *supra* notes 121, 136, 152, 152, 181-82 and accompanying text (acknowledging that OECD failed to consult with non-member nations and vaguely and subjectively analyzed tax systems of nations alleged to engage in harmful tax competition).

219. See *supra* notes 110-11 and accompanying text (discussing that tax competi-

*A. OECD's Effort Deviates From Traditional
International Taxation Principles*

Notwithstanding the substantive findings of the OECD in the 1998 and 2000 Reports, their efforts to curb tax competition marks a substantial deviation from the treaty network established to address international fiscal problems and usurps a basic tenet of fiscal legislation: national sovereignty.²²⁰ The 1998 Report requires tax competitive jurisdictions to alter their fiscal legislation and accompanying practices.²²¹ Although the OECD claims that adoption of these fiscal reform Recommendations are voluntary²²², the threat of targeted jurisdictions being subjected to the defensive measures outlined in the 2000 Report effectively coerces these jurisdictions into an involuntary compliance.²²³

Consideration of the economic disparity between OECD nations and targeted jurisdictions is demonstrative. The OECD is a group of the most industrialized and economically powerful nations in the world.²²⁴ Collectively, the nations of the OECD monopolize the production of global goods and the allocation of capital and resources.²²⁵ Thus, the OECD members are an indispensable part of the global economy, able to leverage their monopolistic economic position in global affairs.

Conversely, the tax competitive nations targeted by the OECD are much weaker economically and more dependent on OECD nations as trading partners.²²⁶ Tax competitive nations'

tion allows developing nations to internally develop economically, and such internal development, allows for more effective global economic growth).

220. See *supra* notes 45-47 and accompanying text (stating that nations have maintained their fiscal sovereignty notwithstanding increasing effect of national systems on international economic relations).

221. See *supra* note 159 and accompanying text (noting that OECD's Recommendations require modifications to targeted jurisdiction's fiscal legislation and practices).

222. See *supra* note 204 and accompanying text (noting OECD's assertion that member countries have discretion in choosing whether or not to adopt defensive measures).

223. See *supra* notes 111, 172 and accompanying text (discussing developing nation's dependence on income from financial services and OECD's defensive measures attempting to curtail developing nation's tax-incentive-based financial services industry).

224. See *supra* note 10 and accompanying text (illustrating that OECD includes most major industrialized nations).

225. See *supra* note 15 and accompanying text (discussing dominance of OECD nations in production of goods and services).

226. See *supra* note 110 and accompanying text (stating lack of natural resources and capital to internally build economy).

lack of resources and labor requires such jurisdictions to seek goods and resources from the more industrialized nations of the OECD.²²⁷ This reliance precludes tax competitive jurisdictions from effectively generating sufficient internal revenue to develop a globally competitive economy.²²⁸ Consequently, this weaker and more reliant position of tax competitive nations hardly places them in any position to refuse the OECD's monopolizing demands.

The OECD attempts to rationalize infringing on developing nations' sovereign right to tax by stating that such a right also confers upon the OECD nations the right to protect their revenue bases.²²⁹ This argument, however, does not accurately reflect the effect of the OECD's effort. Although the implementation of the Recommendations and defensive measures of the 1998 and 2000 Reports may allow OECD member nations to protect their respective revenue bases, a concurrent effect is a trespass on fiscal sovereignty.²³⁰ The 1998 and 2000 Reports effectively dictate legislative and practice reforms targeted jurisdictions must enact,²³¹ thus violating international taxation principles.

The OECD's coercive trespass on national fiscal sovereignty deviates from the traditional fiscal remedial system of tax treaties.²³² Throughout the rise of internationalization and the resulting problems of double taxation and tax evasion, treaties constituted the measures used to address these issues.²³³ Nations maintained control of their fiscal authority and this allowed for

227. *See supra* notes 110-11 and accompanying text (discussing developing nation's lack of natural resources and consequential dependence on developed nations for produced goods).

228. *See supra* notes 110-11 and accompanying text (noting developing nations' reliance on finance and services because of lack of natural resources to enable thriving manufacturing industry).

229. *See supra* note 160 and accompanying text.

230. *See supra* note 172 and accompanying text (discussing defensive measures contemplated by OECD, which require developing nations to involuntarily alter their tax legislation, thus infringing on national sovereignty).

231. *See supra* note 172 and accompanying text (listing reform measures to nations' fiscal policies, such as requiring comprehensive information reporting and adopting CFC legislation).

232. *See supra* notes 54-56 and accompanying text (discussing that treaties are traditional method for addressing international fiscal issues without infringing on national fiscal sovereignty).

233. *See supra* notes 57, 60 and accompanying text (noting prevailing use of taxation treaties in addressing double taxation and tax evasion).

effective negotiations regarding international fiscal issues.²³⁴

The OECD's effort essentially undermines a nation's ability to negotiate. By leveraging their dominant economic power,²³⁵ the OECD member nations are usurping the fiscal authority of tax competitive nations. Because treaty-negotiating power is a reflection of a nation's effective fiscal authority,²³⁶ this usurpation of fiscal authority results in a nation's lack of treaty negotiating power, thus rendering such agreement attempts fruitless.

Although the reluctance of tax competitive jurisdictions to enter into tax evasion treaties²³⁷ made these agreements less effective than double taxation treaties, the lack of success of tax evasion treaties can be rectified by the willingness of OECD member nations to compromise in negotiating these treaties. Tax evasion treaties can be more effective and amenable if industrialized nations agree to tax-sparing arrangements.²³⁸ These arrangements would enable tax competitive jurisdictions to maintain their respective influx of investments from non-resident taxpayers.²³⁹ Also, OECD member nations would likely receive the reciprocal benefit of tax enforcement assistance by the tax competitive jurisdictions. Thus, tax-sparing arrangements are likely the best solution to appease both tax competitive countries and the OECD member nations.

B. *OECD Reports Are Vague and Subjective*

The fundamental make-up of the OECD illustrates the organization's inappropriate position in leading this effort. The OECD is comprised of only twenty-nine countries,²⁴⁰ thus repre-

234. See *supra* note 56 and accompanying text (discussing national preference for using tax treaties to address international fiscal issues due to treaties' lack of infringement on national sovereignty).

235. See *supra* note 16 and accompanying text (discussing OECD's ability to combat tax competition with both tax and non-tax measures because of economic power disparity between OECD nations and developing nations).

236. See *supra* note 56 and accompanying text (stating that nation's fiscal sovereignty is maintained through negotiating position).

237. See *supra* note 65 and accompanying text (noting developing countries reluctance to enter into tax evasion treaties because of detrimental economic effects that result).

238. See *supra* notes 67-68 (noting beneficial effect of tax-sparing arrangements to developing countries).

239. See *supra* note 66 and accompanying text (noting appeal of tax-sparing provisions to foreign investors that invest in developing nations).

240. See *supra* note 10 and accompanying text (listing OECD member countries).

senting a limited scope of global interests. This scope is further reduced when accounting for the abstentions by Luxembourg and Switzerland during the approval of the 1998 Report by the OECD Council.²⁴¹ Consequently, the 1998 and 2000 Reports utilize an OECD-centered approach that significantly omits a substantial number of interests in the world, especially those of the targeted nations.

Moreover, the OECD's failure to solicit design schemes for domestic tax regimes from non-member nations,²⁴² further demonstrates its self-centered focus in curbing tax competition. Although the 1998 Report recommends establishing the Forum, in part to facilitate dialogue between member and non-member nations, no effective consultations with tax havens occurred during the drafting of the 1998 Report.²⁴³ In fact, such failure to consult with these affected jurisdictions contributed to the abstention of Luxembourg during the approval of the 1998 Report.²⁴⁴

Although the OECD claims to represent world interests by having open discussions, the Forum's dialogue with non-member and tax haven jurisdictions following publication of the 1998 Report consisted of consulting with jurisdictions on complying with the OECD-established principles of the 1998 Report and acknowledging those jurisdictions that agreed to comply.²⁴⁵ Thus, the only level of participation by non-OECD countries was to either comply with the 1998 Report or to refuse. As stated by the OECD,²⁴⁶ addressing the issue of tax competition would require a coordinated global approach, which should include the proactive and substantive input of all affected nations.

In addition to being too OECD-centered, the 1998 and 2000

241. *See supra* note 121 and accompanying text (noting abstentions by Switzerland and Luxembourg during approval process).

242. *See supra* note 121 and accompanying text (noting that input for 1998 Report excluded non-OECD member nations).

243. *See supra* note 121 and accompanying text (discussing Luxembourg's abstention from approving 1998 Report due to OECD's failure to consult non-OECD nations).

244. *See supra* note 121 and accompanying text (noting Luxembourg's abstention during OECD's approval of 1998 Report due to lack of effective consultation with targeted nations).

245. *See supra* note 167 and accompanying text (noting that assisting targeted jurisdictions to comply with Recommendations of 1998 Report is purpose of consultations with Forum).

246. *See supra* notes 142, 202 and accompanying text (noting OECD's assertion that cooperative global effort will better address tax competition).

Reports are also vague.²⁴⁷ In determining whether a jurisdiction has an appropriate tax rate, as opposed to low or nominal, the 1998 Report fails to provide an exact figure or tax range that would be considered appropriate.²⁴⁸ Additionally, the 1998 Report fails to provide comparative guidelines to determine if jurisdictions are engaged in harmful tax competition in the context of their respective economic situations.²⁴⁹ Furthermore, the tax haven requirement of no substantial activities has no determinative guidelines, and is vague enough to allow an OECD nation to subjectively determine what is 'substantial.'²⁵⁰ Thus, the OECD's effort outlined in the 1998 and 2000 Reports provides no constructive assistance to guide alleged competitive jurisdictions to unilaterally reform their respective tax systems.

C. *OECD's Effort Will Stymie Global Economic Growth*

The OECD's effort to curb tax competition is likely to hinder overall global economic development. Inherently, international taxation principles foster growth through international trade.²⁵¹ Tax treaties alleviate the encumbered movement of capital, goods, and services that result from the harmful effects of double taxation.²⁵² Additionally, national tax systems provide tax incentives to business enterprises in an effort to encourage their international development.²⁵³ These characteristics of international taxation enhance the profitability of international trade and allow developing nations to participate in the growth

247. See *supra* notes 121, 136, 152, 152, 181-82 and accompanying text (discussing failure of OECD to set specific tax rate criteria for identifying tax havens and harmful preferential tax regimes, failure to distinguish between harmful and beneficial tax competition jurisdictions, and failure to analyze targeted nations' tax policies in context of their particular circumstances).

248. See *supra* notes 136, 152, 152, 181-82 and accompanying text (discussing OECD's failure to specifically state inappropriate tax rates).

249. See *supra* notes 181-82 and accompanying text (discussing OECD's lack of contextual analysis in listing nations that are alleged to possess harmful preferential tax regimes).

250. See *supra* note 149 and accompanying text (noting OECD's concern of adding value to tax haven jurisdiction, but not denoting quantitative criteria defining 'substantial').

251. See *supra* note 57 and accompanying text (discussing importance of tax treaties in eliminating barriers to global trade).

252. See *supra* note 38 and accompanying text (discussing double taxation's hindrance of international transactions).

253. See *supra* notes 109-10 and accompanying text (discussing tax haven's intention to attract foreign capital and investment).

of the global economy.²⁵⁴

Although the industrialized nations argue that their depleted tax revenue resulting from the effects of tax competition diminishes the amount of aid provided to developing nations,²⁵⁵ effective and sustainable economic development is most beneficial when it is internally generated.²⁵⁶ Tax competition allows developing nations to build their economies without relying on subsidies of more industrialized nations.²⁵⁷ Increased economic independence will potentially allow for more input on global economic policy.²⁵⁸

Because competition, on many scales, is characteristic of the free market global economy, tax haven jurisdictions are appropriately addressing the need to develop their respective economies. Due to a lack of natural resources and capital, alleged tax haven jurisdictions are at a significant disadvantage compared to industrialized nations in their ability to contribute to the global economy.²⁵⁹ Consequently, the only recourse for these jurisdictions is to provide investment incentives to individuals and multinational corporations in an effort to develop a financial industry that is vital to their success.²⁶⁰ These jurisdictions, in turn, will be able to develop a stable and growing economy that will provide for the development and improvement of the necessary infrastructure to allow their health care and educational systems to become commensurate with those of more industrialized nations.

Additionally, this economic growth is likely to result in

254. See *supra* note 108 and accompanying text (discussing ability of corporations to transact business in nations with favorable tax rates enabled by national fiscal sovereignty).

255. See *supra* note 110 and accompanying text (discussing developed nations' preference to continue aid and debt support to developing nations).

256. See *supra* note 110 and accompanying text (discussing more independent and sustainable economic development results from nations' ability to internally generate income).

257. See *supra* note 110 and accompanying text (discussing ability of developing nations to internally generate financial services income that would reduce developing nations' reliance on current aid and debt they receive from more developed nations).

258. See *supra* note 110 and accompanying text (noting increased economic independence of developing nations would enable more input regarding global economic affairs).

259. See *supra* note 110 and accompanying text (discussing poor natural resources, labor, and capital).

260. See *supra* note 111 and accompanying text (discussing developing nations' dependence on bank and finance to stimulate economic growth).

growing markets for products and services of the industrialized nations.²⁶¹ The dominating trade positions of the United States and fellow OECD members can offset the loss of fiscal revenue with the increase of export gains that is likely to result from the increasing strength of these developing economies.²⁶² It is indeed ironic that this effort comes at a time when the United States, the OECD's most economically powerful member and perhaps most affected by tax competition, maintains its status as a dominant global exporter.²⁶³

CONCLUSION

The OECD's effort to curb tax competition marks a deviation of accepted international taxation principles. The substantive criteria and defensive measures to be employed against jurisdictions unwilling to comply with the OECD's demands illustrates a coercive attempt to alter the tax systems of these jurisdictions to conform with the unilateral interests of OECD member nations. Additionally, the overall consequence of this effort is likely to hinder global economic development as it will concentrate the benefits of globalizing trends into the hands of a few nations and move further away from a potential level of proportional economic standing among all nations of the world.

261. See *supra* note 111 and accompanying text (discussing economic growth of developing nations facilitated by tax competition that may lead to increased consumption of goods and services of leading export nations of OECD).

262. See *supra* note 111 and accompanying text (reasoning increase in market for goods and services of developed nations stemming from strengthened economies of developing nations).

263. See *supra* note 15 and accompanying text (noting United States' dominant position as global exporter).