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ICRICT LOOKING TO A FUTURE OF ACTUAL TAX REFORM:
AN ORGANIZATIONAL ANALYSIS OF THE INDEPENDENT
COMMISSION FOR THE REFORM OF INTERNATIONAL
CORPORATE TAXATION

*Brendan C. Chisholm**

“As we peer into society’s future, we—you and I, and our government—must avoid the impulse to live only for today, plundering for our own ease and convenience the precious resources of tomorrow. We cannot mortgage the material assets of our grandchildren without risking the loss also of their political and spiritual heritage. We want democracy to survive for all generations to come, not to become the insolvent phantom of tomorrow.” – Dwight D. Eisenhower, Farewell Address¹

I. INTRODUCTION

It is often said that there are only two certainties in life: death and taxes. But for international corporations, this axiom is simply inaccurate; death may yet prove unavoidable, but taxes—especially in today’s corporate world—are optional.

In an era of rapid globalization, national and regional economies are increasingly convoluted due to the spread of multinational corporations and their growing political influence.² Likewise, corporations are growing more complex, with subsidiaries and branches stretching all over the world.³ As corporations grow and spread across international boundaries, concerns regarding tax efficiency arise.⁴ On one hand, double taxation, when corporations are taxed on the same revenue by multiple nations, is a problem for corporations because it causes corporations to limit profitability by over-paying on taxes.⁵ On the other, double non-taxation and under-taxation are problems that governments hope to avoid because these result in shortfall in potential

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1. President Dwight D. Eisenhower, Farewell Radio and Television Address to the American People (Jan. 17, 1961), https://www.eisenhower.archives.gov/all_about_ike/speeches/farewell_address.pdf.

2. See, e.g., Anup Shah, *The Rise of Corporations*, GLOBAL ISSUES (Dec. 5, 2002), <http://www.globalissues.org/article/234/the-rise-of-corporations>.

3. *Id.*

4. See James R. Hines Jr. & Lawrence H. Summers, *How Globalization Affects Tax Design*, 23 TAX POL’Y & ECON. 123 (2009).

5. See *Double Taxation*, INVESTOPEDIA, http://www.investopedia.com/terms/d/double_taxation.asp (last visited Feb. 13, 2017).

tax revenue.⁶ In both cases, the primary concern is efficiency: countries do not want to leave money on the table,⁷ and, generally speaking, corporations try not to pay more than the minimum taxes they owe.⁸ Frequently, however, concerns about violating sovereign rights force nations to tread carefully when writing tax policy, which leaves the door open for corporations to exploit inevitable loopholes in a complex tax system.⁹ This is where the international tax system comes into play—to alleviate these problems by striking the right balance between two extremes.

This Article aims to analyze a new organization devoted to tax reform: the Independent Commission on the Reform of International Corporate Taxation (ICRICT). To do so, Part II discusses the current international-corporate-tax climate and identifies common issues and practices that either contribute to or alleviate problems in international-corporate tax. Part III introduces a different organization: the Organization for Economic Cooperation and Development (OECD), a group consisting of thirty-five nations with the most prosperous economies and prominent social impact around the globe that works to “foster prosperity and fight poverty through economic growth and stability.”¹⁰ This part further analyzes the OECD’s Action Plan on Base Erosion and Profit Shifting (BEPS), which is widely accepted by the international community as a substantial step towards a more efficient and fair tax system. Discussion of the OECD is necessary to understand the current tax climate and the steps that are being taken by ICRICT.

6. “Many governments have to cope with less revenue and a higher cost to ensure compliance. Moreover, Base Erosion and Profit Shifting (BEPS) undermines the integrity of the tax system, as the public, the media and some taxpayers deem reported low corporate taxes to be unfair. . . . Overall resource allocation, affected by tax-motivated behaviour, is not optimal.” ORG. FOR ECON. COOPERATION & DEV., ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 8 (2013), <https://www.oecd.org/ctp/BEPSActionPlan.pdf> [hereinafter ACTION PLAN].

7. Postlewaite and Donaldson describe this concern in the context of a U.S. corporation that uses artificial entities to shield its tax obligations: “If income or expense is shifted to or from a foreign person typically immune from United States taxation, the federal coffers face a permanent leakage of domestic tax on the business activities of that enterprise.” 1 PHILIP F. POSTLEWATE & SAMUEL A. DONALDSON, INTERNATIONAL TAXATION: CORPORATE AND INDIVIDUAL 366 (4th ed. 2003).

8. See *Tax Strategy and Corporate Reputation: A Business Issue*, PRICEWATERHOUSECOOPERS (2013), (<https://www.pwc.com/gx/en/tax/publications/assets/pwc-tax-strategy-and-corporate-reputation-a-tax-issue-a-business-issue.pdf>).

9. See ACTION PLAN, *supra* note 6, at 10. See also 26 C.F.R. § 1.482-1(a)(1) (2016), for the stated purpose of the United States Government’s response to tax evasion by multinational corporations who rightfully owe U.S. taxes: “The purpose of section 482 is to ensure that taxpayers clearly reflect income attributable to controlled transactions and to prevent the avoidance of taxes with respect to such transactions. Section 482 places a controlled taxpayer on a tax parity with an uncontrolled taxpayer by determining the true taxable income of the controlled taxpayer.” This task of “determining the true taxable income” is difficult, and will be the subject of later discussion.

10. *What We Do and How*, ORG. FOR ECON. COOPERATION & DEV., (<https://www.oecd.org/about/whatwedoandhow>) (last visited Feb. 14, 2016).

Next, Part IV delves into ICRICT, its mission and makeup, as well as the issues it tackles. More specifically, this part answers the following question: What does ICRICT do that is different from well-established reform movements such as BEPS? Finally, Part V concludes that ICRICT has a real opportunity to bring on a new future in tax reform that goes beyond a broken status quo that the OECD merely shifted around.

II. CURRENT INTERNATIONAL TAX PRACTICES

In a 2013 report, the International Monetary Fund (IMF) found that there are two primary issues in international taxation: legal tax avoidance by multinational corporations and illegal tax evasion by wealthy individuals.¹¹ In its introduction, the IMF described how tax avoidance practices are self-perpetuating, often because corporations utilize the very measures nations enact to counter tax avoidance:

The overarching problem, however, is in each case the fundamental difficulty that national tax policies create cross-country spillovers. The opportunities for avoidance and evasion that are now such a concern are a very visible manifestation of such spillovers: they exploit gaps and inconsistencies in the international tax framework that arise from combining national tax systems These can arise instead in the less visible but perhaps even more damaging form of either a dislocation of economic activity purely to exploit differences in national tax policies or an overall level of taxation below that which would be chosen if countries took full account of how each is affected by the others' policies.¹²

In other words, many nations jointly agree that tax avoidance is a problem, but have only severally addressed the problem. As a result, differences in codes and limited transparency between nations give corporations room to exploit inevitable loopholes. The 2013 IMF report implies, by identifying a “less visible” form of tax abuse, that the lack of transparency between nations is a major contributor to tax abuse; the scholarly community has seen this for even longer.¹³

11. IMF, *Issues in International Taxation and the Role of the IMF*, Executive Summary (June 28, 2013).

12. *Id.* at 3–4.

13. See Diane Ring, *Protecting the Tax Base of Developing Countries: Transparency and Disclosure* (U.N. Dep't of Econ. & Soc. Affairs, May 2013), http://www.un.org/esa/ffd/tax/2014TBP2/Paper_TransparencyDisclosure.pdf, for an overview of new

New data illustrates the extent to which many major corporations avoid paying their full taxes. In October 2015, Citizens for Tax Justice released a report on Fortune 500 companies' use of offshore tax havens to avoid paying their full share of taxes in the United States.¹⁴ The report found that, as of 2014,¹⁵ 358 of the Fortune 500 companies disclose offshore subsidiaries in tax havens, thereby dodging the vast majority of their tax obligations at home.¹⁶ The most prolific subsidiary holdings belonged to Apple, who reported \$181.1 billion offshore in three subsidiaries incorporated in Ireland.¹⁷ This is only the beginning of the story, however, as two of these subsidiaries are tax residents of neither the U.S. nor Ireland, which allows Apple to pay zero tax to any government on the majority of their offshore profits.¹⁸

The rest of this introduction discusses several of the main tax abuse practices, and concludes with a brief look into how the international community has responded to notable cases.

A. Base Erosion

One common issue in international-corporate taxation is the problem of base erosion, which essentially is when nations are unable to fully tax the economic activity that happens within their borders. The OECD describes a general base erosion problem as follows:

If you upload a video, does the site add the same value if 10 people watch it or 1 million? And if the site uses your video to attract advertisers, is the ad money made in your country, the countries where the video is seen, the country where the computer storing it is kept, or none of these?¹⁹

developments in transparency and disclosure in taxation issues, as well as existing methods for obtaining such information.

14. ROBERT S. MCINTYRE, RICHARD PHILLIPS, & PHINEAS BAXANDALL, CITIZENS FOR TAX JUSTICE, OFFSHORE SHELL GAMES (Oct. 2015), http://ctj.org/ctjreports/2015/10/offshore_shell_games_2015.php#.VsD1QZMrJE4 [hereinafter OFFSHORE SHELL GAMES].

15. The report used data from 2007 fiscal year SEC filings that was presented in 2008 in the findings of the Government Accountability Office. See U.S. GOV'T ACCOUNTABILITY OFFICE, INTERNATIONAL TAXATION: LARGE U.S. CORPORATIONS AND FEDERAL CONTRACTORS WITH SUBSIDIARIES IN JURISDICTIONS LISTED AS TAX HAVENS OR FINANCIAL PRIVACY JURISDICTIONS (Dec. 2008), <http://www.gao.gov/assets/290/284522.pdf>.

16. OFFSHORE SHELL GAMES, *supra* note 14, at 20.

17. *Id.* at 23.

18. *Id.* at 2.

19. Patrick Love, *What is BEPS and How Can You Stop It?*, OECD INSIGHTS (July 19, 2013) <http://oecdinsights.org/2013/07/19/what-is-beps-how-can-you-stop-it/>.

This problem succinctly illustrates the difficulties nations have when determining the appropriate tax amount on intangible goods. It also shows how there is clear opportunity for corporations to manipulate these prices themselves, a strategy called transfer pricing, which will be discussed in the next section. While it causes problems for tax systems all over the world, the practice of keeping earnings on intangible assets ambiguous is not per se illegal.²⁰ Instead, corporations merely take advantage of obsolete tax systems that were created in a time before technology and globalization had reached current levels.²¹

B. Profit Shifting

The three most common methods of profit shifting are through hybrid mismatches, special purpose entities, and transfer pricing. Hybrid mismatches are the result of corporations having “hybrid entities”²² that take advantage of more lenient tax systems in one country while avoiding more stringent regulation in another. Generally speaking, corporations use hybrids to try to have a transaction treated differently by two or more of the nations that are involved—for instance, calling the same transaction debt or equity for accounting purposes to take advantage of different national tax systems.²³

A second method for profit shifting is through the use of a special purpose entity (SPE). SPEs are entities commonly found to possess four aspects: (i) no or few employees; (ii) little or no physical presence in the host economy; (iii) assets and liabilities that represent investments in or from other countries; and (iv) core business that consists of group financing or holding activities.²⁴ Other common names for SPEs include financing subsidiaries, conduits, holding companies, shell companies, shelf companies, and brass-plate companies.²⁵ SPEs contribute to the economies of their resident nations by serving as

20. *Id.*

21. *Id.*

22. In their treatise on international taxation, Postlewaite and Donaldson describe the two types of hybrid entities: “The ‘regular hybrid entity’ arises where the entity is treated as fiscally transparent in the country of source but as a nontransparent enterprise in the country of residence. . . . In the converse setting, i.e., where the enterprise is treated as nontransparent in the country of source but as transparent in the country of residence—the enterprise is appropriately referenced as a ‘reverse hybrid entity.’” 2 POSTLEWAITE & DONALDSON, *supra* note 7, at 339.

23. Patrick Love, *BEPS: Why You’re Taxed More Than a Multinational*, OECD INSIGHTS (Feb. 13, 2013) <http://oecdinsights.org/2013/02/13/beps-why-youre-taxed-more-than-a-multinational/>.

24. See ORG. FOR ECON. COOPERATION & DEV., BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT, 99–108 (4th ed. 2008), <https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>, for an expanded definition of an SPE.

25. *Id.* at 100.

targets of direct investment, which are then taxable by the resident nation.²⁶ These SPEs, however, are not always taxed by their home countries, as illustrated by the Apple example discussed earlier. Recall that Apple uses two subsidiaries that are residents of neither the United States nor Ireland. These subsidiaries are classic examples of SPEs, and illustrate their potential as vehicles for tax avoidance.

Manipulating transfer pricing is another common—albeit a far more nuanced and complex—method for profit shifting. Transfer prices are what companies pay to move goods or services between their own subsidiaries and other corporations.²⁷ The abuse occurs when the company is allowed to set its own prices for these transfers. A widely accepted method of addressing this manipulation is the “arm’s-length standard,” which seeks to “reflect the economic results that would have been derived from that transaction had it occurred between unrelated persons.”²⁸ Essentially, the transaction between corporation and subsidiary is being treated as if it had occurred between two unrelated entities. This task of addressing this manipulation, however, grows more complex when attempting to value intangible assets such as intellectual property and other high value-added services.²⁹ As a result, corporations are able to easily manipulate the values and sources of intangible assets to attain the most favorable tax atmosphere.

C. Double Taxation

Multinational corporations are subject to taxation in both the country where they are organized and the countries where they derive their income.³⁰ If the corporation were subject to the full tax rate of both jurisdictions, the corporation would pay excessive taxes and consequently, would be left with a narrower profit margin. In their

26. See *Coordinated Direct Investment Survey (CDIS)*, IMF, <http://data.imf.org/?sk=40313609-F037-48C1-84B1-E1F1CE54D6D5&slid=1390030109571> (last updated Dec. 12, 2016), for an interactive presentation of data on the amount of money invested (largely through SPEs) as Foreign Direct Investments in nations around the world. Topping the list is the Netherlands, where \$4.3 trillion was invested in 2013 as Inward Direct Investment. The Netherlands also invested the most money in 2013 in other countries through Outward Direct Investment, totaling over \$5.2 trillion.

27. Patrick Love, *Price Fixing*, OECD INSIGHTS (Mar. 16, 2012), <http://oecdinsights.org/2012/03/26/price-fixing/>.

28. I POSTLEWAITE & DONALDSON, *supra* note 7, at 368. See Article 9 of the MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND CAPITAL, ORG. FOR ECON. COOPERATION & DEV. 23–30 (2014), <http://www.oecd.org/tax/treaties/2014-model-tax-convention-articles.pdf>, for the OECD’s official description of the arm’s-length standard.

29. See Prem Sikka, *Shifting profits across borders*, GUARDIAN (Feb. 12, 2009), www.theguardian.com/commentisfree/2009/feb/11/taxavoidance-tax.

30. *Briefing Book: Key Elements of the U.S. Tax System*, TAX POLICY CENTER, <http://www.taxpolicycenter.org/briefing-book/how-does-current-system-international-taxation-work> (last visited Mar. 14, 2017).

treatise on international taxation, Postlewaite and Donaldson illustrate how this simple concept can have a serious impact with a simple scenario known as “double taxation”:

Thus, a United States individual or corporation earning \$500 in Germany may be taxed both by Germany (assuming a 40 percent rate yielding a \$200 tax) and the United States (assuming a 35 percent rate yielding a \$175 tax). Without relief from one or both of the jurisdictions, the tax bill on the \$500 of income would thus be \$375, imposing upon the taxpayer an effective tax rate of 75 percent.³¹

In the real world, however, corporations oftentimes earn profits in dozens of other countries, which could subject them to the tax rate of each country they generate revenue in.³²

As a result, nations work together to limit the potential negative effect such a harsh tax rate would have on international-corporate activity. There are two primary methods of limiting harsh double-taxation: tax treaties and foreign tax credits. Under tax treaties, “residents (not necessarily citizens) of foreign countries are taxed at a reduced rate, or are exempt from . . . income taxes of certain items of income they receive from sources within [a given country].”³³ The hope is that these tax treaties will eliminate any potential for double-taxation by signatories. The other U.S. method of mitigating potential double taxation is the foreign tax credit, which is a purely domestic method of addressing double taxation. The IRS describes this tax credit as follows: “If you paid or accrued foreign taxes to a foreign country on foreign source income and are subject to U.S. tax on the same income, you may be able to take either a credit or an itemized deduction for those taxes.”³⁴

31. 1 POSTLEWAITE & DONALDSON, *supra* note 7, at 148.

32. Double taxation of corporate income tax may also occur at other levels, including at the individual level through income tax on dividends and capital gains, but these are not the focus of this Article. See Kyle Pomerleau, *Eliminating Double Taxation through Corporate Integration*, TAX FOUND. (Feb. 23, 2015), <http://www.taxfoundation.org/article/eliminating-double-taxation-through-corporate-integration>, for an argument that this second form of double taxation may be eliminated by merging corporate and individual income tax as corporate earnings in the U.S. Tax Code.

33. *Tax Treaties*, IRS, <https://www.irs.gov/individuals/international-taxpayers/tax-treaties> (last updated Jan. 20, 2017).

34. *Foreign Tax Credit*, IRS, <https://www.irs.gov/Individuals/International-Taxpayers/Foreign-Tax-Credit> (last updated Dec. 16, 2017).

D. Recent Remedies

Despite the complexity of any attempt to simultaneously tackle all of these intertwined issues, countries and organizations have gotten better at identifying notable tax avoidance practices and have responded by more aggressively pursuing these corporations to recover lost tax revenue. This past year, in the wake of a massive tax evasion scandal in Luxembourg, the European Commission (the executive of the European Union) issued judgments against large corporations like Starbucks Corporation and Fiat Chrysler, while continuing an in-depth probe into the relationship between Apple and the Irish government for evidence of official misconduct.³⁵

As part of its process, the European Commission begins by distributing an official communication of findings through which the Commission justifies pursuing official action. These communications provide insight into the European Commission's evaluation process. The documents clearly establish the methods of discovery, the corporate structures of Starbucks and Fiat Chrysler, as well as the negotiated tax relationships that each of these two companies have established with Holland and Luxembourg, respectively.³⁶ On October 21, 2015, the European Commission issued a press release that contained its findings: the "selective tax advantages" that were given to Starbucks and Fiat Chrysler by the Netherlands and Luxembourg were in violation of the officially legislated European Union rules on state aid that govern all member nations.³⁷

EU officials indicate that these decisions are likely only the beginning of a new, more aggressive tax rules-enforcement policy. EU Commissioner for Competition Margrethe Vestager said in a statement on the European Commission's findings:

Tax rulings that artificially reduce a company's tax burden are not in line with EU state aid rules. They are illegal. I hope that, with today's decisions, this message will be heard by member state governments and companies alike. All companies, big or small,

35. Stephanie Bodoni & Gaspard Sebag, *Starbucks, Fiat Told to Repay Tax as EU Sets Up Apple Clash*, BLOOMBERG TECH. (Oct. 21, 2015), <https://www.bloomberg.com/news/articles/2015-10-21/starbucks-fiat-first-in-firing-line-as-eu-orders-tax-repayments-ig0kk625>.

36. *See* Alleged Aid to Starbucks 2014 O.J. (C 460) 11; Invitation to Submit Comments Pursuant to Article 108(2) of the Treaty on the Functioning of the European Union 2014 O.J. (C 369) 11.

37. European Commission Press Release IP/15/5880, Commission Decides Selective Tax Advantages for Fiat in Luxembourg and Starbucks in the Netherlands Are Illegal Under EU State Aid Rules (Oct. 21, 2015). Bloomberg reports that the two corporations could be responsible for as much as €30 million in back taxes and that they must immediately cease the illegal tax practices. Bodoni & Sebag, *supra* note 35.

multinational or not, should pay their fair share of tax.³⁸

A recent report from the *Irish Independent* further signals a continuation of this policy. In September 2015, the Irish newspaper announced the European Commission's intention to find against Ireland for giving what amounted to state aid to Apple through transfer pricing schemes.³⁹ The report suggested that the back taxes Apple would owe could total as much as \$19 billion,⁴⁰ an amount which Apple itself—expressing concern—has said is “material.”⁴¹

While these recent moves have certainly caused a splash, they are undoubtedly only the tip of the iceberg of harmful tax practices. EU Commissioner for Competition Vestager recently promised, “We do not stop here. We [will] continue the inquiries into tax rulings in all EU member states.”⁴² Transparency and an equal commitment from the rest of the international community will be essential for future progress in these matters.

III. OECD'S MOVEMENT AGAINST BASE EROSION AND PROFIT SHIFTING

The first official concerted effort to address international tax problems came from the Organisation for Economic Cooperation and Development (OECD). Established on September 30, 1961, the OECD describes itself as “a unique forum where governments work together to address the economic, social and environmental challenges of globalization.”⁴³ In its 50th Anniversary Vision Statement, the OECD reestablished its original vision and announced its position as a policy network that is determined “to help countries develop policies together to promote economic growth and healthy labour markets, boost investment and trade, support sustainable development, raise living standards, and improve the functioning of markets.”⁴⁴ In 2013, the OECD, in concert with the G20, promulgated its Action Plan on Base Erosion and Profit Shifting (BEPS), of which the primary goal is to provide “domestic and international instruments that will better align

38. Bodoni & Sebag, *supra* note 35.

39. *European Commission to Find Against Ireland in Apple Tax Probe – Reports*, IRISH INDEP. (Sept. 4, 2015), <http://www.independent.ie/business/irish/european-commission-to-find-against-ireland-in-apple-tax-probe-reports-31503070.html>.

40. *Id.*

41. Bodoni & Sebag, *supra* note 35.

42. *Id.*

43. *The Organisation for Economic Co-operation and Development (OECD)*, ORG. FOR ECON. COOPERATION & DEV., <http://www.oecd.org/about/> (last visited Feb. 14, 2017).

44. *OECD 50th Anniversary Vision Statement*, ORG. FOR ECON. COOPERATION & DEV. (May 26, 2011), <http://www.oecd.org/mcm/48064973.pdf>.

rights to tax with economic activity.”⁴⁵ This section introduces the OECD by describing its makeup and functions and then looks at the BEPS initiative.

The OECD was born out of an earlier organization called the Organisation for European Economic Co-operation (OEEC).⁴⁶ The primary purpose of this earlier organization was to administer the funds the United States gave to Western Europe in the Marshall Plan by ensuring cooperation between nations and establishing policies that facilitated greater cross-border trade.⁴⁷ In time, the Marshall Plan and OEEC were deemed successful, but increased opportunity for inter-European trade created unprecedented interdependence and the need to formally include other nations.⁴⁸ Thus, with the addition of the United States and Canada, the OECD was born in 1961.⁴⁹

While the focus of this Article is on the BEPS initiative that was created in 2013, the OECD also has several subcommittees that have specific roles in achieving the overall goal of the Organisation.⁵⁰ The Organisation is headed by a Secretary General, a position currently held by Mexican economist Angel Gurría,⁵¹ who oversees an Executive Committee in charge of the many subcommittees, as well as an International Secretariat that oversees the “efficient administration of the Organisation.”⁵² Today, there are thirty-five Member nations and over one hundred developing economies who work together to promote the economic and social well-being of people around the world.⁵³

45. ACTION PLAN, *supra* note 6, at 11.

46. History, ORG. FOR ECON. COOPERATION & DEV., <http://www.oecd.org/about/history/> (last visited Feb. 14, 2017).

47. ORG. FOR ECON. COOPERATION & DEV., OECD: HISTORY, AIMS, STRUCTURE 5 (1972), <http://oac.cdlib.org/ark:/28722/bk0003z6f8w/?brand=oac4> [hereinafter OECD: HISTORY, AIMS, STRUCTURE].

48. *Id.* The OECD discusses the international social and economic condition at the time of its emergence as providing a perfect opportunity for different and even more coordinated international effort: “[I]t was becoming increasingly the case that the policies of any individual country had a direct and unavoidable influence for good or bad on economic conditions in every other country. This increased interdependence of the industrialised countries made it logical to plan for an Organisation in which the North American countries would participate on an equal footing.” *Id.*

49. *Id.*

50. The formal statement of aims read as follows: “(a) the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy; (b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.” *Id.* at 13.

51. Secretary-General, ORG. FOR ECON. COOPERATION & DEV., <http://www.oecd.org/about/secretary-general/> (last visited Mar. 14, 2017).

52. OECD: HISTORY, AIMS, STRUCTURE, *supra* note 47, at 35. See also *id.* at 39 for a graphic depiction of the OECD’s structure.

53. Members and Partners, ORG. FOR ECON. COOPERATION & DEV.,

A. BEPS

In 2013, the OECD Finance Committee published a report containing its findings on base erosion and profit shifting and presented it to the G20. The report found that base erosion and profit shifting occurred on two separate levels.⁵⁴ The report describes the problem as “clearly a tax compliance aspect, as shown by a number of high profile cases,” but, “there is a more fundamental policy issue: the international, common principle drawn from national experiences to share tax jurisdiction may not have kept pace with the changing business environment.”⁵⁵ Given this observation, the report establishes a basic principle upon which the rest of the BEPS discussion is built: “[C]urrent international tax standards may not have kept pace with changes in global business practices, in particular in the area of intangibles and the development of the digital economy.”⁵⁶

There are hidden implications to this basic principle that give insight into the way the OECD thinks about BEPS. First, there is a strong emphasis on addressing transfer pricing, which is most rampant in the digital economy, as illustrated by the example in Part I. Second, there is little forthright attention given to economies that do not have strong presences in intangible goods or the digital economy. Third, as evidenced by the weak “*may not have kept pace*”⁵⁷ language, those future propositions for reform will not be harsh or binding; rather, they will be deferential to leading nations with well-established tax policy.

Based on this initial premise, the OECD outlined general goals for nations to work together to achieve: (i) simplification of tax administration;⁵⁸ (ii) establishment of requirements for corporate documentation to aid in auditing;⁵⁹ (iii) improved transparency between nations;⁶⁰ and (iv) a holistic approach to tackling the global issue of

<http://www.oecd.org/about/membersandpartners/> (last visited Mar. 14, 2017).

54. ORG. FOR ECON. COOPERATION & DEV., ADDRESSING BASE EROSION AND PROFIT SHIFTING 5 (Feb. 12, 2013), http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#.WMhyWG_yvRY [hereinafter ADDRESSING BASE EROSION].

55. *Id.*

56. *Id.* at 7.

57. *Id.*

58. *Id.* (“Simplification should also ensure that tax administrations have access to better tools for assessing tax compliance risks.”).

59. *Id.* (“This involves the development of documentation requirements able to provide tax auditors with the full picture of business operations.”).

60. ADDRESSING BASE EROSION, *supra* note 54, at 7 (“In the recent Past, the OECD also identified a number of avenues to better assess tax compliance risks, such as those described in *Tackling Aggressive Tax Planning through Improved Transparency and Disclosure*.”).

BEPS.⁶¹ The report, given to the G20 at their annual meeting in 2013, called the assembled world leaders to action by saying a “comprehensive approach, globally supported, should draw on an in-depth analysis of the interaction of all these pressure points. It is clear that coordination will be key in the implementation of any solution, though countries may not all use the same instruments to address the issue of BEPS.”⁶² This call was followed by a caveat: “What is at stake is the integrity of the corporate income tax. A lack of response would further undermine competition, as some business . . . may profit from BEPS opportunities In addition to issues of fairness, this may lead to an inefficient allocation of resources”⁶³ Of ultimate importance, however, is the precedent that would be set if action were not taken by all of the most powerful nations: “[I]f other taxpayers think that multinational corporations can legally avoid paying income tax it will undermine voluntary compliance by all taxpayers—upon which modern tax administration depends.”⁶⁴

Based on this report, the OECD and the G20 formulated the *Action Plan on Base Erosion and Profit Shifting*, which was released later in 2013. This action plan consists of fifteen Action Points, all of which are scheduled for completion by December 2015.⁶⁵ The points were designed for individual nations to separately research and address, with the understanding that findings and conclusions would be shared, as is expected of OECD members.⁶⁶ The fifteen Action Points have been well-executed by many of the G20 and OECD nations, particularly those in the European Union.⁶⁷ In June 2015, the EU presented its own unilateral action plan to address tax avoidance practices that were upheld by the OECD as being in line with the BEPS Action Plan.⁶⁸ This action plan is deserving of a closer look because it details the many considerations the EU made when attempting to curb BEPS and tax avoidance and, additionally, because the structure of the European market as a whole is an easily-studied microcosm of the global market.

The EU’s structure offers unique challenges when addressing tax avoidance practices that are technically legal:

61. *Id.* (“Government actions should be comprehensive and deal with all of the different aspects of the issue. These include, for example, the balance between source and residence taxation, the tax treatment of intra-group financial transactions, the implementation of anti-abuse provisions, as well as transfer pricing rules.”).

62. *Id.* at 7-8.

63. *Id.* at 8.

64. *Id.*

65. ACTION PLAN, *supra* note 6, at 11.

66. *Id.* at 25.

67. Jack Bernstein, *BEPS: The European Response So Far*, 79 TAX NOTES INT’L 1111 (2015).

68. *Id.*

The pressure to lure multinationals with attractive tax regimes has stretched what is considered acceptable in tax competition. The European Union is unique because it is a single market; it has treaties providing for the freedom of establishment, which must be respected; and it has the ability to introduce legislation.⁶⁹

In other words, the member nations of the EU, in order to entice multinational corporations to establish a presence in their nations, have frequently adjusted tax rates and requirements. This practice has resulted in a race-to-the-bottom mentality. However, that same interconnectedness presents an opportunity to enable more expedient reform because all nations have the same greater legislative body for economic matters. The EU's proposal has five primary goals, all of which correlate with the OECD's Action Plan on BEPS and thus carry the OECD's support: (i) create a common consolidated corporate-tax base that simplifies nation-to-nation tax interaction; (ii) ensure effective taxation where profits are generated, which is a primary part of the OECD's plan and would greatly limit transfer pricing schemes; (iii) create a better tax environment for EU businesses through measures like cross-border loss offset and improvement of double-taxation dispute mechanisms; (iv) create further progress on taxation transparency, another common theme of OECD action; and (v) emphasize cooperation between EU member nations, as is also called for by the OECD.⁷⁰

While this is a separate action by a coalition of nations other than the OECD or G20, the measures proposed by the European Union's Commission shows that BEPS and tax avoidance have gained international attention. Moreover, real change is in the works, as research demonstrates the cognizable benefit to be had from the proposed changes.

IV. IS BEPS NOT ENOUGH? ICRICT'S BROADER, MORE AGGRESSIVE STANCE

On June 2, 2015, the Independent Commission for the Reform of International Corporate Taxation issued a Declaration that claimed the OECD's BEPS did not go far enough to address deeper issues.⁷¹ During

69. *Id.*

70. A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, EUR. PARL. DOC (COM 302) (2015).

71. See *Evaluation of the Independent Commission for the Reform of International Corporate Taxation for the Base Erosion and Profit-Shifting Project of the G20 and OECD*, INDEP. COMMISSION REFORM OF INT'L CORP. TAX'N 1 (Oct. 2015), <http://www.icrict.org/wp->

his inaugural speech, Chairman Jose Antonio Ocampo, former United Nations Under-Secretary General, claimed the process undertaken by the OECD is “undemocratic, limited in scope, and unable to provide adequate solutions for developing countries.”⁷² This section introduces ICRICT by telling its history, describing its makeup and primary figures, and finally presenting its goals for reform.

The Commission seeks to occupy a different space in the tax-reform debate. ICRICT calls itself “a group of leaders from government, academia, and civil society, including the faith community.”⁷³ The group acknowledges its ubiquity, claiming that “our backgrounds, experience, and expertise span the globe.”⁷⁴

Organized and coalesced by non-government organizations (NGOs) and aid organizations such as Oxfam, the World Council of Churches, Action Aid, Christian Aid, the Global Alliance for Tax Justice, and others, ICRICT sees the current moment in history as ripe for more significant reform of the international-corporate-taxation system.⁷⁵ In addition to Mr. Ocampo, ICRICT’s Committee consists of many well-respected academics such as Nobel Prize-winner Joseph E. Stiglitz, as well as political figures such as Eva Joly of France and Manuel F. Montes of the United Nations Department of Economic and Social Affairs (UNDESA).⁷⁶ Ocampo laments the esoteric nature of the debate, arguing, “Tax policy affects everyone, but so far the debate over global tax policy has been reserved for tax lawyers and accountants. There is a desperate need to bridge the gap between discussions on the technical challenges . . . and everyone’s right to participate in the debate and provide solutions.”⁷⁷

Toby Quantrill, the Principal Economic Justice Adviser at Christian Aid, illustrates one way ICRICT will differ from the OECD’s efforts in the BEPS initiative: “Although civil society organizations have agreed to work with the G-20 and the OECD on the BEPS initiative and with the U.N. on its Financing for Development agenda, ICRICT will provide an alternative platform to discuss systemic issues affecting developing

content/uploads/2015/10/ICRICT_BEPS-Briefing_EN_web-version-1.pdf [hereinafter *Evaluation*].

72. Margaret Burow, *Independent Commission Seeks to Bridge Gap in BEPS Debate*, 77 TAX NOTES INT’L 1053 (2015).

73. *Declaration*, INDEP. COMMISSION FOR THE REFORM OF INT’L CORP. TAX’N 1 (June 2015), http://www.icrict.org/wp-content/uploads/2015/06/ICRICT_Com-Rec-Report_ENG_v1.4.pdf [hereinafter *Declaration*].

74. *Id.*

75. *About ICRICT*, INDEP. COMMISSION FOR THE REFORM OF INT’L CORP. TAX’N, <http://www.icrict.org/about-us/> (last visited Mar. 14, 2017).

76. *The Commission*, INDEP. COMMISSION FOR THE REFORM OF INT’L CORP. TAX’N, <http://www.icrict.org/the-commission/> (last visited Mar. 14, 2017).

77. Burow, *supra* note 72.

countries.”⁷⁸ This is an important difference, as Christine Allen of Christian Aid describes in her blog: “[T]he perspective of countries [that] are poor and less powerful has to be influencing the debate for it to be worthwhile. Hearing the perspective of the poor is long overdue, and a vital element to working for the common good—it cannot be right that only the rich define what this is.”⁷⁹ In short, ICRICT aims to address the broader tax system framework, rather than the narrower focus of OECD’s BEPS initiative.

Recommendations 1, 2, 3, and 5, while only a portion of the entire body of work, demonstrate the overall method that ICRICT advances. In its first recommendation, found in the organization’s original Declaration, ICRICT boldly claims, “States must reject the artifice that a corporation’s subsidiaries and branches are separate entities entitled to separate treatment under tax law, and instead recognize that multinational corporations act as single firms conducting business activities across international borders.”⁸⁰ This should sound similar to the action plan against tax avoidance that the EU delivered in 2015, the second primary goal of which was to “ensure effective taxation where profits are generated.”⁸¹ However, ICRICT’s version pushes further than the OECD and the EU example because it is a stricter standard that eliminates the arm’s-length standard that the OECD and the vast majority of nations follow. Instead, ICRICT calls for an alternative method of treating multinational corporations and their subsidiaries. This method is known as the “primary-purpose test” and “provides more legal authority for countries to evaluate the economic substance of income attribution and challenge the characterization of transactions that have the primary purpose of avoiding taxation.”⁸² While some aspects of the OECD’s BEPS Action Plan have the similar effect of giving nations more power to challenge the way corporations characterize income,⁸³ the OECD always operates under the arm’s-length method that naturally gives more deference to corporations.

The Declaration continues to recommend reform that heavily stresses equitable taxation for all nations and maximum transparency between

78. *Id.*

79. Christine Allen, *The Case for a Global Tax System That Works for the Common Good*, RESPONSIBLE TAX FOR COMMON GOOD (Apr. 27, 2015), <http://www.responsibletax.org.uk/post/117524667851/the-case-for-a-global-tax-system-that-works-for>.

80. *Declaration*, *supra* note 73, at 2.

81. A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, EUR. PARL. DOC (COM 302) (2015).

82. *Evaluation*, *supra* note 71, at 1.

83. *E.g.*, Action 8 of OECD’s Action Plan on Base Erosion and Profit Shifting: “Assure that transfer pricing outcomes are in line with value creation of intangibles,” which suggests, “Develop rules to prevent BEPS by moving intangibles among group members.” ACTION PLAN, *supra* note 6, at 20.

sovereigns regarding tax practices. Recommendation 2 is titled Curb Tax Competition and is similar to the EU Commission's recommendation referenced above.⁸⁴ In this Recommendation, just as the EU Commission recommended in 2011,⁸⁵ ICRICT suggests that the race-to-the-bottom can be halted by establishing an international-uniform-corporate-tax rate.⁸⁶ In addition, ICRICT calls on nations to more proactively disclose tax practices, incentives given to lure corporations, and exclusions provided to corporations.⁸⁷ It also implores them to use this information to bring more legal actions to organizations like the EU Commission.⁸⁸

Recommendation 3 is a sharper divergence from the OECD's BEPS plan. Here, ICRICT calls on nations to strengthen enforcement of tax laws in several ways, including: (i) imposing criminal penalties on abusive tax practices; (ii) protecting whistleblowers with official provisions and legislation; (iii) funding and empowering tax administrators; and (iv) requiring multinational corporations to publish practices and adhere to universally adopted ethical principles.⁸⁹ ICRICT qualifies this, however, by reiterating that the international community must cooperate to produce coherent rules;⁹⁰ if every nation were to create their own more stringent rules, multinationals would simply take advantage of differences as they do now with the more than 3000 tax treaties that exist between nations.⁹¹

ICRICT addresses the vast amount of intertwined tax treaties in Recommendation 5 of their initial Declaration. Here, ICRICT suggests:

- (i) States should avoid restriction on tax withholding in tax treaties;
- (ii) Multilateral organizations should expand the objectives of model tax treaties to include preventing double non-taxation . . . ;
- (iii) Multilateral organizations [such as the EU] should amend the model tax treaties to include a general anti-avoidance rule; [and]
- (iv) States should avoid the inclusion of provisions in [various tax agreements] that weaken or circumvent

84. In fact, ICRICT includes the EUC's common consolidated corporate-tax base as part of their second Recommendation. *Declaration, supra* note 73, at 3.

85. *Commission Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)*, SEC (2011) 316.

86. *Declaration, supra* note 73, at 3.

87. *Id.*

88. *Id.* This seems to be just what the European Commission did when it brought actions against Fiat Chrysler, Starbucks, Inc., and Apple, as discussed above in Part I.

89. *Declaration, supra* note 73, at 4.

90. *Evaluation, supra* note 71, at 4.

91. ADDRESSING BASE EROSION, *supra* note 54, at 8.

tax law.⁹²

This is similar to the OECD's BEPS Action 6 on preventing treaty abuse, which calls on nations to develop new model treaties that would "prevent the granting of treaty benefits in inappropriate circumstances."⁹³ ICRICT, however, maintains that the OECD's initiative does not go far enough on this matter. In their review of the OECD's action, ICRICT says that "the proposals for reform for the tax nexus rules could contain greater acknowledgement of digital activity and services, which permeate our knowledge- and service-based global economy and have become a major source of tax avoidance."⁹⁴

A general theme is thus present throughout ICRICT's Recommendations—the OECD's plan is neither aggressive nor inclusive enough. ICRICT has support from several sides in this belief. In one recent report, the Tax Justice Network (TJN)—in coalition with Oxfam International, the Global Alliance for Tax Justice, and Public Services International (PSI)—demonstrated that developing nations deserve more consideration than they currently receive in the international corporate-tax-reform conversation.⁹⁵ TJN shows how economies in developing nations often rely more on corporate-tax revenue than do their G20 counterparts.⁹⁶ While the G20 economies do endure the majority of the total dollar amount of tax avoidance, corporate tax accounts for a smaller share of G20 national revenue which offsets the effect of the higher amount lost.⁹⁷ TJN's main criticism thus matches ICRICT's: Developing nations—the entities *most* affected by tax avoidance methods—are largely left out of the conversation on international-corporate-tax reform, which until now has resembled a G20 big-boys' club of the global superpowers.

In another article from October 2015, one analyst gave an in-depth analysis of the fifteen Action Points from the OECD to counter BEPS.⁹⁸ Throughout his analysis, Ramon Tomazela identified holes in the OECD's Action Points that, when taken together, show that the BEPS plan is largely toothless and does not effect any real change of its own

92. *Declaration*, *supra* note 73, at 5.

93. *ACTION PLAN*, *supra* note 6, at 31.

94. *Evaluation*, *supra* note 71, at 3.

95. TAX JUSTICE NETWORK ET AL., *STILL BROKEN: GOVERNMENTS MUST DO MORE TO FIX THE INTERNATIONAL CORPORATE TAX SYSTEM* (Nov. 2015), https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bn-still-broken-corporate-tax-101115-embargo-en.pdf.

96. *Id.* at 6.

97. *Id.*

98. Ramon Tomazela, *A Critical Evaluation of the OECD's BEPS Project*, 79 *TAX NOTES INT'L* 239 (2015).

because, “in practice, the success of the OECD measures largely depends on whether countries will embrace the outcomes of the BEPS action plans even against their national interest.”⁹⁹ The implication, of course, is that no lasting change will happen as a result of the political quagmire in which the BEPS finds itself.

V. ICRICT POSITIONED TO CREATE ACTUAL CHANGE

ICRICT’s 2015 *Evaluation for the Base Erosion and Profit-Shifting Project of the G20 and OECD* ends with an acknowledgment that the tax-reform conversation is merely beginning and that any hope for long-term success in curbing tax abuse will take multilateral cooperation and increased inclusion of public-interest groups:

However, this is not the end-point, but just the beginning of a new and wider debate on global tax reform. Our world has been changed by globalization. The global economy has transformed since the last century when the old rules were made by the United States and Europe. It’s time for smarter rules based on global negotiation and made in the public interest. It’s time to go beyond BEPS.¹⁰⁰

The position that the biggest players should not dominate the reform conversation is the overarching theme of ICRICT’s reform recommendations. ICRICT’s position that BEPS does not go far enough has also been shown to have support¹⁰¹—even if not in a formal, officially recognized sense—from objective observers and independent research.¹⁰² ICRICT, however, also faces an uphill battle in its path to sparking real change on its own account for many of the same reasons that detract from the OECD’s plan. This seems entirely likely to doom ICRICT to a role that will keep it outside of the primary powers behind tax reform.

Three initial criticisms emerge that ICRICT must take into account. First, how costly will their proposed methods of strengthening tax enforcement, increasing transparency, and treaty reformation be for the developing nations that ICRICT claims are its primary concern? In many circumstances, it seems as though new infrastructure will be needed to begin to address the tax-abuse issues that the OECD and ICRICT want to address, which may simply not be feasible in

99. *Id.*

100. *Evaluation*, *supra* note 71, at 4.

101. *See supra* Part IV.

102. *See* TAX JUSTICE NETWORK ET AL., *supra* note 95.

economies that are still developing. And yet, the need for reform certainly still exists, as developing nations are also the seat of much of the world's early-stage production of goods. Corporations are seemingly invited to abuse tax systems that allow for them to pay fewer taxes in countries where employees live and work in favor of declaring the work done in another country that has a more favorable tax rate. This transfer pricing scheme is just what ICRICT's public-interest backers hope to change, but this type of scheme will need exponentially greater diligence and investment to transform in many developing nations around the world.

Second, and possibly more importantly, any effectiveness of ICRICT's recommendations depends largely on the political willingness of powerful nations to make drastic changes to the subjective motivation behind current policies. Time and again, nations show that they are committed to maintaining and developing human rights, but when trillions of dollars' worth of tax revenue is at stake, organizations like OECD seem opt to give great deference to established nations' policies. This happens at the expense of developing nations, but there is little that can be done to ameliorate this problem without the official buy in of the members of the OECD and G20, as well as other nations around the world, that are in position to take advantage of less-powerful nations in order to gain more slices of the international-corporate-tax pie.

Third, ICRICT does not have the official support of the international community or the reputation the OECD has built over decades.¹⁰³ Clearly, the ability to appear before the G20 or other official bodies and gain public support from influential nations is the ideal position for advocacy groups like ICRICT. On the other hand, operating separately allows ICRICT to avoid the political concerns that seem to delay the OECD's BEPS proceedings or soften proposed reform measures.

Despite these challenges, however, the time to challenge the OECD or expand on its progress is now, as the program just received G20 support for its final stages.¹⁰⁴ But, even with the nominal support of the international community, there is plenty of indication that the OECD's plan does little to cause change. The nations that are taking action have been forced to take unilateral or independent actions that are either ahead of schedule or different from the rest.¹⁰⁵ The result is that the

103. See *The Coalition*, INDEP. COMMISSION FOR THE REFORM OF INT'L. CORP. TAX'N, <http://www.icrict.org/partner-organizations/> (last visited Feb. 14, 2017) (ICRICT's "coalition," which it calls the group of NGOs responsible for assembling the commission, lacks any official government or government body).

104. Stephanie Johnston, *G-20 Endorses Final BEPS Package*, 80 TAX NOTES INT'L 647 (2015).

105. See Mindy Herzfeld, *News Analysis: U.K. Leads On while the U.S. Dithers*, 80 TAX NOTES INT'L 727 (2015); see also Mindy Herzfeld, *News Analysis: Will the United States Take Action on the BEPS Action Plan?*, 79 TAX NOTES INT'L 817 (2015).

international-corporate-tax system of old that was hopelessly complicated and fractured by tax treaties is still hopelessly complicated by a combination of old tax treaties that remain due to political pushback against BEPS reform as well as ambitious reform movements by other nations. In light of these developments, criticisms like ICRICT's—that the OECD is not inclusive or aggressive enough—undeniably strike home. TJN's conclusion, that “the measures recently announced by the OECD leave the fundamentals of a broken tax system intact and do not stop the race to the bottom in corporate taxation,”¹⁰⁶ gives an excellent final word to the current status of international-corporate-tax reform.

If ICRICT is to take off as a reform body, its own criticisms of BEPS must serve as an important reminder that ICRICT must always strive to be different and bolder than the OECD in order to thrive as a reform body. If ICRICT is to succeed in becoming a catalyst for real change, it must maintain its identity as an organization devoted to shaping the *future* tax system rather than merely altering the *current* tax system.

V. CONCLUSION

There is no doubt that tax avoidance in the form of base erosion and profit shifting is a real problem that every nation faces. Thus far, however, the international community has hamstrung itself against meaningful, lasting change by following the OECD's BEPS program as a solution to these problems. ICRICT stands apart as a group with an aggressive plan that requires complete cooperation from every single nation, with no exceptions. This insistence, if firmly maintained, gives ICRICT the opportunity to create the *real* change that the OECD could not quite muster.

106. TAX JUSTICE NETWORK ET AL., *supra* note 95, at 1.