III. The OECD's International Tax Proposal: The Action Plan

A. Introduction

Multinational companies substantially reduce their corporate tax burdens by legally shifting assets to low tax jurisdictions and moving losses to places that receive high deductions.[1] Responding to the unfairness and distortions caused by this tax avoidance and desiring to protect governmental revenue, the Organization for Economic Cooperation and Development ("OECD") published a report on July 2013 entitled the Action Plan on Base Erosion and Profit Shifting ("Action Plan").[2] This article will examine the potential effects of the Action Plan and the likelihood of its realization. Part B will describe the public events leading to the Action Plan's publication and endorsement. Part C will explain the fifteen actions recommended by the Action Plan. Part D will consider the possible beneficial and harmful effects of the Action Plan on developing countries. Part E will analyze the political difficulties with fully implementing the Action Plan.

B. Impetus for and Endorsement of the Action Plan

Recently, governments and the public have criticized a number of high profile multinational companies that have substantially reduced their taxes by shifting their assets to low tax jurisdictions and their losses to high tax jurisdictions.[3] For example, although not alleging any illegal activity, Congress held a hearing to condemn Apple for its methods of reducing United States tax obligations.[4] According to Congress, over the last four years, Apple

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[1] *See, e.g.*, Vanessa Houlder, *Taxation: Unsafe Offshore*, FIN. TIMES, Jan. 13, 2013, at 9 (citing Apple, Google, and Amazon as examples of companies engaging in such activities).

[2] Lydia DePillis, *Can an International Agreement Stop the Global Taxation Shell Game?*, THE WASHINGTON POST (July 25, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/25/can-an-international-agreement-stop-the-global-taxation-shell-game.

[3] *See, e.g.*, Houlder, *supra* note 1, at 9 ("Political anger is mounting over the low taxes paid by multinationals such as Apple, Google and Amazon during an age of brutal cuts in public spending.").

[4] *Offshore Profit Shifting and the U.S. Tax Code - Part 2 (Apple Inc.)*: *Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Gov. Affairs,* 113th Cong. (2013).

has avoided about $10 billion in United States taxes per year by keeping money in foreign countries.[5] Among other methods of reducing its tax burdens, Apple avoided bringing foreign resources to the United States by instead financing its domestic investments with borrowed money.[6]

Apple's tax reduction methods are representative of many multinational companies in the United States.[7] In fact, eighteen US companies would have to pay more than $92 billion in taxes if they brought their money stored in offshore tax havens to the United States.[8] However, some commentators suggest that the outcry against these multinational companies may be misdirected, observing that the provisions in the U.S. tax code that allow companies to defer the taxation of income earned abroad balance out the unique worldwide nature of U.S. taxes.[9]

Like the United States Congress, the British Parliament held hearings condemning Google's legal activity before its Public Account Services Committee.[10] Overall, Google reduced its tax burden on its 2011 overseas profits to 3.2% despite having most of its sales in countries with much higher tax rates.[11] Among other methods, Google lowered its tax burden by shifting billions of

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[5] Howard Gleckman, *The Real Story About Apple's Taxes*, TAX POL'Y CENTER, URB. INST. & BROOKINGS INSTITUTION (May 21, 2013, 4:36 PM), http://taxvox.taxpolicycenter.org/2013/05/21/the-real-story-about-apples-taxes.

[6] *Id.*

[7] *Id.*

[8] Jillian Berman, *18 Of America's Biggest Companies Using Tax Havens To Skirt $92 Billion In U.S. Taxes: CTJ*, THE HUFFINGTON POST (June 3, 2013, 5:05 PM), http://www.huffingtonpost.com/2013/06/03/apple-tax-havens_n_3378935.html.

[9] *See* Dan Mitchell, *Four Reasons to Applaud Apple's Tax Planners*, CATO INST. (May 21, 2013), http://www.cato.org/blog/four-reasons-applaud-apples-tax-planning; *see also* CHRIS EDWARDS & DAN MITCHELL, GLOBAL TAX REVOLUTION: THE RISE OF TAX COMPETITION AND THE BATTLE TO DEFEND IT 108 (2008) ("[A] compromise in the U.S. tax system allows 'deferral' of tax on the foreign income of U.S. companies.").

[10] Brid-Aine Parnell, *Clap Google, Amazon in Irons to End Tax Shenanigans—MPs*, THE REG. (Dec. 3, 2013), http://www.theregister.co.uk/2012/12/03/mps_tax_report.

[11] Brid-Aine Parnell. *Schmidt 'Very Proud' of Google's Tiny Tax Bill: 'It's Called Capitalism,'* THE REG. (Dec. 13, 2012), http://www.theregister.co.uk/2012/12/13/schmidt_proud_capitalist_google.

dollars into a Bermuda shell company, thus avoiding both United States and European taxes.[12]

Company executives and accounting firms have responded to legislative as well as public criticism by explaining that companies have fiduciary obligations to minimize their tax obligations, thereby placing the burden on the legislature to reform the tax codes.[13]

In July 2013, the OECD published its advice on how to fix problems with the international system of corporate taxation in a report entitled the Action Plan.[14] Shortly after the Action Plan's publication, China agreed to join the international effort to combat tax avoidance and signed an agreement to share tax records.[15] In a September G20 conference in Russia, the world's leaders and central bank governors met to negotiate and coordinate economic policies, ultimately endorsing the Action Plan.[16] The endorsement specifically mentioned the importance of international tax cooperation in promoting the interests of developing countries, of the need for greater transparency, and of the desire to automatically exchange tax information between countries.[17] The G20 leaders planned to implement the Action Plan within a few years.[18]

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[12] Brian Womack, *Google Chairman Says Android Winning Mobile War With Apple: Tech*, BLOOMBERG (Dec. 12, 2012), http://www.bloomberg.com/news/2012-12-12/google-chairman-says-android-winning-mobile-war-with-apple-tech.html.

[13] *See, e.g.*, Tom Bergin, *MPs Press Accountants on Tax Avoidance*, REUTERS (Jan. 31, 2013, 2:31 PM), http://uk.reuters.com/article/2013/01/31/uk-britian-tax-accountants-idUKBRE90U0SG20130131; Martin Sullivan, *A Moral Obligation to Aggressively Lobby*, THE TAX ANALYSTS BLOG (Mar. 1, 2013, 8:34 AM), http://www.tax.org/taxcom/taxblog.nsf/Permalink/MSUN-95D45A ("If government thinks business is not paying enough tax, it is up to government to write tougher tax law.").

[14] DePillis, *supra* note 2.

[15] Vanessa Houlder & Javier Blas, *Drive to Close Tax Loopholes and Catch Evaders GainsPpace: Abuse Crackdown*, FIN. TIMES, Sept. 6, 2013, at 3.

[16] *G20 Leaders' Declaration*, RUSS. G20 SUMMIT 12 (Sept. 6, 2013), https://www.g20.org/sites/default/files/g20_resources/library/Saint_Petersburg_Declaration_ENG.pdf.

[17] *Id.*

[18] Raymond Doherty, *G20 Leaders Back OECD Tax Plan*, ECONOMIA (Sept. 6, 2013), http://economia.icaew.com/news/september-2013/g20-leaders-back-oecd-tax-plan ("G20 leaders . . . set a deadline 2015 to put the process in place.").

C. The Action Plan's Goals and Policy Recommendations

The Action Plan seeks to harmonize the tax codes across nations so as to reduce the inefficiencies, distortions, and unfairness that occurs when corporations reorganize their companies based on tax incentives.[19] Although it recognizes the significance of avoiding double taxation of the same income by multiple countries, the Action Plan expresses particular concern for what it calls double non-taxation: instances in which the interaction of international tax laws enable corporations to avoid taxation of earnings by any country.[20]

The Action Plan endeavors to make corporate income taxation internationally coherent, beneficial, and transparent through international cooperation.[21] To achieve these goals, the Action Plan makes fifteen specific, overlapping recommendations for harmonizing the tax codes across countries, with a particular emphasis on curbing double non-taxation and promoting transparency.[22] The fifteen actions can be divided into five broad categories: 1) addressing the digital economy's tax challenges, 2) establishing the international coherence of corporate income taxation, 3) restoring the full effects and benefits of international tax standards, 4) ensuring transparency, and 5) swiftly implementing the measures.[23]

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[19] OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 15 (2013), *available at* http://www.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en [hereinafter ACTION PLAN].

[20] *Id.* at 13 ("Fundamental changes are needed to effectively prevent double non-taxation, as well as cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it.").

[21] Isaac Zailer, Bradley Phillips, Howard Murray & William Arrenberg, *G20 Endorses OECD Proposals to Reduce and Prevent Tax Avoidance: Potential Impact on the UK*, LEXOLOGY (Sept. 19, 2013), http://www.lexology.com/library/detail.aspx?g=9a2ca93b-b3f1-4a83-892f-f04def562d77.

[22] ACTION PLAN, *supra* note 19, at 14–24.

[23] *Base Erosion and Profit-Shifting (BEPS): OECD and Ways & Means Start Taking Action*, PRICEWATERHOUSECOOPERS 2 (Aug. 2, 2013), http://www.pwc.com/en_US/us/tax-services-multinationals/newsletters/us-outbound-tax/assets/pwc-beps-oecd-wm-start-taking-action.pdf [hereinafter *Ways and Means*].

First, to address the digital economy's tax challenges, the Action Plan advocates creating a task force to study tax issues related to e-commerce and the digital economy.[24] Thus, for the next few years, the OECD will likely not be taking any actions that substantially affect internet companies, pending such further study.[25]

Second, the Action Plan endorses a variety of policies designed to make international taxation of corporations more coherent.[26] In particular, the Action Plan seeks to account for hybrid entities that engage in double non-taxation by deducting the same expense in multiple countries[27] and strengthen the rules against controlled foreign corporations ("CFCs").[28] It also recommends limiting the deduction of interest expenses that enable double non-taxation when the income related to the interest expense is not fully taxed.[29] More generally, the Action Plan calls for the OECD to review the tax regimes of member countries, expand cooperation with non-member countries, and revise the measures of harmful tax practices.[30]

Third, the Action Plan seeks to eliminate the friction between different tax systems through international standards.[31] These provisions support correcting abuses associated with bilateral tax treaties through anti-abuse clauses,[32] updating the definition of "Permanent Establishment" so that profit shifting occurs only due to substantive changes rather than for tax purposes,[33] and assuring that transfer pricing connects with value creation.[34] Together, these policies seek to make companies account for their income where they earned it.[35]

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[24] ACTION PLAN, *supra* note 19, at 14.
[25] *Ways & Means*, *supra* note 23, at 2.
[26] *Id.*
[27] ACTION PLAN, *supra* note 19, at 15.
[28] *Id.* at 16. This component of the plan most likely relates to the United States rather than the rest of the OECD because the European Court of Justice has limited CFC rules. *Ways & Means*, *supra* note 23, at 3.
[29] ACTION PLAN, *supra* note 19, at 17.
[30] *Id.* at 18; *see also Ways & Means*, *supra* note 23, at 4.
[31] ACTION PLAN, *supra* note 19, at 19–20.
[32] *Id.* at 19.
[33] *Id.*
[34] *Id.* at 20.
[35] *Ways & Means*, *supra* note 23, at 5 ("The general thrust of these workstreams is to ensure that entities and locations earning income have sufficient substance to justify that income.").

Fourth, the Action Plan seeks to increase transparency in international taxation.[36] To do so, it seeks to collect and analyze data on base erosion and profit sharing,[37] require the disclosure of aggressive tax planning to tax administrators,[38] standardize transfer pricing rules across countries so as to reduce the asymmetry of information between taxpayers and tax authorities,[39] and make the mechanisms for dispute resolution more effective.[40]

Finally, to implement its reforms, the Action Plan seeks to bypass the current, slow, and country-by-country basis for international taxation by developing a multinational instrument or, basically, a multilateral income tax treaty.[41] Just as multilateral World Trade Organization agreements regulate much of global commerce, this multinational instrument would allow signatory countries to implement changes to OECD-based tax treaties immediately without the need for bilateral renegotiation between countries.[42]

D. The Implication of the Action Plan for Developing Countries

The G20 endorsement specifically mentioned the importance of international tax cooperation for promoting the interests of developing countries.[43] A number of commentators have suggested that the Action Plan's implementation on a global scale would confer the most benefits to developing nations that suffer from tax avoidance, with some estimates suggesting that developing countries lose around $100 billion in revenue through tax avoidance each

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[36] *Id.*
[37] ACTION PLAN, *supra* note 19, at 21.
[38] *Id.* at 22.
[39] *Id.* at 23.
[40] *Id*.
[41] *Id.* at 24.
[42] *Ways & Means*, *supra* note 23, at 6.
[43] *G20 Leaders' Declaration*, *supra* note 14, at 13 ("Developing countries should be able to reap the benefits of a more transparent international tax system, and to enhance their revenue capacity, as mobilizing domestic resources is critical to financing development.").

year,[44] and other studies estimating that losses reach as high as $160 billion per year.[45]

Former Secretary-General of the United Nations and current chair of the Africa Progress Panel Kofi Annan defended the developing world's need for the program, estimating that transfer mispricing costs African governments around $38 billion per year and explaining that Africa does not deserve and will not tolerate more exploitation from the rest of the world.[46] Similarly, Oxfam, an international confederation of seventeen organizations focused on the issues of global poverty, estimates that African countries lose around two percent of their gross domestic product ("GDP") due to the tax system.[47] Furthermore, increasing the transparency in the administration of taxes may reduce the corruption in oppressive regimes in Africa.[48]

However, despite its rhetoric, the G20 has not made any indication when developing nations will have a chance to take part in the arrangements.[49] Additionally, some critics argue that the alleged harms of international tax competition to government revenues[50]

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[44] Cécile Barbière, *G20 Leaves Developing World Behind in Tax Evasion Fight*, EURACTIV (Sept. 10, 2013), http://www.euractiv.com/development-policy/tax-evasion-g20-leaves-developin-news-530307.

[45] Alex Prats, *G20 Tax and Transparency Rules Must Work for Everyone*, THE GUARDIAN (Sept. 6, 2013, 12:20 PM), http://www.theguardian.com/global-development/2013/sep/06/g20-tax-transparency-poverty.

[46] Kofi Annan, *G20: How Global Tax Reform Could Transform Africa's Fortunes*, THE GUARDIAN (Sept. 5, 2013, 4:23 PM), http://www.theguardian.com/commentisfree/2013/sep/05/g20-africa-global-tax-reform.

[47] Jennifer Lazuta, *G20 Urged to Fix Tax System That Shortchanges Africa*, VOICE OF AMERICA (Sept. 4, 2013), http://www.voanews.com/content/g20-urged-to-fix-tax-system-that-shortchanges-africa/1743164.html.

[48] *G20 Talks Taxes: Why Africa Stands to Gain The Most from Global Tax Regulation Reform*, INT'L BUS. TIMES (Sept. 5, 2013, 3:12 PM), http://www.ibtimes.com/g20-talks-taxes-why-africa-stands-gain-most-global-tax-regulation-reform-1402955 ("If taxation could be made more transparent governments would not only receive more official revenues; they would also be held more accountable for the spending of those revenues.").

[49] Doherty, *supra* note 18.

[50] *See, e.g.*, Jeffrey Sachs, *Stop this Race to the Bottom on Corporate Taxation*, FIN. TIMES, Mar. 28, 2011, at 13 ("Each government aims to attract globally mobile capital by cutting corporate taxation. The rich doubly benefit: by the forces of globalisation and by the governmental response.").

have not materialized.[51] For example, although corporate tax rates have fallen across the OECD, the revenue collected from the lower corporate tax rates remains higher as a percent of GDP in the United States and in Europe than the revenue generated in previous decades.[52] In fact, even the OECD has admitted that corporate tax revenue has increased over time.[53]

Increasing the annual taxes on multinational companies could ultimately deter a substantial amount of investment in developing countries.[54] For comparison, given that the average country in the OECD only collected 2.7% of GDP from its corporate income tax in 2011, the estimated tax increase of 2% just on multinational corporations in Africa would nearly equal the total corporate tax on all corporations in the OECD—suggesting a substantial tax burden.[55] Finally, the heightened transparency requirements would be expensive and may further reduce investments in developing countries, as emphasized recently by financial services industries in China.[56]

E. The Action Plan is Unlikely Due to Political Incentives

The Action Plan has two primary obstacles. First, it requires virtually unanimous support and, thus, suffers from significant free-

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[51] Dan Mitchell, *OECD Launches New Effort to Undermine Tax Competition*, CATO INST. TAX & BUDGET BULLETIN 1 (Mar. 2013), http://www.cato.org/sites/cato.org/files/pubs/pdf/tbb_68.pdf.

[52] *Id.* (documenting an "upward trend in average corporate tax revenues in the OECD" over the last few decades "despite dramatic cuts to statutory corporate tax rates since the 1980s in most countries").

[53] OECD, ADDRESSING BASE EROSION AND PROFIT SHIFTING 16 (2013), *available at* http://www.oecd-ilibrary.org/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en.

[54] *See* Andrei Shleifer, *The Age of Milton Friedman*, 47 J. OF ECON. LITERATURE 123, 135 (2009) ("[R]educing the burdens of (particularly corporate) taxation and regulation, and replacing extremely inefficient regulations with more appropriate ones, are the central challenges facing many developing countries today.").

[55] *A Global Revenue Grab*, WALL ST. J., July 23, 2013, at A16.

[56] Toh Han Shih, *G20 Tax Push to Hit Hard in Finance Sector*, S. CHINA MORNING POST, Sept. 16, 2013, at 5.

rider problems.[57] In fact, despite spear-heading the tax reform, Britain itself could be considered a tax haven in that, in the short time since George Osbourne became its Chancellor of the Exchequer, it has offered tax deals for research and development companies, special low-taxes for patent-owning businesses, and benefits to multi-national offshore finance subsidiaries.[58] The OECD could only effectively stop countries from using tax havens to their advantage if all countries stayed united together without any acting opportunistically,[59] which is unlikely to happen.[60]

Secondly, public choice economists suggest that policies which benefit a small number of politically connected interests are unlikely to be repealed by the legislative branch.[61] With the benefits of the tax policies concentrated among a small number of large companies and the costs diffused among the population as a whole, large corporations have significant financial incentives to invest money in ways that promote narrow benefits for themselves, making political change against the large corporate interests unlikely.[62] Multinational corporations that benefit greatly from tax policies have a substantial reason to lobby to influence legislators, likely ensuring that policy changes will not substantially harm their interests.[63]

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[57] *See, e.g.*, Robert Carroll, *Special Report No. 167: Bank Secrecy, Tax Havens, and International Tax Competition*, TAX FOUND 1–2 (May 2009), http://taxfoundation.org/sites/taxfoundation.org/files/docs/sr167.pdf.

[58] *Watch the Coalition Lead the Battle against Tax Havens . . . such as Britain*, THE OBSERVER, Sept. 7, 2013, at 50. Britain's new incentives to attract companies through its tax code likely result partly from major corporations recently leaving Britain due to excessive taxation. *See* Carroll, *supra* note 57, at 9.

[59] *See, e.g.*, Sachs, *supra* note 47 ("[T]ax and regulatory co-ordination across countries are vital to prevent a ruinous fiscal race to the bottom.").

[60] *Cf. Ways & Means*, *supra* note 23, at 6 ("Even within the European Union, it has not yet been possible to begin harmonizing income tax systems.").

[61] *See, e.g.*, Amicus Curiae Brief on Behalf of Professor Todd J. Zywicki in Support of Plaintiffs-Appellees and in Support of Affirming the Decision Below, at 11, St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013).

[62] *See, e.g.*, *id.* at 6 ("In many situations, smaller, homogenous interest groups will have a comparative advantage in the political process relative to larger, more heterogeneous and diffuse groups such as consumers and the public at large.").

[63] *See* Martin Sullivan, *How Will Business Lobbyists Spin the OECD Action* Plan?, THE TAX ANALYSTS BLOG (July 22, 2013, 9:21 AM), http://www.taxanalysts.com/taxcom/taxblog.nsf/Permalink/MSUN-

F. Conclusion

The OECD has correctly determined that the current corporate income tax system is, at least in part,inefficient and unfair. Companies that reorganize their structure based on tax incentives create significant distortions in the economy and unfairly disadvantage the smaller companies unable to do so. The Action Plan proposes various mechanisms for the international community to cooperate to prevent double non-taxation. Although many believe that correcting the problems associated with the corporate income tax would particularly benefit developing nations by increasing the revenue of their governments, the increased tax burdens could also deter a substantial amount of investment in developing nations and consequently not generate very much revenue. Finally, the Action Plan may not be realizable due to the incentive for governments to entice companies through corporate tax benefits and because of powerful lobbying interests.

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99UGH2; *see also* Randall Holcombe, *Tax Policy from a Public Choice Perspective* 51 NAT'L TAX J. 359, 360 (June 1998).

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