

1-1-2016

Follow The Money: A Discussion Of The Organisation For Economic Co-Operation And Development's Base Erosion And Profit Shifting Project: Has The US Taken Steps To Adopt A Global Solution To This Worldwide Problem?

Claire Arritola

Follow this and additional works at: <http://repository.law.miami.edu/umblr>

 Part of the [Business Organizations Law Commons](#), [Taxation-Federal Commons](#), and the [Taxation-Transnational Commons](#)

Recommended Citation

Claire Arritola, *Follow The Money: A Discussion Of The Organisation For Economic Co-Operation And Development's Base Erosion And Profit Shifting Project: Has The US Taken Steps To Adopt A Global Solution To This Worldwide Problem?*, 24 U. Miami Bus. L. Rev. 85 (2016)

Available at: <http://repository.law.miami.edu/umblr/vol24/iss1/6>

Follow The Money: A Discussion Of The Organisation For Economic Co-Operation And Development's Base Erosion And Profit Shifting Project: Has The US Taken Steps To Adopt A Global Solution To This Worldwide Problem?¹

Claire Arritola *

This article looks at the recent actions taken by the Organisation for Economic Co-operation and Development (OECD) to prevent hybrid mismatches and tax base erosion. These actions have come in the form of the "Action Plan for Base Erosion and Profits" (BEPS). BEPS has spanned from 2013 to 2015 and has been the collaborative effort of representatives from 34 countries (with much help from the G-20 countries) as well as input from other non-member countries. Through this project, the OECD seeks to eradicate the problems caused by the current corporate tax structure and the tendency of countries to choose country-specific solutions to global problems of tax avoidance by large multinational corporations. Some of the areas targeted by the BEPS project include abuses of transfer pricing, corporate inversions, the use of tax havens, and hybrid entities. Most recently, the OECD has released its final set of deliverables in October 2015. This article seeks to explain some of the problems with the current state of corporate taxation and explain some of

¹ Please note that this topic is still evolving and new developments are expected in the near future. This paper reflects the state of affairs as of October 25, 2015. Thank you to Patricia Brown for her review and comments.

* Claire Arritola practices tax law in the Miami area and is a member of the Florida Bar. She received a Bachelor's of Business Administration in Accounting in 2011. She continued her education by receiving a Juris Doctor from the George Washington University Law School in 2014, and an LL.M. in Taxation from the University of Miami School of Law in 2015. She has previously been published in TaxAnalyst and the Thurgood Marshal School of Law Journal on Gender, Race and Justice.

the BEPS deliverables. The article will also take a critical look at the suggestions made by the OECD, the challenges companies will face, unilateral steps that countries have already taken, whether or not the OECD is the correct body to promulgate these solutions, and what the United States has done in response to BEPS.

I.	HOW DID WE GET HERE?	90
A.	<i>Globalization has created a perfect storm of conditions</i>	90
B.	<i>An explanation of common international tax avoidance techniques</i>	91
C.	<i>Proposed resolutions, failed solutions and other troubles encountered in attempting to solve issues of double taxation and tax arbitrage</i>	94
II.	WHAT IS THE BEPS PROJECT AND WHAT ROLE WILL THE OECD WILL PLAY IN IMPLEMENTING GLOBAL SOLUTION?	95
III.	OPPOSITION TO BEPS PROJECT	97
IV.	HAS THE US TAKEN STEPS THAT ARE CONSISTENT WITH BEPS SUGGESTIONS?	98
V.	REACTIONS OF OTHER COUNTRIES	103
VI.	HOW SHOULD COMPANIES PREPARE FOR THE IMPACT OF BEPS? .	105
VII.	ANALYSIS: IS THE BEPS PROJECT GOING TO SOLVE THESE MANY GLOBAL ISSUES?	106
VIII.	CONCLUSION	108

If you were asked to identify a company that has 93% of the market for mobile phones² and employs 66,000 people in the United States³, but has historically paid low United States corporate taxes while making billions in profits, would you be able to identify the company? It is Apple. What about a company that we are all familiar with that we use to find the answer to everything? Now we are discussing Google. How about a retailer that has revolutionized the way we purchase items? Amazon has changed how we think about buying items online. All three of these companies have several things in common: they are

² Shirley Siluk, *Apple Rakes in 93% of Mobile Phone Profits*, CIO TODAY, http://www.cio-today.com/article/index.php?story_id=021000OCEGB0 (last updated Feb. 9, 2015).

³ Tim Higgins, *Apple Touts U.S. Job Creation, Says App Store Sales Rose*, BLOOMBERG BUS. (Jan. 8, 2015, 11:00 AM), <http://www.bloomberg.com/news/articles/2015-01-08/apple-touts-u-s-job-creation-says-app-store-sales-rose-50->.

multinational companies that have changed the world in the past 15 years—and they are well-known by the public. However, perhaps the most important characteristic they share is that they pay relatively little United States’ corporate taxes, while *technically* following the letter of the tax law.

How do they do it? Each of them has historically employed tax-planning techniques such as the “Double Irish” or the “Double Irish with a Dutch Sandwich.”⁴ Google and Apple, digital companies, have been the most aggressive in tax planning.⁵ This planning technique is quite complicated.⁶ It involves several subsidiaries in different countries. First, there is a U.S. parent corporation that forms an Irish subsidiary that is legally a tax resident of Bermuda.⁷ The Irish subsidiary then forms a Dutch holding corporation in the Netherlands and an operating company in Ireland.⁸ The U.S. parent corporation then licenses a right to the Irish subsidiary, such as a patent.⁹ The two companies agree upon a royalty rate to be paid to the U.S. parent.¹⁰ That patent is then sublicensed to the Dutch holding corporation, which then sublicenses the same patent again to the Irish operating company.¹¹ The Irish operating company then proceeds to engage in regular business operations and earns revenue attributable to Ireland, which has a very low corporate income tax.¹² The Irish operating company claims enormous deductions for royalties paid to the Dutch holding corporation; there is no withholding tax on these payments in Ireland.¹³ That Dutch holding corporation then pays Dutch tax on the royalties, but the royalties paid to the Irish subsidiary offset these taxes and there is no Dutch withholding tax on these payments.¹⁴ Next, the Irish subsidiary pays royalties to the U.S. parent corporation and the U.S. corporation pays U.S. corporate income tax on these amounts.¹⁵ The net effect is that most of the income from non-U.S. operations is kept outside of the U.S. and is never distributed to the U.S.

⁴ ‘*Double Irish With a Dutch Sandwich*’, N.Y. TIMES (Apr. 28, 2012), <http://www.nytimes.com/interactive/2012/04/28/business/Double-Irish-With-A-Dutch-Sandwich.html>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

parent.¹⁶ The money never makes it back to the U.S. and it is reinvested into the company.¹⁷

The issues of taxation and the potential erosion of national tax bases are distinctly global.¹⁸ The news frequently covers the increasing importance and the rapid pace of globalization in modern life and economic development. Undoubtedly, the world is changing and phrases like “the world is getting smaller” do not adequately describe the far-reaching impact of the break-neck speed and scope of globalization. No organization is more deeply entrenched in fast-paced globalization and its far-reaching effects than the Organisation for Economic Co-Operation and Development (“OECD”).¹⁹ The OECD is an organization that consists of the governments of 34 market-economy democracies and over 70 non-member countries; these countries work together to “promote economic growth, prosperity, and sustainable development.”²⁰ The OECD has been working to promote these goals through the use of “statistical, economic and social data” for more than 50 years and the importance of the organization has been growing.²¹ The OECD member countries now make up “63 percent of world GDP, three-quarters of world trade, 95 percent of world official development assistance, over half of the world’s energy consumption, and 18 percent of the world’s population.”²² Although it is influential, the OECD does not have the authority to enforce its recommendations.²³

Many authors have written about the consequences of globalization. These consequences are so far reaching and all-encompassing that they span categories such as economics, health and epidemiology, and human migration. Broadly, this article will deal with a specific consequence of globalization – its impact on countries’ corporate income tax regimes and the increasing global integration of corporations. The interactions of different corporate taxation schemes may lead to double taxation; as a result, countries may agree upon guidelines to avoid double taxation and prevent exploitation by savvy multinational companies. This exploitation

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *About Base Erosion and Profit Shifting (BEPS)*, OECD, <http://www.oecd.org/ctp/beps-about.htm> (last visited Oct. 22, 2015).

¹⁹ *See History*, OECD, <http://www.oecd.org/about/history/> (last visited Oct. 22, 2015).

²⁰ *About the OECD*, U.S. MISSION OF THE ORG. FOR ECON. COOPERATION AND DEV., <http://usoecd.usmission.gov/mission/overview.html> (last visited Jul. 22, 2015).

²¹ *Id.*

²² *Id.*

²³ Gregory J. Hartker, Mary Burke Baker & Frank W. Dworak, *OECD/G20 Base Erosion and Profit Shifting Project*, K&L GATES, 1 (Nov. 2014), http://www.klgates.com/files/Publication/b3ed65cc-dfab-47b3-9862-9b7f985d8028/Presentation/PublicationAttachment/47090006-55bc-4a30-ac09-b929ee4eb8da/Tax_Alert_11202014.pdf.

has manifested itself in specific types of tax avoidance, such as hybrid mismatches and base erosion and profit sharing, which are considered “harm[ful] to competition, economic efficiency, transparency and fairness.”²⁴ The OECD has defined hybrid mismatches as “being the result of a difference in the characterization of an entity or arrangement under the laws of two or more tax jurisdictions that result in a mismatch in tax outcomes.”²⁵ “The hybrid mismatch arrangements targeted in the reports are those resulting in a lower aggregate tax burden for the parties involved.”²⁶ “Base erosion and profit shifting” is a technical term that is used to describe certain tax planning strategies. These strategies depend on mismatches that exist between tax regimes of different countries to lower the corporate tax that is payable by corporations. These strategies either make tax profits “disappear” or shift them to countries with low corporate taxation.²⁷ BEPS strategies are not illegal but they seek to take advantage of tax rules in different countries with the objective of paying lower corporate tax, which results in diminished tax revenue for many countries.²⁸

The article seeks to explain the failings of the current corporate tax system and of individualized, country-specific solutions to such global tax avoidance issues. As a result, the OECD’s “Action Plan for Base Erosion and Profit Shifting” (“BEPS”) will be discussed as a promising solution to tax base erosion.²⁹ The project aims to “rewrite the rules of corporate taxation” and improve the public perception of taxing regimes, emphasizing transparency and fairness.³⁰ The article will also take a critical look at the steps taken by the U.S. to adopt a global solution to worldwide tax avoidance by multinational corporations. It will assess the U.S. tax policy towards the BEPS project and gauge the likelihood that the 114th Congress will take action in this area. As this is an extremely complex area of law, this article will not provide a comprehensive overview of the international taxation rules; rather, it will explain the BEPS project and some of the tax areas most troubling to the OECD.

²⁴ *OECD releases two discussion drafts on hybrid mismatch arrangements*, PWC (March 21, 2014), http://www.pwc.com/en_GX/gx/tax/newsletters/tax-policy-bulletin/assets/pwc-oecd-releases-two-discussion-drafts-hybrid-mismatch-arrangemen.pdf.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Definition of base erosion and profit shifting Beps*, FINANCIAL TIMES, <http://lexicon.ft.com/Term?term=base-erosion-and-profit-shifting-Beps> (last visited Oct. 25, 2015).

²⁸ *Id.*

²⁹ *See generally Action Plan on Base Erosion and Profit Shifting*, OECD, <http://www.oecd.org/ctp/BEPSActionPlan.pdf> (last visited Oct. 25, 2015).

³⁰ Kash Mansori, *What Is This ‘BEPS’ Thing, and Should I Care?*, TRANSFER PRICING ECON., (Oct. 24, 2014), <http://www.minaeconomics.com/2014/10/what-is-this-beps-thing-and-should-i-care/>.

This area of the law is of great importance because international tax law is an integral piece of international business. Clear and well-developed rules of engagement for multinational companies are needed to foster fair play and global prosperity.

I. HOW DID WE GET HERE?

A. *Globalization has created a perfect storm of conditions*

Undoubtedly, globalization is an inescapable reality, but it is a polarizing topic in many respects. Some emphasize the many positive effects of its existence, such as the endless creation of jobs, environment of innovation and exchange of ideas, and overall growth of opportunity.³¹ Others note negative effects, especially in developing countries in the form of heightened income inequalities, domination by corporations, increased banking and currency risk, and cultural dilution.³²

Globalization has set the stage for these tax avoidance techniques by large companies that deal in markets in more than one country.³³ Globalization has also given rise to a large number of multinational corporations, often referred to as multinational enterprises (“MNE”).³⁴ The worldwide dealings of these types of corporations have created the possibility of double taxation because of the interaction of domestic tax systems.³⁵ “Double taxation” is defined “as the imposition of comparable taxes in at least two countries on the same taxpayer with respect to the same subject matter for identical periods.”³⁶ The reality of double taxation is that it burdens economic activity and growth and

³¹ *The Pros and Cons of Globalization*, FORBES, (May 6, 2015, 3:06 PM), <http://www.forbes.com/sites/mikecollins/2015/05/06/the-pros-and-cons-of-globalization/>.

³² Don McCubbrey, *Negative and positive effects of globalization for developing country business*, BOUNDLESS, <https://www.boundless.com/users/235420/textbooks/business-fundamentals/international-business-for-the-entrepreneur-14/globalization-opportunities-and-threats-to-developing-country-business-55/negative-and-positive-effects-of-globalization-for-developing-country-business-253-15556/> (last visited Jul. 19, 2015).

³³ *Definition of base erosion and profit shifting Beps*, FINANCIAL TIMES, <http://lexicon.ft.com/Term?term=base-erosion-and-profit-shifting-Beps> (last visited Oct. 25, 2015).

³⁴ *See generally Action Plan on Base Erosion and Profit Shifting*, OECD, <http://www.oecd.org/ctp/BEPSActionPlan.pdf>. (last visited Oct. 25, 2015).

³⁵ *Id.* at 9.

³⁶ Fabian Barthel, Matthias Busse & Eric Neumayer, *The Impact of Double Taxation Treaties on Foreign Direct Investment: Evidence from Large Dyadic Panel Data*, LONDON SCH. OF ECON. AND POL. SCI. 4, http://eprints.lse.ac.uk/28823/1/_Libfile_repository_Content_NGU0XH~S_TC7W1N~Q_The%20impact%20of%20double%20taxation%20treaties%20on%20foreign%20direct%20investment%20evidence%20from%20large%20dyadic%20panel%20data%20%28LSE%20RO%29.pdf (last updated May, 2009).

reduces foreign direct investment and the allocation of foreign direct investment across countries.³⁷ The awareness of double taxation has led to more public awareness of tax fairness and has fostered an environment among MNEs of strategic tax avoidance.³⁸

Another effect of the interaction between separate and discrete taxation regimes in different countries is that MNEs have found and exploited gaps in the tax laws.³⁹ The tax laws of different sovereign states may not sufficiently take into account the effect of other countries' rules or the potential interaction of the various taxing regimes.⁴⁰ Many of these tax laws were written and considered in a time before globalization. As described above, the interaction of different tax laws may create double taxation, which is negative for global economies, but equally troubling is the tax evasion and avoidance resulting from gaps in tax law coverage.⁴¹ There are cases where, as a result of the interaction of various countries' tax laws, corporate income is not taxed at all, "either by the country of source or the country of residence, or is only taxed at nominal rates."⁴² This reality has encouraged the type of tax arbitrage that the OECD seeks to eradicate. As a result of these negative effects, global economies likely desire international rules that provide clarity for both governments and corporations, eliminate double taxation, and deal adequately with the many opportunities for tax arbitrage.⁴³

B. An explanation of common international tax avoidance techniques

Tax avoidance is a way to legally reduce tax payments.⁴⁴ It has been described as "behavior that the taxpayer hopes will serve to reduce his tax liability but that he is prepared to disclose fully to the IRS."⁴⁵ Tax avoidance techniques accomplish the payment of tax on "profits

³⁷ *Id.* at 5.

³⁸ *Id.*

³⁹ *Definition of base erosion and profit shifting Beps*, FINANCIAL TIMES, <http://lexicon.ft.com/Term?term=base-erosion-and-profit-shifting-Beps> (last visited Oct. 25, 2015).

⁴⁰ *Action Plan on Base Erosion and Profit Shifting*, OECD, <http://www.oecd.org/ctp/BEPSActionPlan.pdf>. (last visited Oct. 25, 2015).

⁴¹ *See generally Action Plan on Base Erosion and Profit Shifting*, OECD, <http://www.oecd.org/ctp/BEPSActionPlan.pdf>. (last visited Oct. 25, 2015).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Jasmine M. Fisher, *Fairer Shores: Tax Havens, Tax Avoidance, And Corporate Social Responsibility*, 94 B. U. L. REV. 337, 339 (2014) available at <http://www.bu.edu/bulawreview/files/2014/03/FISHER.pdf>.

⁴⁵ *Id.* at 340.

declared in a country other than where they were really earned.”⁴⁶ These techniques also may result in less tax than may otherwise be required and deferral of tax payment.⁴⁷ When employing tax avoidance techniques, MNEs seek to take advantage of uncertainty in the tax law to reduce their tax liability.⁴⁸

MNEs often engaged in quick deals characterized by cross-border activity.⁴⁹ More specifically, BEPS refers to “tax planning strategies that rely on mismatches and gaps that exist between the tax rules of different jurisdictions, to minimize the corporation tax that is payable overall, by either making tax profits ‘disappear’ or shift profits to low tax operations where there is little or no genuine activity.”⁵⁰ There are several ways that this tax avoidance may be accomplished. MNEs use transfer pricing, hybrid mismatches, and corporate inversions involving tax havens to accomplish the goal of paying lower corporate tax than otherwise would be required.⁵¹ It should be noted that base erosion and profit shifting are particularly problematic for developing countries because they rely very heavily on corporate income tax to fund their government services.⁵²

A hybrid mismatch arises when the laws of the United States treat a particular cross-border arrangement differently than another country’s tax laws.⁵³ There are several different types of hybrid mismatches that may arise. There may be hybrid instruments, which are “financial instruments that are classified differently under the tax laws of the United States from their classification under the tax laws of another country.”⁵⁴ Hybrid transfers are another form of hybrid mismatch; they are “transactions related to property, such as stock or indebtedness, that are characterized differently under U.S. tax law and foreign tax law.”⁵⁵ Finally, hybrid entities are “business entities that are classified

⁴⁶ *Id.* (citing RONEN PALAN ET AL., *TAX HAVENS: HOW GLOBALIZATION REALLY WORKS* 10 (2010)).

⁴⁷ *Id.* at 340-41.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Definition of base erosion and profit shifting Beps*, FINANCIAL TIMES, <http://lexicon.ft.com/Term?term=base-erosion-and-profit-shifting-Beps> (last visited Oct. 25, 2015).

⁵¹ Jasmine M. Fisher, *Fairer Shores: Tax Havens, Tax Avoidance, And Corporate Social Responsibility*, 94 B. U. L. REV. 337, 339 - 344 (2014), available at <http://www.bu.edu/bulawreview/files/2014/03/FISHER.pdf>.

⁵² *Id.* at 339.

⁵³ STAFF OF THE JOINT COMM. ON TAXATION, 113TH CONG., DESCRIPTION OF CERTAIN REVENUE PROVISIONS CONTAINED IN THE PRESIDENT’S FISCAL YEAR 2015 BUDGET PROPOSAL 50 (Comm. Print 2014).

⁵⁴ *Id.* at 27.

⁵⁵ *Id.*

differently under the tax laws of the United States and another country.”⁵⁶ MNEs have been able to take advantage of these mismatches in legal treatment to effectively avoid taxes and shift profits to lower tax jurisdictions.⁵⁷ The corporate inversion has gotten much attention in the media in recent years.⁵⁸ A corporate inversion occurs when a “corporation replaces a domestic corporation as the parent company of a multinational group.”⁵⁹ This type of tax avoidance technique may be motivated by a variety of tax avoidance purposes, including the “removal of a group’s foreign operations from the U.S. taxing jurisdiction and the potential for reduction of U.S. tax on U.S. source income.”⁶⁰

Another tactic used by MNEs employs transfer pricing. The OECD describes transfer price as “a price, adopted for book-keeping purposes, which is used to value transaction between affiliated enterprises integrated under the same management at artificially high or low levels in order to effect an unspecified income payment or capital transfer between those enterprises.”⁶¹ However, it should be noted that many times, transfer pricing is a legitimate practice⁶² so long as the corporation “abides by the [a]rm’s length principle”⁶³ that requires that the MNE with a subsidiary value the transactions “as if they had been carried out by unrelated parties.”⁶⁴ It is easy to abuse this principle, especially for products with few competitors, such as intellectual property because pricing analysis to determine “arm’s length” pricing, may be difficult to conduct since there is little market for the intellectual property.⁶⁵ Transfer pricing abuses have resulted in “significant revenue loss to the U.S. government.”⁶⁶

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Pressure for tax reform buildings corporate ‘inversions’ continue, says expert*, OUT-LAW.COM (June 17, 2015), <http://www.out-law.com/en/articles/2015/june/pressure-for-tax-reform-building-as-corporate-inversions-continue-says-expert/>.

⁵⁹ *Id.* at 44.

⁶⁰ *Id.* at 41.

⁶¹ Jasmine M. Fisher, *Fairer Shores: Tax Havens, Tax Avoidance, And Corporate Social Responsibility*, 94 B. U. L. REV. 337, 344-45 (2014) available at <http://www.bu.edu/bulawreview/files/2014/03/FISHER.pdf> (citing *Glossary of Statistical Terms*, ORG. FOR ECON. CO-OPERATION & DEV. (Feb. 20, 2003), <http://stats.oecd.org/glossary/detail.asp?ID=2757>).

⁶² *Id.* at 345.

⁶³ *Id.* (citing ORG. FOR ECON. CO-OPERATION & DEV., ANNUAL REPORT ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: CONDUCTING BUSINESS IN WEAK GOVERNANCE ZONES 176 (2006)).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* (citing *Offshore Profit Sharing and the U.S. Tax Code—Part 1 (Microsoft and Hewlett-Packard): Hearing Before the Permanent Subcomm. on Investigations of the S.*

C. *Proposed resolutions, failed solutions and other troubles encountered in attempting to solve issues of double taxation and tax arbitrage*

Since the 1920s, countries have attempted to address double taxation and gaps in tax law coverage with bilateral tax treaties while continuing to assert sovereignty to administer their own tax laws.⁶⁷ It should be noted that these solutions have, in some cases, been adequate to protect against tax arbitrage.⁶⁸ The principles of clarity and predictability have guided these efforts and are essential for economic growth.⁶⁹ Despite some successful global efforts, time has proven that the long-standing rules of engagement in this area are often weak and vulnerable to arbitrage.⁷⁰

The BEPS project is concerned with “arrangements that achieve no or low taxation by shifting profits away from the jurisdictions where the activities creating those profits take place.”⁷¹ This becomes a concern when the low tax paid “is associated with practices that artificially segregate taxable income from the activities that generate it.”⁷² In some instances, the application of tax treaties results in “unduly low[] tax[].”⁷³

Another reason these previous solutions have proved inadequate is that the global economy has become a digital economy.⁷⁴ In a digital economy there is great reliance on intangible assets; companies also rely greatly on the use of personal data.⁷⁵ In a digital economy there is also difficulty in determining the jurisdiction where value creation occurs.⁷⁶ This relatively new way of conducting global business requires a close evaluation of how the digital economy generates value to determine how current rules should apply in these instances and to prevent further arbitrage.⁷⁷

Comm. on Homeland Sec. & Governmental Affairs, 112th Cong. App at 78 (2012)(statement of Sen. Carl Levin)).

⁶⁷ OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD PUBLISHING 7 (Jul. 19, 2015, 8:35 PM), <http://dx.doi.org/10.1787/9789264202719-en>.

⁶⁸ *Id.*

⁶⁹ *Id.* at 10.

⁷⁰ *Id.* at 7.

⁷¹ *Id.* at 10.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

II. WHAT IS THE BEPS PROJECT AND WHAT ROLE WILL THE OECD WILL PLAY IN IMPLEMENTING GLOBAL SOLUTION?

The BEPS Action plan includes 15 actions that were scheduled for staggered releases between 2013 and 2015.⁷⁸ The OECD has stated that its “key areas of work” include: Aggressive Tax Planning, Transfer Pricing, Tax Treaties, Tax Policy and Statistics, Tax and Development, and Tax Compliance.⁷⁹ The OECD has clearly delineated the technical work that will be undertaken by the OECD Committee on Fiscal Affairs.⁸⁰ Several groups will work on this project, including groups in the following areas: Tax Conventions and Related Questions, Tax Policy Analysis and Tax Statistics, Taxation of Multinational Enterprises, Aggressive Tax Planning, Forum on Harmful Tax Practices, and the Task Force on Digital Economy.⁸¹ The OECD specifically focuses on intangible content and the digital economy.⁸² Some of the important issues that the project addresses are “a clear acknowledgement that intangibles and e-commerce are different.”⁸³ This principle implies that “physical presence simply cannot be the only trigger of tax jurisdiction.”⁸⁴ This is a novel idea for most countries that base their taxing jurisdiction on the source of income.⁸⁵ The second issue that has to be addressed is the valuation of intangibles. The project struggles greatly with this issue.⁸⁶

The 2015 deliverables include work in the following areas: strengthening CFC rules (Action 3), limiting base erosion via interest deductions and other financial payments (Action 4), countering harmful tax practices more effectively, taking into account transparency and substance (Action 5), preventing the artificial avoidance of PE status (Action 7), assuring that transfer pricing outcomes are in line with value creation (Actions 8-10), establishing methodologies to collect and analyze data on BEPS and the actions to address it (Action 11), requiring taxpayers to disclose their aggressive tax planning arrangements (Action 12), making dispute resolution mechanisms more effective (Action 14),

⁷⁸ *About BEPS*, OECD, <http://www.oecd.org/tax/beps-about.htm> (last visited Jul. 22, 2015).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Yariv Brauner, *What the Beps?*, 16 FLA. TAX REV. 55, 75 (2014).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

and developing a multilateral instrument (Action 15).⁸⁷ In October 2015, the final recommendations were released and the OECD is currently focusing on monitored implementation and providing support for interested countries.⁸⁸

This article will focus on the 2014 deliverables. The September 2014 deliverables include the following actions: Actions 1, 2, 3, 5, 6, 8, 12, and 15.⁸⁹ One of the important 2014 deliverables is a report detailing the tax challenges raised by the digital economy and actions the OECD considers necessary to address these challenges.⁹⁰ The OECD describes the G-20 “as an international co-corporation that brings together finance ministers and central bank governors of 20 economies: 19 member countries plus the European Union.”⁹¹ The G-20 members have been greatly involved in the BEPS project development and the BEPS project has been “driven by the political agendas of the G-20 members.”⁹² There has been tension between the developed and developing countries over the transfer price rules.⁹³ Smaller countries view the BEPS project with suspicion and resent that only 34 countries are planning to write the rules for the rest of the world.⁹⁴ Additionally, there are significant disagreements between developed countries.⁹⁵ European countries have different goals than India and China, for instance.⁹⁶ China and India would like to ensure that they are “allocated their fair share of a multinational’s taxes, regardless of the technicalities of transfer pricing or nexus rules.”⁹⁷

⁸⁷ See generally *BEPS Frequently Asked Questions*, OECD (Jul. 22, 2015, 12:08 PM), <http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm>.

⁸⁸ *OECD/G-20 Base Erosion and Profit Shifting Project, 2015 Final Report*, OECD, 1, 8, <http://www.oecd.org/ctp/beps-reports-2015-information-brief.pdf> (last visited Oct. 25, 2015).

⁸⁹ *BEPS 2014 Deliverables*, OECD, www.oecd.org/tax/beps-2014-deliverables.htm (last visited Jul. 21, 2015).

⁹⁰ *About BEPS*, OECD, <http://www.oecd.org/tax/beps-about.htm> (last visited Jul. 22, 2015).

⁹¹ *G20 Members*, OECD, <http://www.oecd.org/g20/g20-members.htm> (last visited Jul. 22, 2015).

⁹² *News Analysis: A Quick Overview of the BEPS Project*, TAXANALYST (Jun. 2, 2015), <http://www.taxanalysts.com/www/features.nsf/Features/D46435B354D8C62085257CE9004791EB?OpenDocument>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

III. OPPOSITION TO BEPS PROJECT

In some instances, businesses are opposing the BEPS project. Some business representatives have made it clear that they would like to ensure that the “cure was not worse than the disease.”⁹⁸ Some of the concerns that have been voiced by the business community include concerns about the scope of audits of large MNEs.⁹⁹ These companies may be subject to “separate, multiple and uncoordinated audits from various revenue authorities.”¹⁰⁰ Revenue authorities will need to have a high level of coordination to prevent double taxation, duplicate reporting requirements and confusion among taxpayers as to the appropriate authority.¹⁰¹ There is also a fear that conflicting laws will further complicate the tax system and that double taxation will again emerge.¹⁰² The complexity in the laws will also lead to increased compliance costs, administrative costs, and increased uncertainty for taxpayers.¹⁰³ Business representatives have suggested that there should be a materiality threshold to minimize compliance costs.¹⁰⁴ Further complication of the tax systems and double taxation, increases in compliance and administrative costs, and increased uncertainty are concerns for the business community.¹⁰⁵ The longer the OECD has taken to provide the deliverables, the more uncertainty has pervaded the international tax community. Furthermore, some countries have begun to act unilaterally in response to some of the OECD’s deliverables. For instance, the United Kingdom has adopted the Diverted Profits Tax (“DPT”) in response to the BEPS project.¹⁰⁶ The DPT is a new tax that is 25% of diverted profits relating to UK activity.¹⁰⁷ The DPT tax applies to “large multinational enterprises with business activities in the UK” that attempt to avoid U.K. corporate tax by avoiding U.K. taxable permanent establishment status through relationships with

⁹⁸ Terry Hayes, *BEPS is coming, but raises legitimate concerns for business*, ECONOMIA (Oct. 15, 2014), <http://economia.icaew.com/opinion/october-2014/beps-is-coming-but-raises-legitimate-concerns-for-business> (quoting business representatives at the G20 international tax symposium in Tokyo on May 9 -10, 2014).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Diverted profits tax, Details released*, EY (2015), [http://www.ey.com/Publication/vwLUAssets/EY-Finance-Bill-2015-Diverted-profits-tax-Details-released/\\$FILE/EY-Finance-Bill-2015-Diverted-profits-tax.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Finance-Bill-2015-Diverted-profits-tax-Details-released/$FILE/EY-Finance-Bill-2015-Diverted-profits-tax.pdf).

¹⁰⁷ *Id.*

related entities.¹⁰⁸ The United States has been vocal in criticizing this unilateral step.¹⁰⁹ Robert Stack, Treasury Deputy Assistant Secretary (international tax affairs), spoke openly at an OECD International Tax Conference on June 10, 2015, about how “[t]he DPT points in a disturbing direction.”¹¹⁰

The BEPS provisions will likely increase competition in the market place and encourage creativity in tax planning. This may lead to more tax evasion as companies try to plan around this uncertain period. Another pointed criticism of the project is that it “does not directly seek to address issues regarding the allocation of taxing rights between source and residence countries.”¹¹¹ The recommendations are simply trying to reach an agreement among countries in terms of “the common interpretation of taxation principles.”¹¹² Countries may still continue to “determine the allocation of taxation rights via bilateral negotiations with its treaty partners.”¹¹³ Also, innovation may suffer as a result of these measures.¹¹⁴ It is possible that these provisions will compromise confidentiality, as well.¹¹⁵ Taxpayer information will be shared more widely and there is a possibility that “commercially sensitive or tax-related information” could be at risk.¹¹⁶ The OECD provisions may also lead to more treaty abuse because they may be too rigid and exclude legitimate tax planning maneuvers. Based on the above information, the BEPS project is not without some opposition.

IV. HAS THE US TAKEN STEPS THAT ARE CONSISTENT WITH BEPS SUGGESTIONS?

In 2004, the American Jobs Creation Act “included provisions that were specifically intended to prevent inversion transactions and the IRS

¹⁰⁸ *Diverted Profits tax: Details released*, EY, [http://www.ey.com/Publication/vwLUAs/sets/EY-Finance-Bill-2015-Diverted-profits-tax-Details-released/\\$FILE/EY-Finance-Bill-2015-Diverted-profits-tax.pdf](http://www.ey.com/Publication/vwLUAs/sets/EY-Finance-Bill-2015-Diverted-profits-tax-Details-released/$FILE/EY-Finance-Bill-2015-Diverted-profits-tax.pdf) (last visited Oct. 25, 2015).

¹⁰⁹ *U.S. ‘Extremely Disappointed’ in DPT and BEPS Output*, Stack Says, TAXANALYST, (June 15, 2015), <http://services.taxanalysts.com/taxbase/tpnews.nsf/SearchIndex/C9F3064B00502E9085257E610017D091?OpenDocument&highlight=0,U.S.%2520extremely%2520disappointed%2520in%2520DPT%2520and%2520BEPS%2520output>.

¹¹⁰ *Id.*

¹¹¹ *BEPS is coming, but raises legitimate concerns for business*, ECONOMIA (Oct. 15, 2014), <http://economia.icaew.com/opinion/october-2014/beps-is-coming-but-raises-legitimate-concerns-for-business>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

followed this up with detailed guidance in the form of regulations under Section 7874.”¹¹⁷ Later, in 2012, the Senate “condemned multinational corporations’ use of ‘complex structures, dubious transactions and legal fictions’ to shift profits overseas and avoid paying US taxes.”¹¹⁸ Senator Carl Levin explained that MNEs were shifting profits to subsidiaries in lower tax jurisdictions to avoid paying taxes, and this had “pushed corporate income tax revenue, as a share of all federal revenue, to historically loose levels.”¹¹⁹

At this time, it is unclear exactly what steps the United States will take in this area. However, the government has shown great interest in the project and has recently taken steps indicative of a willingness to consider several of the BEPS proposals. For instances, several “[r]epresentatives of the U.S. Treasury Department have indicated the Administration will seriously consider implementation of the OECD BEPS project results.”¹²⁰ Of course, the final position of the U.S. government is unclear at this time and the ultimate reactions will depend on the final suggestions recently published by the OECD.¹²¹ The political process has often stalled progress towards implementation of these goals.¹²² However, BEPS has been on the minds of lawmakers and has been at the forefront of U.S. tax policy in recent years.¹²³ The recently rising number of corporate inversions is a symptom of the existing problems with the current U.S. tax policy.¹²⁴

The U.S. Treasury Department has indicated some interest in reforming the U.S. tax policy in this area to improve competitiveness.¹²⁵

¹¹⁷ STAFF OF THE JOINT COMM. ON TAXATION, 113TH CONG., DESCRIPTION OF CERTAIN REVENUE PROVISIONS CONTAINED IN THE PRESIDENT’S FISCAL YEAR 2015 BUDGET PROPOSAL 28 (Comm. Print 2014).

¹¹⁸ Jasmine M. Fisher, *Fairer Shores: Tax Havens, Tax Avoidance, And Corporate Social Responsibility*, 94 B.U. L. REV. 337, 342 (2014), available at <http://www.bu.edu/bu-lawreview/files/2014/03/FISHER.pdf> (quoting *Offshore Profit Sharing and the U.S. Tax Code—Part 1 (Microsoft and Hewlett-Packard): Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. App at 77 (2012)(statement of Sen. Carl Levin)).

¹¹⁹ *Id.* (quoting Press Release, U.S. Senate Permanent Subcomm. on Investigations, Subcommittee Hearing to Examine Billions of Dollars in U.S. Tax Avoidance by Multinational Corporations (Sept. 20, 2012)).

¹²⁰ *OECD BEPS Action Plan Taking The Pulse In The Americas Region*, KPMG 19 (Nov. 2014), <http://www.kpmg.com/Global/en/services/Tax/international-tax/Documents/oecd-beps-action-plan-taking-the-pulse-in-the-americas-region.pdf>.

¹²¹ *Id.* at 20.

¹²² Hartker, *supra* note 23.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Testimony of Robert B. Stack, Deputy Assistant Secretary (International Tax Affairs)*, U.S. DEP’T OF THE TREASURY BEFORE THE SENATE FINANCE COMM. 2 (Jul. 22,

The Administration has also spoken about proposing that “statutory changes based on the OECD BEPS project results.”¹²⁶ The House Ways and Means Chairman and the Committee Chairman “introduced proposals for international tax reform that include provisions targeted at base erosion.”¹²⁷ Robert Stack testified before the Senate Finance Committee on July 22, 2014, and stated, “there is more that can be achieved, and also several areas where we must guard against bad outcomes.”¹²⁸ He also expressed strong support for the “significant broadening of the use of mandatory arbitration to resolve tax disputes between the tax authorities of the two countries.”¹²⁹ He insisted that in 2015, the Treasury was going to “work closely with other countries to limit base stripping.”¹³⁰ In October 2015, the OECD released the finalized draft of Action 3, “Designing Effective Controlled Foreign Corporation Rules,” which addresses base stripping.¹³¹ The public discussion draft of Action 3 discusses the scope of base stripping and how the Controlled Foreign Corporation rules can be used to prevent it.¹³²

President Obama has included several international tax reform proposals that are meant to address the BEPS concerns in the 2015 budget.¹³³ Included in these proposals are measures to “create new categories of Subpart F income for certain low-taxed earnings of a controlled foreign company,” “impose limitations on earnings stripping interest expense,” “neutralize tax benefits from certain hybrid agreements,” and “defer tax inversions.”¹³⁴ If these suggested measures are taken and the President and Congress remain focused on eradicating the problems created by BEPS, “the influence of BEPS on U.S. international tax policy going forward could be considerable.”¹³⁵

2014), <http://www.finance.senate.gov/imo/media/doc/Testimony%20of%20Robert%20Stack.pdf>.

¹²⁶ *OECD BEPS Action Plan Taking The Pulse In The Americas Region*, *supra* note 120.

¹²⁷ *Id.*

¹²⁸ *Testimony of Robert B. Stack*, *supra* note 125.

¹²⁹ *Id.*

¹³⁰ *Id.* at 3.

¹³¹ *See generally Designing Effective Controlled Foreign Corporation Rules, Action 3 – 2015 Final Report*, OECD (Oct. 5, 2015), <http://www.oecd.org/tax/designing-effective-controlled-foreign-company-rules-action-3-2015-final-report-9789264241152-en.htm>.

¹³² *Public Discussion Draft BEPS Action 3: Strengthening CFC Rules*, OECD (May 12, 2015), <http://www.oecd.org/tax/aggressive/discussion-draft-beps-action-3-strengthening-CFC-rules.pdf>.

¹³³ *OECD BEPS Action Plan Taking The Pulse In The Americas Region*, *supra* note 120.

¹³⁴ *Id.*

¹³⁵ Hartker, *supra* note 23.

Most recently on May 20, 2015, five draft amendments to the U.S. Model Income Tax Convention (2006) were released by the U.S. Treasury Department.¹³⁶ The Treasury also released several technical explanations to the amendments.¹³⁷ These amendments provide insight into the Treasury's thought process on BEPS but are not yet final.¹³⁸ The amendments are in the following areas: income earned through tax-favored or non-treaty country permanent establishment, interest, royalties, and "other income" that benefit from "special tax regimes;" revision of the limitation on benefits article; payments made by expatriated entities; and post-signing changes in the laws of a contracting state that remove the threat of double taxation.¹³⁹ However, the model treaty is not an actual treaty but "a public notice to the treaty negotiators of other countries, and to the U.S. Congress and the public generally, of what the Treasury's opening position is likely to be in any income tax treaty negotiation."¹⁴⁰ Nonetheless, this is a step in the direction of adopting some of the BEPS recommendations and strongly indicates support from the U.S. Treasury.

Despite steps towards supporting the BEPS project and adopting some of its proposals, the U.S. has expressed some concerns about certain portions of the BEPS project recommendations. For instance, the U.S. does not support a "major overhaul of the international tax regime."¹⁴¹ The Senate has also expressed concerns about the BEPS project suggestions in the area of transfer pricing. The Treasury, through Robert Stack ("Stack"), has expressed interest in keeping the current arm's length standard "clearly articulated" and to maintain "that profits are attributable to the place of economic activity."¹⁴² The U.S. would like to be certain that any measures taken by the OECD are firmly rooted in the principles expressed in the U.S. corporate tax regime in regard to the arm's length principle.¹⁴³

The Treasury and the Senate have indicated that there are measures that can be taken that are in line with the recommendations.¹⁴⁴ For instance, Stack suggests "[a]s the President has proposed, we should

¹³⁶ *Treasury Releases Draft Amendments to the 2006 U.S. Model Income Tax Convention*, DELOITTE: UNITED STATES TAX ALERT, (Jul. 10, 2015), <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-unitedstates-10-july-2015.pdf>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Yariv Brauner, *What the Beps?*, 16 FLA. TAX REV. 55, 73-74 (2014).

¹⁴² *Testimony of Robert B. Stack*, *supra* note 125.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

reform our business tax system by reducing the rate and broadening the base.”¹⁴⁵ The high rate of corporate tax in the United States has encouraged MNEs to shift profits, “especially on intangible income, to other jurisdictions.”¹⁴⁶ Lowering the corporate tax rate may begin to ameliorate the issues of profit shifting while the BEPS project is finalized.¹⁴⁷ Despite optimism about these simple measures, Stack expresses that this would only be a start, as multinationals would likely continue to shift profits in an attempt to aggressively lower their effective tax rates.¹⁴⁸ From Stack’s comments, it is clear that, as the OECD asserts, “[b]ase erosion and profit shifting is a global problem which requires global solutions.”¹⁴⁹

Even if the United States does not adopt the OECD’s recommended measures, U.S. companies with foreign operations will still have many changes to comply with,¹⁵⁰ including changes in local tax laws in any country where it operates.¹⁵¹ Companies will have to “prepare enterprise-wide transfer pricing documentation in accordance with the new OECD country-by-country reporting recommendation.”¹⁵² They will also have to deal with other countries’ taxing authorities, which may request more documentation.¹⁵³ Other issues may arise from changes in treaties, taxing authorities, and the protocol for international dispute resolution.¹⁵⁴

The consequences of inaction in this area could be dire for governments around the world.¹⁵⁵ If a bold move is not made to solve these problems, governments may lose corporate tax revenue, which is crucial for developing countries.¹⁵⁶ Also, there may be global tax chaos and double taxation because of competing international standards and potential unilateral measures.¹⁵⁷ It is imperative that countries reach agreements on the steps that should be taken to eliminate BEPS. The G20 Leaders have stated, “Despite the challenges we all face

¹⁴⁵ *Id.*

¹⁴⁶ *Testimony of Robert B. Stack, supra* note 125.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *About BEPS*, OECD, <http://www.oecd.org/tax/beps-about.htm> (last visited Jul. 22, 2015).

¹⁵⁰ *OECD BEPS Action Plan Taking The Pulse In The Americas Region, supra* note 120.

¹⁵¹ *Id.* at 19.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Action Plan on Base Erosion and Profit Shifting*, OECD 10 (2013), <http://www.oecd-ilibrary.org/docserver/download/2313331e.pdf?expires=1442328616&id=id&acname=guest&checksum=483504CB743B121F3791A2F061CB6224>.

¹⁵⁶ *Id.* at 8.

¹⁵⁷ *Id.* at 10.

domestically, we have agreed that multilateralism is of even greater importance in the current climate, and remains our best asset to resolve the global economy's difficulties."¹⁵⁸ As a result of the importance of these issues to the global economy, it is apparent that a global solution is necessary for the elimination of BEPS, and the OECD has taken steps in the right direction.

V. REACTIONS OF OTHER COUNTRIES

European countries have had a variety of reactions to the BEPS project. The majority has reacted positively as most countries brace themselves to actively participate in the implementation of its policies.¹⁵⁹ It will likely take years for each country to react to these sweeping changes; these governments will need to take time to confer with members of the private sector and then create legislation that will help implement the OECD recommendations.¹⁶⁰ Some countries are proving to be more resistant to these types of changes.¹⁶¹ For example, some countries, such as Ireland, with traditionally low tax rates are concerned about remaining competitive.¹⁶² Countries that rely heavily on their financial services sector, such as Luxembourg, are particularly concerned about the OECD suggestions.¹⁶³ Their government has been cautious because of concern over losing its competitive edge.¹⁶⁴ Also, Ireland has strongly expressed that it will maintain a low tax rate.¹⁶⁵ The Minister of Finance has clearly stated that "Ireland remains 100 Percent committed to the 12.5 percent corporate tax rate. This will not change."¹⁶⁶ Therefore, the general consensus is that these measures are necessary, but caution is being exercised in some respects.¹⁶⁷

The European Commission, which is the executive body of the European Union, proposes legislation and it has proposed a project that is parallel to the BEPS project.¹⁶⁸ However, it would apply only to business conducted within the European Union.¹⁶⁹ This plan focuses on "requiring

¹⁵⁸ *Id.* at 11.

¹⁵⁹ *OECD BEPS Action Plan Taking The Pulse In The Americas Region*, *supra* note 120.

¹⁶⁰ *Id.* at 4.

¹⁶¹ *Id.* at 1.

¹⁶² *Id.* at 16.

¹⁶³ *Id.* at 20.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 16.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 4-6.

¹⁶⁹ *Id.*

greater corporate transparency” and “requiring greater transparency from Switzerland, Andorra, Monaco, San Marino, and Liechtenstein,” as well as “tightening the rules against aggressive tax planning.”¹⁷⁰ This project demonstrates the enthusiasm expressed by the European Union for the principles of the OECD BEPS project.¹⁷¹ Another aspect of the OECD that makes it likely to have widespread support across Europe is that many high-ranking officials from various European countries are deeply entrenched in the process of drafting the OECD deliverables.¹⁷² For instance, high-profile government officials from the United Kingdom are involved in the BEPS Action Plan, sending a clear message that the United Kingdom is supportive of the BEPS project.¹⁷³

In the time before all the BEPS deliverables are released, some European countries have already taken steps to prevent base erosion.¹⁷⁴ For instance, many European taxing authorities have increased the frequency with which audits identifying “mismatching, transfer pricing or substance” are conducted.¹⁷⁵ It is expected that audits will become more common and more rigorous in the years to come.¹⁷⁶ Many companies have also reacted with caution, as they have stopped attempting to implement aggressive tax strategies.¹⁷⁷ Many European countries are playing an important role in the OECD’s process of creating these deliverables; therefore, they are deeply entrenched in the goals and values of the project.¹⁷⁸ Several countries are taking a “wait-and-see approach” while others are being more proactive, such as France. In France, a “40 percent penalty may be imposed on companies for business restructuring re-assessments undertaken on the grounds that the French company was unable to ignore that the restructuring was not made in its interest.”¹⁷⁹ To prevent base erosion, France has also been taking steps to reform its tax laws based on the tax codes of various other countries.¹⁸⁰ Other countries, such as Germany, already have extensive anti-avoidance laws.¹⁸¹ As discussed above, the United Kingdom has

¹⁷⁰ *Id.* at 4.

¹⁷¹ *Id.*

¹⁷² *Id.* at 26.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 5.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 12.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 14.

begun taking unilateral action consistent with the BEPS project, and Australia has also considered similar measures.¹⁸²

Other countries, such as Italy, have not expressed any opinion on these matters.¹⁸³ However, Italy already has a very aggressive tax system that is hurting business in the region.¹⁸⁴ Some countries, such as Switzerland, actually beat the OECD to the issue.¹⁸⁵ In October 2014, Switzerland had a draft bill that called for stricter audits and the abolition of the holding company regime, mixed and domiciliary regime, finance branch regime, and Swiss principal regime.¹⁸⁶ Many of the proposals made in the draft bill are consistent with the OECD project, while some additions will need to be made after the deliverables are complete.¹⁸⁷

VI. HOW SHOULD COMPANIES PREPARE FOR THE IMPACT OF BEPS?

For many companies, the implementation of BEPS proposals will require them to revisit their existing tax structures to identify weaknesses.¹⁸⁸ Companies should be prepared to look closely at the following areas: “movement of functions, assets and personnel within the group; development of supporting legal, tax, and transfer pricing documentation, and preparation of internal controls and working guidelines to mitigate tax risks.”¹⁸⁹ By taking these steps, MNEs will be prepared to face these changes without great disruption to their operations.¹⁹⁰ Companies should be prepared to face more in-depth audits and more questions regarding their tax structures.¹⁹¹ Another suggestion for a company is to stay abreast of developments, not only on the OECD level but to also be aware of what changes have arisen in the laws of other countries.¹⁹² The OECD itself provides information about

¹⁸² Lee A. Sheppard & Stephanie Soong Johnston, *U.S. ‘Extremely Disappointed’ in DPT and BEPS Output, Stack Says*, TAX ANALYST, (Jun. 15, 2015), <http://services.taxanalysts.com/taxbase/tpnews.nsf/SearchIndex/C9F3064B00502E9085257E610017D091?OpenDocument&highlight=0,U.S.%2520extremely%2520disappointed%2520in%2520DPT%2520and%2520BEPS%2520output>.

¹⁸³ *OECD BEPS Action Plan Taking The Pulse In The Americas Region*, *supra* note 120, at 18.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 24.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 29.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

the progress of the project.¹⁹³ Finally, companies should consider making efforts to establish connections with local taxing authorities as this will help ensure clear and open communication with these authorities and limit conflict.¹⁹⁴

VII. ANALYSIS: IS THE BEPS PROJECT GOING TO SOLVE THESE MANY GLOBAL ISSUES?

There are many questions that a government must address when thinking about international transactions.¹⁹⁵ First, the government has to determine which person to take and what to consider income.¹⁹⁶ The tenets of good tax planning call for an elimination of double taxation and for national neutrality.¹⁹⁷ The BEPS project is aimed at promoting fairness in taxation and preventing double taxation. Under this project, countries are encouraged to adopt laws that are consistent with good tax policy. The BEPS project will also prevent many of the issues that have arisen in response to jurisdiction shopping. Companies like Apple and Google will have a more difficult time bending the tax laws to exploit loopholes. This project will close many of the loopholes that have been exploited. “National neutrality” promotes efficiency in allocation of investments and is defined as “a condition that promotes maximum national output and income.”¹⁹⁸ The BEPS project promotes the economies of the member countries by ensuring the MNEs are properly taxed. It elevates the efficiency of every country’s tax regimes rather than elevating some over others, as has been the case for low tax rate regimes in the past.

Additionally, the OECD is the best organization for this job. In the world’s increasingly globalized society, international tax policy “is no longer predominately within the purview of the individual state.”¹⁹⁹ International organizations are continuing to play a crucial role in the creation of international tax policy; they continue to conduct research in crucial areas and serve as mediators among different countries with many differing viewpoints. There is now a larger number of MNEs and

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ ROBERT J. MISEY, JR. AND MICHAEL S. SCHAEDEWALD, PRACTICAL GUIDE TO U.S. TAXATION OF INTERNATIONAL TRANSACTIONS, Wolters Kluwer CCH, Ninth Ed. (2013).

¹⁹⁶ *Id.*

¹⁹⁷ Peggy B. Musgrave, *National Neutrality*, in THE ENCYC. OF TAXATION & TAX POLICY, 267 (Joseph J. Cordes et al eds., Urban Inst. Press 2d ed., 2005).

¹⁹⁸ *Id.*

¹⁹⁹ Diane Ring, *Who Is Making International Tax Policy?: International Organizations As Power Players in A High Stakes World*, 33 FORDHAM INT’L L.J. 649, 649 (2010).

business is increasingly conducted remotely and globally. These organizations are at the forefront of tax policy and serve as invaluable resources for countries around the world as they seek to navigate a variety of taxing regimes. The OECD has great power in lobbying and uniting, or efforts to coordinate with other large organizations.²⁰⁰ These are all largely outside the reach of individual countries.

It remains to be seen whether the United States will adopt most of the BEPS recommendations. Some commentators have suggested that the United States may be better served by adopting other solutions to this problem. The United States could make minor adjustments to the current regime. One approach the United States could adopt is to join the race to the bottom and lower its corporate tax rate in order to discourage companies from incorporating in other jurisdictions. The United States has the highest corporate tax rate of the OECD countries, according to the Tax Foundation.²⁰¹ This solution would definitely be much easier than overhauling the methods many different countries use to tax corporations. However, this is most likely a poor solution because it does not address the global nature of this problem; it only looks at the issue from the perspective of the United States. As discussed previously, this problem is a global one and a solution in any one country will not benefit the world economies in the future. Therefore, it would not appear that any unilateral action by one country would solve this issue.

Some countries express unease that the United States is not concerned about the tax reduction of other countries through tax planning techniques; some have characterized the United States' attitude as "indulgent."²⁰² An article in a British Tax Review quotes a U.S. tax lawyer as saying "[I]f that income is not the United States' to tax, *why should we—rather than the UK tax authorities—worry if those companies are employing strategies to minimize their UK taxes?*"²⁰³ While this statement indicates that it may have been the American attitude to be unconcerned with the lost tax revenues of other countries, the enthusiasm that the United States has shown for the OECD's BEPS project indicates that there may have been a shift in views over the issue. It would benefit the United States, as well as other countries, to be concerned about how corporations are being taxed globally rather than

²⁰⁰ *Id.* at 685.

²⁰¹ Kyle Pomerleau & Andrew Lundeen, *The U.S. Has the Highest Corporate Income Tax Rate in the OECD*, TAX FOUNDATION (Jan. 27, 2014), <http://taxfoundation.org/blog/us-has-highest-corporate-income-tax-rate-oecd>.

²⁰² Anthony Ting, *iTax—Apple's International Tax Structure And The Double Non-Taxation Issue*, BRIT. TAX REV. 2014 No. 1 (Mar. 19, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411297.

²⁰³ *Id.* (emphasis in original).

only focus on its own tax revenues. There will always be clever tax attorneys looking to exploit every loophole, weakness, and vulnerability of a given tax code. With clearer laws and the integration of concepts and standards around the world, it will greatly limit the planning opportunities for these tax attorneys willing to take positions that seriously stretch the tax legislation.

We must also be cautious about the increasing public opinion against MNEs and consider the role that the CEOs of these companies may play in these concerns. Surveys in the past several years have indicated that the public is very concerned about the avoidance of taxes by MNEs through profit shifting.²⁰⁴ The turning tide against these companies may bias governments to take severe action against them. However, the public interest in this topic is spurring government action in this area, as “Apple, HP, and Microsoft have all been investigated in bipartisan U.S. Senate Subcommittee hearings.”²⁰⁵ During these hearings, the companies have been cast in an unflattering light. The subcommittee focused on whether these companies have been acting as “responsible U.S. taxpayers.”²⁰⁶ This attitude seems to suggest that the CEOs of these companies have some form of responsibility other than minimizing costs for the company and increasing value for shareholders. This view is an unrealistic standard to have for CEOs of these types of companies. A more workable standard for a CEO is to implement the BEPS project standards to prevent this type of tax avoidance rather than rely on the morals of CEOs of major companies.

VIII. CONCLUSION

In conclusion, the OECD has already made great strides towards reaching its ambitious goal of promoting policies that will improve economic well-being around the world.²⁰⁷ The OECD has provided a forum for the major leaders in taxation in large economies to discuss the issues of base erosion and profit shifting in an environment that fosters discussion, research, and innovation. This has allowed for groundbreaking and working solutions in the form of the deliverables for the OECD project. Other solutions to these issues, such as relying on each company to be a good tax citizen, relying on countries to enact laws that would be good for the global tax community and dependence on

²⁰⁴ *Tax Transparency-A U.S. Perspective*, KPMG 4 (2013), <http://www.kpmg-institutes.com/content/dam/kpmg/taxwatch/pdf/2013/tax-transparency-us-perspective.pdf>.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *About the OECD*, OECD, <http://www.oecd.org/about/> (last visited Feb. 12, 2015).

individualized solutions for widespread problems are not workable solutions. All of those original solutions have led us to where we are today. We are ready for a new type of solution and the BEPS project is a promising one.

The future of the BEPS project remains uncertain as we wait and see how many countries are willing to adopt such suggestions and how effective the proposed solutions will be. However, we can be certain that the BEPS project is a step in the right direction and the OECD is the right organization for the task. Many countries have already demonstrated interest in adopting many of the suggestions. This is promising for the future of the BEPS project and the work the OECD has been able to accomplish. We will have to wait and see if this project truly changes global taxation, but, in the meantime, the experts working with the OECD continue to make strides in solving what is a very complex problem.