

Fairness: A Dire International Tax Standard with No Meaning?

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In their discussions on corporate income tax systems the International Organizations (IOs) OECD, UN, IMF and World Bank, Supranational Organizations (SOs), Non-Governmental Organizations (NGOs), associations of practitioners and Governments often refer to the concept of fairness without proper definition of what in the context of their arguments is fairness and how the fairness can be achieved. The consequence is that fairness in taxation is a blurred concept.

This article shows that fairness in taxation has an economical, juridical, philosophical and political perspective. Following the overview of these perspectives, this article calls for more research on global perceptions of fairness and for formulating an agenda for discussing this issue by IOs, SOs, NGOs and Governments.

I INTRODUCTION

In their Global Framework for Financing Development Post-2015 Program¹ the Heads of State and Government and High Representatives gathered in Addis Ababa from 13 to 16 July 2015 recognized ‘that significant additional domestic public resources, supplemented by international assistance as appropriate, will be critical to realizing sustainable development and achieve the SDGs’.² Furthermore, they committed to ‘enhance revenue administration through modernized, progressive tax systems, improved tax policy and more efficient tax collection’; and to ‘work on improving the fairness, transparency, efficiency and effectiveness of their tax systems, including by broadening the tax base and continuing efforts to integrate the informal sector into the formal economy in line with country circumstances’.

Like in many other publications of International Organizations (hereafter IOs) and Supranational Organizations (hereafter SOs), governments and Non-Governmental Organizations (hereafter NGOs) on, amongst others, tax avoidance one of the buzzwords used is fairness. Taxation should be fair. That taxation should be fair is evident, but less evident is what fairness refers to.

Is this fairness in an economical sense, implying horizontal and/or vertical equity? Is it fairness as perceived by philosophers or politicians? Or is it fairness in a juridical sense implying ‘justice’, ‘legal equality’/non-discrimination, ‘legitimacy’, ‘legal certainty’, ‘procedural fairness’?

Another question that is relevant for the interpretation of what is meant in the international tax discussion on fairness is whether what is referred to is fairness perceived from a domestic perspective (fairness within the state or (also) from an international perspective (fairness between states); from the perspective of the state (taxpayers should not evade or aggressively avoid taxation; taxpayers should pay their fair share; harmful tax competition is not fair; taxation rights should be allocated fairly between states, legitimacy); or from that of the taxpayer (horizontal and vertical equity, justice, legal certainty, legal procedural fairness, legitimacy)? Systematic research on what is meant by the term fair taxation by these organizations and from which perspective they use the term is lacking.

Another issue of which we have little knowledge is whether fairness is perceived in the same way by countries and taxpayers. We know the tax morale of individual taxpayers differs within countries and between countries from research of Alm and Torgler, and of Riahi-Belkaoui.

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¹ <http://www.un.org/esa/ffd/ffd3/wp-content/uploads/sites/2/2015/07/Addis-Ababa-Action-Agenda-Draft-Outcome-Documents-7-July-2015.pdf>

² At the United Nations Sustainable Development Summit on 25 Sept. 2015, world leaders adopted the 2030 Agenda for Sustainable Development, which includes a set of seventeen Sustainable Development Goals (SDGs) to end poverty, fight inequality and injustice, and tackle climate change by 2030. <http://www.undp.org/content/undp/en/home/sdgoverview/post-2015-development-agenda.html>.

Based on the World Surveys Dataset Alm and Torgler showed that at the time of their research the tax morale differs significantly and systematically across countries in Europe and the United States.³ Riahi-Belkaoui showed – based on data of thirty countries – including the developing countries Indonesia, Malaysia, the Philippines and Thailand – that tax compliance of individual taxpayers is positively related to the level of economic freedom, the level of importance of the equity market and the effectiveness of competition laws and high moral norms.⁴

As far as we are aware there is no evidence on whether the tax morale of companies differs between countries. Nor are we aware of any empirical research on the perception of other aspects of tax fairness from the perspective of the taxpayer. We also have little knowledge on whether developing countries have the same ideas about fairness as developed countries. So far as we know there is no systematic and analytic research available about this topic either, nor did IOs address this.⁵

Having answers to the questions raised above is of importance for amongst others creating global legitimacy for the IOs initiatives to counteract tax avoidance and evasion. In this article we call for more research on global perceptions of tax fairness and for formulating an agenda for discussing this issue at an international level. As a starting point in this article we address the concept of fairness.

We first describe each of the approaches to fairness (economical, juridical, philosophical and political approach) (section 2). We do not aim to provide a concept of fairness or justice or a philosophical discussion of fairness, but only to describe the main approaches to fairness by tax scholars and institutions.⁶ Next we give an overview of how NGOs (Cristian Aid, Tax Justice Network

and Oxfam, FairTaxMark), business associations (VBDO), associations of tax practitioners (AOTCA-CFE-STEP) and IOs (OECD, UN, IMF and World Bank), as well as the EU (hereafter SOs) and organizations of tax administrations (ATAF) addressed fairness in their recent reports focussing on aggressive tax planning and Base Erosion Profit Shifting (BEPS) (section 3). Finally, we provide our conclusions and recommendations (section 4). We limit the discussion to corporate income tax issues.⁷

2 APPROACHES TO FAIRNESS

Below we give a non-exhaustive overview of approaches to fairness found in academic literature.

2.1 Economical Approach to Fairness

In his famous ‘Wealth of Nations’ Adam Smith formulated the following four Maxims (also referred to as Canons) of Taxation that are necessary for a fair tax system:⁸

(1) Maxim of Equality:

‘The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expence of government to the individuals of a great nation is like the expence of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation.’⁹

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³ James Alm & Benno Torgler, *Culture Differences and Tax Morale in the United States and in Europe*, 27 J. Econ. Psychol. 224–246 (2006), <http://www.sciencedirect.com/science/article/pii/S0167487005001054>

⁴ A. Riahi-Belkaoui, *Relationship Between Tax Compliance Internationally and Selected Determinants of Tax Morale*, 13 J. Int'l Accounting, Auditing & Tax'n 135–143 (2004).

⁵ For a discussion of the use of fairness by IOs, NGOs, SOs and governments in respect of developing countries. See I. Burgers & I. J. Mosquera Valderrama, *Corporate Taxation and BEPS: A Fair Slice for Developing Countries?* Erasmus L. Rev., Special Edition on the Taxation of Multinationals in a Post-BEPS Age, Issue 08 2017, http://www.erasmuslawreview.nl/tijdschrift/ELR/2017/08/ELR_2017_10_01_004.

⁶ The global approach to fairness without defining fairness has been also discussed by tax scholars addressing issues such as exchange of information, country by country reporting, stateless income and its remedies, the taxation of multinational enterprises, among others. See T. Pogge & K. Mehta, *Global Tax Fairness* (Oxford University Press 2016).

⁷ For arguments why fairness concerns in developing countries may be different than in developed countries in respect of individual income taxes, wealth taxes and consumption taxes see the 2003 World Bank Publication Introduction to Tax Policy Design and Development written by R. M. Bird and E. M. Zolt Apr. 2003. The main arguments of these authors being that:

- developing countries are less capable of using the tax system to redistribute income as income and wealth taxes play a relatively small role in the tax structure of developing countries and individual income taxes are merely a wage withholding tax;
- care must be taken not to complicate individual income taxes;
- it is likely that the consequences of using individual income taxes for influencing economic behaviour are different in developing countries than in developed countries (work vs. leisure, formal versus grey/black economy, saving at home versus portfolio investment outside the country);
- personal income taxes in developing countries should have a ‘threshold’ well above average income levels;
- the most effective way to reduce inequality in many countries seems likely to be through spending programs targeted at the poor;

most likely are still valid.

⁸ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, <http://www.econlib.org/library/Smith/smWN21.html>. See also Tushar Seth, *Canons of Taxation Enunciated By Adam Smith – Discussed!*, <http://www.economicdiscussion.net/taxes/canons-of-taxation-enunciated-by-adam-smith-discussed/1948>.

⁹ Expense was spelled expence at the time.

(2) **Maxim of Certainty:**

'The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person.'

(3) **Maxim of Convenience:**

'Every tax ought to be levied at the time or in the manner which it is most likely to be convenient to pay it.'

(4) **Maxim of Economy:**

Every tax ought to be so contrived as both to take out and keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the State.' Smith refers to the number of tax officers, obstruction of the industry of people and discouragement from applying to certain branches of business, the penalties to be paid by tax evaders which may ruin them and thereby put an end to the benefit which the community might have received from the employment of their capitals, the great temptation to smuggling of an injudicious tax ('The law, contrary to all the ordinary principles of justice, first creates the temptation, and then punishes those who yield to it') and too much unnecessary trouble, vexation and oppression due to frequent visits and odious examination of tax-gatherers.

Other economists added more Maxims – generally referred to as principles – including productivity, elasticity, simplicity, variety, flexibility.¹⁰

Public finance scholars traditionally have defined fairness in terms of horizontal and vertical equity (the quality of being fair and impartial¹¹). Musgrave and Kaplow defined horizontal equity as the requirement

that equals be treated alike and both defined vertical equity as requiring an 'appropriate' pattern of differentiation among unequals.¹² Both concepts have been challenged, amongst others as:

- horizontal equity requirements can only be satisfied in respect of income taxes if individuals have identical tastes and a single type of ability or income and if it can be determined which differences are important and why these differences justify different tax treatment;
- it is not clear what constitutes 'appropriate' differences in treatment (vertical equity) and;¹³
- both horizontal and vertical equity do not have any independent normative content. As Mc Daniel and Repetti concluded 'content must be supplied by reference to economic assumptions and a theory of justice'.¹⁴

Scholars also addressed fairness from the perspective of fairness between states. This approach to fairness calls for fair division of taxation rights between states and no harmful/unfair tax competition. If these conditions are not fulfilled the Maxim of Equality is not met, as the taxpayers do not pay to the respective states an amount of tax that reflects the amount of revenue they enjoy under the protection of these states.¹⁵

2.2 Philosophical Approach to Fairness

Greek philosophers such as Aristotle and Plato initially developed the concept of fairness as justice.¹⁶ In a nutshell,¹⁷ justice for Aristotle is to give people what

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¹⁰ Seth, *supra* n. 8.

¹¹ https://www.google.nl/?gws_rd=ssl#q=equity+definition.

¹² See R. A. Musgrave, *The Theory of Public Finance* 160 (1959); Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, Discussion Paper No. 8. 5/85, Harvard Law School, 2 Nat'l Tax J. 139 (1989), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kaplow_8.pdf; quoted by P. R. McDaniel & J. Repetti, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange*, 1(10) Fla. Tax Rev. (1993), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1706&context=lsfp>.

¹³ R. Bird & E. Zolt, *Introduction to Tax Policy Design and Development, Prepared for a Course on Practical Issues of Tax Policy in Developing Countries*, World Bank (28 Apr.–1 May 2003), <http://www.gsdr.org/document-library/introduction-to-tax-policy-design-and-development/>, s. 3.

¹⁴ McDaniel & Repetti, *supra* n. 12, at 621.

¹⁵ E.g. A. H. Rosenzweig, *Defining a Country's 'Fair Share' of Taxes*, 42 Fla. St. U. L. Rev. 373 (2015), who argues that the modern debate has inappropriately focused on how to capture tax base or prevent corporations from shifting income across jurisdictions rather than how to build a new international tax regime for the modern international order. Rosenzweig proposes a hybrid regime in which each country is entitled to tax a portion of worldwide tax base based on that country's amenities and then the relevant countries will divide the remaining common tax base among themselves so as to maximize the return to worldwide public goods. M. Devereux & J. Vella, *Are We Heading Towards a Corporate Tax System Fit for the 21st Century?*, Fiscal Studies The Journal of Applied Public Economics, Volume 35, Issue 4 (2014) 449–475, <http://onlinelibrary.wiley.com/doi/10.1111/j.1475-5890.2014.12038.x/abstract>. For a discussion on harmful/fair tax competition see e.g. G. R. Zodrow, *Tax Competition and Tax Coordination in the European Union*, 10 Int'l Tax & Pub. Fin. (2003) 651–671; P. Lampeave, *Fiscal Competitiveness Versus Harmful Tax Competition in the European Union*, 65(6) Bull. Int'l Tax'n (2011).

¹⁶ Several contemporary authors have elaborated in the concept of Justice. This article aims to address only the philosophers' perspective mainly taking into account the origins of justice as explained by Plato and Aristotle, and the development of the concept of justice made by Hart and Rawls. For the concept of justice, see *Justice* (A. I. Ryan ed., Oxford: Oxford University Press 1993); *Justice: A Reader* (M. J. Sandel ed., New York: Oxford University Press 2007); A. Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press 2009); *What Is Justice?* (R. C. Solomon & M. C. Murphy eds, 2d ed., New York: Oxford University Press 2000). See the reference to these and other books in the Internet Encyclopaedia of Philosophy: W. Pomerleau, *Western Theories of Justice*, <http://www.iep.utm.edu/justwest/> (accessed Oct. 2017).

¹⁷ In a nutshell as the analysis of the concept of justice by Aristotle and Plato is very extensive. Therefore, the main elements for the argument of justice are taking by these authors for this article. See for the analysis of the concept of distributive justice. S. Fleischacker, *A Short History of Distributive Justice* 204 (Harvard University Press Sept. 2005). See also E. Barker, *The Political Thought of Plato and Aristotle* 592 (Dover Publications Inc. May 2009) also A. Hamed, *The Concept of Justice in Greek Philosophy (Plato and Aristotle)*, 5(27) Mediterranean J. Soc. Sci. (Dec. 2014).

they deserve.¹⁸ For Plato, justice is doing one's own taking into account that each person has his/her own role in the society.¹⁹ For Aristotle²⁰ the concept of justice takes into account both distributive justice and corrective justice.²¹

In the seventeenth and eighteenth century theories about fair taxation were developed by social contract scholars such as Thomas Hobbes, John Locke and Thomas Paine arguing that taxation is a contract between the state and the individual in which taxation is perceived as a voluntary alienation of individual rights as payment for state protection of property. On the contrary Jeremy Bentham, the founder of utilitarianism, held that men had always lived in society, so there could be no such thing as a social contract. Rights are meaningful only if law enforces them.²²

Philosophers such as Hart and Rawls also addressed the concept of fairness. For these philosophers, it implies a political dimension that comprises for all citizens an obligation to contribute to society. For Hart, in a political community, the benefits are for the whole society, and therefore, all members of society should contribute since a free ride on the sacrifices of others, is unfair. According to Hart, 'when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to those restrictions when required have a right to a similar submission from those who have benefited by their submission'.²³

According to Rawls, justice provides 'a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation'.²⁴ Rawls is a believer in distributive justice. For him the demands of justice are met by a society that provides maximum liberty to everyone and in which 'the advantages of the more fortunate promote the well-being of the least fortunate'.²⁵ In his view the best tax system may be a system with a flat tax rate on consumption.

2.3 Juridical Approach to Fairness

2.3.1 Fairness as Justice

In law justice is reflected in the legal principles of equality and certainty, reflecting legal values, and in the principle of legitimacy, reflecting a necessary condition for acceptance of the law. Fairness has been also reflected in relation to due process including the protection of taxpayers' rights.²⁶

Tax scholars are using the concept of fairness as justice to restrict the behaviour of the taxpayer by claiming the moral duty²⁷ of the taxpayer to pay their fair share. Some tax scholars have addressed the concept of fairness in respect of the role of the citizen (taxpayer) in a political community. For instance, Hemels argues that the principle of fairness imposes an obligation on taxpayers towards each other.²⁸ In this approach the

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¹⁸ Aristotle, *Book V. Nicomachean Ethics* 67–86 (Terence Irwin trans., 2d ed., (called 'Nicomachean') Indianapolis: Hackett 1999).

¹⁹ Plato, Books IV and V. *The Republic of Plato* (Allan Bloom trans., 2d ed., HarperCollins Publishers 1968).

²⁰ Several books, articles and internet encyclopaedias have addressed Aristotle and its concept of justice. For illustration purposes, see for a literature overview of the philosophical approach to Aristotle, the Stanford Encyclopedia of Philosophy at <http://plato.stanford.edu/entries/aristotle/> For an ethical perspective, see Thomas Brickhouse, *Aristotle on Corrective Justice*, 18(3) J. Ethics 187–205 (Sept. 2014). For a political science approach see R. G. Mulgan, *Aristotle's Political Theory: An Introduction for Students of Political Theory* (Oxford: Clarendon Press 1977).

²¹ In general, distributive justice gives to everyone in according to the merits (rewards) of the person whereas corrective justice ensures equality by taking away from the advantage of one and adding to the disadvantage of other. Jacob rightly explains that 'being just as distributive justice emerges as a commitment to the equal treatment of all citizens, but to an equality tempered by always contentious considerations of merited reward. Being Just as corrective justice is a commitment to protecting and repairing the sphere of each person's dignity and opportunity from damaging and sometimes malicious interactions'. B. E. Jacob, *Aristotle and the Graces*, Hofstra Univ. Legal Studies Research Paper No. 04-14 (Oct. 2004). Available at SSRN: <http://ssrn.com/abstract=611105> or <http://dx.doi.org/10.2139/ssrn.611105>.

²² For a more elaborate overview of the work of seventeenth and eighteenth century philosophers on principles of taxation see Jane Frecknell-Hughes, *Philosophy and Principles of Taxation*, in *The Theory, Principles and Management of Taxation, an Introduction* Ch. 3 (Routledge 2014).

²³ H. L. A. Hart, *Are There Any Natural Rights?*, 64(2) *Philosophical Rev.* 185 (1955).

²⁴ *A Theory of Justice* 2 (Oxford: Oxford University Press 1971); See also J. Rawls, *Justice as Fairness*, 67(2) *Philosophical Rev.* 178 (1958); J. Rawls, *Justice as Fairness: Political Not Metaphysical*, 14(3) *Philosophy & Pub. Aff.* 223–251 (1985).

²⁵ Referred to by McDaniel & Repetti, *supra* n. 12, at 610.

²⁶ Stewart and Bentley have addressed the approach to fairness as due process. Stewart argues that 'as transnational information exchange becomes more widespread and involves more developing countries as well as multilateral exchange, or even the establishment, in time of central repositories of information, legitimacy in the form of due process will become of increasing concern'. M. Stewart, *Transnational Tax Information Exchange Networks: Steps Towards a Globalized, Legitimate Tax Administration*, 4(2), *World Tax J.* 152, 176 (June 2012). Bentley has stated in respect of the rise of soft law that revenue administrators 'have to engage with and understand taxpayers as much as they can. To do this effectively they have to protect taxpayers and set up the frameworks that provide effective rule of law both under the law and through the daily operation and administration of the law'. D. Bentley, *The Rise of 'Soft Law' in Tax Administration- Good News for Taxpayers?*, 14 *Asia-Pac. Tax Bull.* 32, IBFD (Jan./Feb. 2008).

²⁷ See on the argument of taxpayer morality. A. Christians, *Avoidance, Evasion and Taxpayer Morality and Gribnan Not Argued from But Prayed To. Who's Afraid of Legal Principles?* 12(1) *E-journal Tax Res.* 185–217 (2014), SSRN: <http://ssrn.com/abstract=2461247>.

²⁸ Hemels takes into account the approach of Rawls addressing 'the observation of John Rawls that the question of fairness arises when free persons, who have no authority over one another (as is the case with tax payers vis a vis each other), are engaging in a joint activity (forming a state together) and amongst themselves settling or acknowledging the rules which define it (such as tax rules) and which determine the respective shares in its benefits and burdens (if I pay my taxes, you have to do so as well)'. S. J. C. Hemels, *Chapter 18: Fairness: A Legal Principle in EU Tax Law?*, in *Principles of Law: Function, Status and Impact in EU Tax Law* (C. Brokelind ed., IBFD 2014), Online Books IBFD. See also S. J. C. Hemels, *Fairness and Taxation in a Globalized World* (26 Feb. 2015). Available at SSRN: <http://ssrn.com/abstract=2570750>.

concept of fairness aims to protect compliant taxpayers from non-compliant taxpayers. Gribnau has further elaborated the concept of fairness stating that the discussion of NGO's has also brought a new dimension to the concept of fairness mainly calling for taxpayers to pay fair share taxes not only as required by law, but also as expected from society.²⁹ This approach – that reflects John Locke's social contract theory – aims to ensure that individuals and multinationals do not engage in (aggressive) tax practices to take advantage of the mismatches between tax systems (e.g. claim of deductions in two countries, or double non-taxation). In this context, Happé has also argued that fairness implies that the taxpayer must refrain from making use of tax loopholes. For Happé, the role of the taxpayer therefore is relevant to address the concept of fairness, and therefore, the taxpayer should be fair to each other and not engage in aggressive tax planning.³⁰

The approach of these scholars results in fairness between taxpayers who should abstain from engaging in aggressive tax planning. However, one of the drawbacks is that the concept of fairness is used without having a proper definition of what is fairness and how fairness can be achieved? The consequence is that fairness in taxation is a blurred concept that may – also from a juridical perspective have different meanings.

Below we distinguish fairness as legal equality, fairness as legal certainty, fairness as legitimacy, and procedural fairness.

2.3.2 Fairness as 'Legal Equality'

Legal equality implies legislation that is fair and a tax administration that is fair.

Article 7 of the Universal Declaration of Human Rights (UDHR) states: 'All are equal before the law and are entitled without any discrimination to equal protection of the law.' This article reflects one of the main fundamental legal principles, to wit equality and can be found in similar words also in other laws. As Gribnau points out these fundamental legal principles, reflecting legal values, function as a check on legislative power protecting citizens against arbitrary interferences with

their liberty. The principles restrict the legislative power to tax, by providing courts the possibility to protect amongst others taxpayers.³¹

Not only should the law not discriminate, legal equality also implies a well-functioning tax administration that treats all taxpayers equal and is not corrupt.³²

2.3.3 Fairness as 'Legal Certainty'

The other main fundamental legal principle reflecting a legal value is legal certainty. Legal certainty has several aspects. Gribnau distinguishes the requirements of stability, promulgation, non-retroactivity and clarity of laws.³³

2.3.4 Fairness as 'Legitimacy'

Without legitimacy members of society do not accept rules.³⁴ Legitimacy has different forms. Max Weber made the distinction between:

- Traditional legitimacy, deriving from social custom;
- Charismatic legitimacy, deriving from the ideas and personal charisma of the leader; and
- Rational-legal legitimacy, deriving from a system of institutional procedure.³⁵

Scharpf distinguishes between input and output legitimacy. Input legitimacy implies that all people affected by the decision should be brought together in deliberations searching for win-win solutions on which all can agree. Output legitimacy results in the capacity 'to solve problems that require collective solutions because they could not be solved through individual action, through market exchanges, or through voluntary cooperation in civil society'.³⁶

Following the distinction of Scharpf, the approach of fairness as legitimacy should be two-fold. The first requirement for fairness is the participation and representation of all parties in the decision making process (input legitimacy). The second one is that the outcome is fair if all parties have obtained a benefit and it provides solutions to citizens' needs (output legitimacy).³⁷

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²⁹ This approach is embedded in the concept of Corporate Social Responsibility. See J. L. M. Gribnau & A. G. Jallai, *Good Tax Governance and Transparency. A Matter of Ethical Motivation*, Tilburg Law School Legal Studies Research Paper Series. No. 06/2016.

³⁰ R. Happé, *Fiscale ethiek voor multinationals*, 144(7108) *Weekblad fiscaal recht*. 944 and 953 (2015). Deventer (Kluwer). See also R. Happé, *Belastingethiek: een kwestie van fair share*, in *Belastingen en ethiek. Geschriften van de Vereniging voor Belastingwetenschap* 3–69, 52–53, no. 243, (Deventer: Kluwer 2011).

³¹ H. Gribnau, *Equality, Legal Certainty and Tax Legislation in the Netherlands – Fundamental Legal Principles as Checks on Legislative Power: A Case Study*, 9(2) *Utrecht L. Rev.* 52–74 (Mar. 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244793.

³² M. H. J. Alink & V. van Kommer, *Chapter 1: Taxation in Handbook on Tax Administration* (2d Revised ed., IBFD 2016), Online Books IBFD.

³³ Gribnau, *supra* n. 31, at 53.

³⁴ A. Van Staden, *The Right to Govern: The Democratic Legitimacy of the European Union*, Study 20, Clingendael Institute 20 (2003).

³⁵ See Dana Williams, Max Weber, Traditional, Legal-Rational, and Charismatic Authority, <http://danawilliams2.tripod.com/authority.html>.

³⁶ F. Scharpf, *Governing in Europe: Effective and Democratic* 7 and 11 (Oxford University Press 1999).

³⁷ This approach to legitimacy has been developed in respect of BEPS and the Multilateral Instruments to Exchange Information. See ss 5 and 6. I. J. Mosquera Valderrama, *Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism*, 7(3) *World Tax J.* 3 (2015), *Journals IBFD* at 358–382.

2.3.5 Fairness as 'Having Procedural Right'

A tax system is not fair if the taxpayer does not have any procedural rights such as the right to appeal and dispute resolution, to confidentiality and privacy, representation, enforcement actions such as audits, collections, reassessment, penalties and prosecutions that are proportionate to the circumstances and the right to be presumed honest in the absence of any evidence to the contrary.³⁸

Favouring the interpretation of law according to its purpose and the intention for which it was implemented Richard Murphy formulated a Code of Conduct for Taxation for which he developed the following principles of taxation based on the UDHR (articles between brackets):

1. A State has a duty to protect its citizens (3)
2. A State has a duty to provide public goods for its citizens; (22, 23, 25, 26, 27);
3. A State may not discriminate in the provision of protection or provision for its citizens; (1, 2, 3,7,8, 10, 21)
4. The extent of the provision to be supplied by a State shall (subject to achievement of those rights inherent in the Universal Declaration) be determined by democratically elected governments; (21)
5. The right of a State to determine its will shall not be constrained by the actions of another State; (28, 29)
6. A State has the right to levy taxation; (implicit in the obligations imposed in Articles 3, 22, 25, 26, 27 and 28 which could not be achieved if this were not true)
7. Any charge to tax must respect the right to hold private property; (17)
8. The charge to tax must not be arbitrary; (17)
9. Taxation must be imposed by law; (12)
10. All citizens of a State shall be subject to the same taxation laws; (1, 2, 7)
11. Each citizen has the duty to pay the tax due by them; (the corollary of 21 and implicit in 29)
12. The citizen shall have the right to appeal against any charge to tax; (8, 10)
13. The State may only oblige a citizen to disclose that data required by law when requesting information for the purposes of assessing their liability to tax; (12)

14. A citizen shall have the right to leave the State and its protection and shall as such deny themselves the right to its provision but be relieved of the obligation to contribute to its upkeep. (13, 28, 29).³⁹

The Code is divided into six sections (Government, Accounting, Planning, Reporting, Management, Accountability), each of which contains three statements of principle.⁴⁰

2.4 Political Approach to Fairness

Fairness can also be addressed from a political perspective. For example, in his 2003 treatise 'The principle of Fairness and Political Obligation' George Klosko argues individuals who benefit from the cooperative efforts of others have obligations to cooperate as well and therefore citizens should obey the law because of moral obligations. Klosko specifies a set of conditions for grounding existing political obligations on the principle of fairness.⁴¹

David R. Mapel explains the fairness theory of political obligation holds that individuals who receive public goods produced by the cooperative efforts of their fellow citizens have a prima facie obligation to do their fair share in return by obeying the law. Mapel argues that fairness theory does not automatically lead to the conclusion that citizens who receive benefits across borders acquire political obligations to obey foreign states, as political obligations still largely coincide with the territorial boundaries of states.⁴²

Nagel discusses the problem of how global justice can be achieved. He argues 'global justice requires global sovereignty' and that 'the most likely path toward some version of global justice is through the creation of potentially unjust and illegitimate global structures of power that are tolerable to the interests of the most powerful current nation-states'. These effective but illegitimate institutions, to which the standards of justice apply, will first increase injustice.⁴³

Dagan builds on the concept of global justice of Nagel⁴⁴ addressing the transformed role of the state.

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³⁸ The practical protection of taxpayers' rights has been addressed in the 2014 IFA General Report. In the report, the authors identified the best practices and minimum standards for the protection of taxpayers' rights by examining the practical experience of each jurisdiction (branch report). IFA Report. P. Pistone & P. Baker, General Report. The Practical Protection of Taxpayers' Fundamental Rights, International Fiscal Association (IFA), Cahiers de droit fiscal international, vol. 100B (Amsterdam, the Netherlands: International Bureau of Fiscal Documentation 2015);

³⁹ <http://www.taxresearch.org.uk/Documents/TaxCodeofConductFinal.pdf>.

⁴⁰ *Ibid.*

⁴¹ G. Klosko, *The Principle of Fairness and Political Obligation* 34 a.f (Rowman and Littlefield Publishers 2003).

⁴² D. R. Mapel, *Fairness, Political Obligation and Benefits Across Border*, 37(4) *Polity* 426 a.f (Oct. 2005).

⁴³ T. Nagel, *The Problem of Global Justice*, 33(2) *Philosophy & Pub. Aff.* 122, 146, 147 (2005).

⁴⁴ *Ibid.*, at 113, 120.

For Dagan, the questions that should be asked in international tax and the achievement of global justice are:

if states' coercive power is eroding due to competition and if they now find it difficult to treat their citizens justly, what, if anything, can be done to promote justice? Can we still expect states to uphold principles of justice even if they can no longer do so unilaterally? Can we expect them to cooperate in order to ensure justice? And if they have to rely on the cooperation of other states in order to sustain their sovereign power, does this give rise to a new level of justice duties, across state boundaries?⁴⁵

In this context, Dagan addresses the shortcoming of the current BEPS Project in the promotion of global justice, which 'have not centred on considerations of justice but, rather, on ways to improve states' ability to collect taxes in light of increasing tax competition', reason why a new way to promote cooperation with justice for all states should be promoted.⁴⁶

3 NGOS, IOS, SOS AND GOVERNMENTS APPROACHES TO FAIRNESS IN THE CONTEXT OF THEIR FIGHT AGAINST AGGRESSIVE TAX PLANNING

This section addresses the approach to fairness of the NGOs, IOs OECD, IMF, the World Bank, and the UN and SOs, the EU and the African Tax Administration Forum (ATAF). These organizations have focused mainly on the economic approach to fairness including tax revenue concerns, fair tax competition of multinationals vis-à-vis local businesses. To some extent NGOs, the OECD, the IMF and the World Bank also addressed fairness as justice including fair taxpayer behaviour, fair tax system and fair tax administration. The objectives of these organizations are to ensure that companies pay their fair share and that countries have fair tax systems free of corruption. However, not so

much attention has been given by these organizations to fairness as having procedural rights for the taxpayer nor to fairness as legitimacy taking into account the participation and representation of developing countries in the agenda making and the decision making process and in order to ensure that the outcome benefits all parties including also developing countries. The following paragraphs will provide the approach to fairness by NGOs, IOS and SOs.

3.1 NGOs, Business Associations, and Associations of Practitioners: Philosophical Approach to Fairness (Fair Tax Is a Moral Problem), Fairness as Justice (Fair Taxpayer Behaviour, Fair Tax Design, and Fair Tax Administrations) and Economical Fairness (Pay Fair Share in Countries Where the Economic Activities Occur)

At international level, the discussion about aggressive tax planning has been initiated by NGOs⁴⁷ such as Christian Aid,⁴⁸ Tax Justice Network⁴⁹ and Oxfam.⁵⁰ In short, the approaches of these NGOs is to request the payment of a fair share of taxes by multinationals in the jurisdiction where the economic activities and investment are actually located rather than using aggressive tax planning strategies to shift profits from one jurisdiction to another. Richard Murphy's FairTaxMark⁵¹ initiative added to this that taxpayers should be transparent about their tax affairs. Considering the aim of the NGOs their approach to fairness has a philosophical background: fair tax is a moral problem. By placing emphasis on the state to which the taxes should be paid their approach to fairness also reflects the economic and political perspective. Associations of tax practitioners also contributed to the discussion on what is a fair tax and on fairness to achieve justice. An example is the Model Taxpayer Charter developed by Asia Oceania Tax Consultants' Association, *Confédération Fiscale Européenne* and the

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⁴⁵ T. Dagan, *International Tax and Global Justice*, 18(1) *Theoretical Inquiries L.* 24 (2017).

⁴⁶ *Ibid.*

⁴⁷ Other NGOs that are also active in this discussion are for instance in the Netherlands the Centre for Research on Multinational Corporations (SOMO). SOMO in the statement of Europe for a fair tax system of 1 May 2014 advocates for 'an alternative tax system that ensures that a company pays its fair share of tax in every country based on its economic presence. A company must be seen as a single entity so that shifting profits within a multinational becomes impossible'. See <https://www.somo.nl/europe-for-a-fair-tax-system/>.

⁴⁸ According to the website of Christian Aid, Christian Aid 'is a Christian organisation that insists the world can and must be swiftly changed to one where everyone can live a full life, free from poverty. We work globally for profound change that eradicates the causes of poverty, striving to achieve equality, dignity and freedom for all, regardless of faith or nationality. We are part of a wider movement for social justice'. http://www.christianaid.org.uk/aboutus/who/aims/our_aims.aspx.

⁴⁹ The mission of Tax Justice Network is 'to 'change the weather' on a wide range of issues related to tax, tax havens and financial globalisation'. <http://www.taxjustice.net/about/who-we-are/goals/>.

⁵⁰ The mission of Oxfam is 'to help create lasting solutions to the injustice of poverty. We are part of a global movement for change, one that empowers people to create a future that is secure, just, and free from poverty' <https://www.oxfam.org.au/>.

⁵¹ <http://www.fairtaxmark.net/>.

Society of Trust and Estate Practitioners (AOTCA-CFE-STEP). A similar approach has been adopted in the Netherlands by the *Vereniging van Beleggers voor Duurzame Ontwikkeling* (VBDO)⁵² and *Oikos*,⁵³ The approach AOTCA-CFE-STEP and VBDO-OIKOS to fairness is from the perspective of justice to the taxpayer.

3.1.1 Christian Aid

In 2013, Christian Aid stated:

the current tax system raises serious issues of fairness and compliance. Aggressive tax planning by unscrupulous multinationals hinders development and increases inequality. So we are calling on the OECD, G20 and UN Tax Committee to work together and find an alternative that reflects how multinationals actually operate today – and to make them pay their fair share of tax in all countries where they operate.⁵⁴

3.1.2 Tax Justice Network

In the same direction, the Tax Justice Network stated in 2014:

in a highly globalised world dominated by large multinational corporations, it is essential to ensure that taxes are paid where the true economic activity occurs. Under current global rules, this is often not the case, and companies are able to shift profits around the globe to places where they will be taxed less. This has a particularly devastating impact on developing countries.

Therefore, a campaign was initiated to make sure that multinationals pay their fair share that also aimed to take forward the discussion of 'how tax justice can support social justice for all'.⁵⁵

3.1.3 FairTaxMark

The founder of Tax Justice, Richard Murphy took the initiative for a FairTaxMark awarded to UK companies as of 1 January 2016. According to the FairTaxMark website 'fair tax' means that a business seeks to pay the right amount of tax (but no more) in the right place at the right time. Fair tax is defined as:

For businesses that trade solely within the UK, this means putting their accounts on public record to demonstrate their commitment to the transparency that is at the heart of fair tax. It also means making a public declaration of their commitment to fair taxation that says they will not use tax havens and artificial transactions to avoid tax. Finally it means explaining the tax that they pay in their accounts and having a tax rate that is reasonably close to the UK headline rate that applies to their company, or which is explained when it is not. For multinational corporations, fair tax means everything that it does for a nationally based company plus making tax declarations in the place where the real economic benefit of its trade occurs, at the time that it occurs, in accordance with the spirit of the law of the jurisdiction in question, and being able to demonstrate that fact in its accounts.

In other words, 'if a profit is really made in the UK it should be taxed in the UK at the time it was earned and not be shifted to another country to be taxed there, or maybe not be taxed at all. If tax is paid in that way then we think that the company is being fair'.⁵⁶

3.1.4 Oxfam

Oxfam in the program Make Tax Fair claims that 'multinational tax dodging is starving developing countries of much needed funds for development. Billions of dollars are hidden in tax havens around the world, fueling inequality and holding back the fight against poverty. Government action to date falls far short of what is needed to tackle this global problem'.⁵⁷

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⁵² The Dutch Association of Investors for Sustainable Development.

⁵³ An NGO encouraging politicians and other individuals to act in order to achieve sustainability.

⁵⁴ It's time to make multinationals pay their fair share of tax, campaigners urge. News Christian Aid 27 Mar. 2013. Available at <http://www.christianaid.org.uk/pressoffice/pressreleases/march-2013/its-time-to-make-multinationals-pay-their-fair-share-of-tax-campaigners-urge.aspx>.

⁵⁵ This approach started in 2014. 'To combat the problem, we need to develop a new set of rules and to ensure that all countries voices are heard during the process. The Global Alliance believes that tax justice has to be a central part of any inequality-focused agenda. In 2015, we will be working on this issue via our global campaign to make multinationals pay their fair share. We urge all others working on inequality to sign up, and help us to take forward the discussion of how tax justice can support social justice for all.' 17 Oct. 2014 <http://www.taxjustice.net/2014/10/17/fair-taxes-key-fair-share/>
See also Tax Justice Network, *The Greatest Invention: Tax and the Campaign for a Just Society* (Sept. 2015).

⁵⁶ <http://www.fairtaxmark.net/what-is-it/>.

⁵⁷ See news Oxfam news reports on Make Tax Fair and 127 billion reasons to close tax loopholes and end tax havens available at https://www.hiddenbillions.org/?utm_source=HiddenBillions&utm_medium=Homepage and also <https://www.oxfam.org.au/2016/06/172-billion-reasons-to-close-tax-loopholes-and-end-tax-havens/>.

3.1.5 VBDO and Oikos

In 2014 the VBDO⁵⁸ and Oikos⁵⁹ developed Good Tax Governance Principles in order to bring back trust in companies accused of immoral tax behaviour by promoting good tax governance as part of corporate Social Responsibility (CSR).⁶⁰ In their view 'a purely legal technical approach on the issue will not protect companies from charges of irresponsibilities and associated reputational damage and eroding brand value'. 'Public frustration over the fair share has showcased tax as a moral problem.' And 'the number of stakeholders is growing rapidly'.⁶¹ In 2015 VBDO developed a Tax Transparency Benchmark in order to examine to what extent Dutch listed companies are transparent about their responsible tax strategy and tax payments, being one of the good tax governance principles.

3.1.6 AOTCA-CFE-STEP

On 13 November 2015 AOTCA, CFE and STEP presented their Model Taxpayer Charter aiming at achieving greater fairness in taxation.⁶² The three organizations are concerned with the health and well-being of the worlds' tax systems. The 'good partner theory', implying that a partnership exists between tax administrations and taxpayer requires a fair tax system. AOTCA, CFE and STEP recognize that fairness has many different aspects. In the Introduction to the Model they state: 'Fairness considerations manifest in the day-to-day operations of the tax system, the design and implementation of tax legislation, the rights of appeal, and many other aspects.'

The focus of the three organizations is not on the economical or political aspects of taxation, such as what the appropriate tax rate should be, how the tax burden should be distributed across society, or how money entrusted to governments should be spent, but on taxpayers' rights and obligations. In his foreword STEP executive officer David Harvey writes: 'A fair tax system must include effective measures to counteract abuse, however, there must also be a clear balance between taxpayer obligations and taxpayer rights'. AOTCA, CFE and STEP developed ten fundamental taxpayer rights' principles and ten taxpayer obligations,

which in their view should be laid down in legislation. 'Recognising and enshrining comprehensive Taxpayer Rights in legislation will contribute substantially to both the perception and reality of fairness and integrity in the tax system. Placing statements of Taxpayer Responsibilities in an over arching document reinforces the proposition that while holding rights, taxpayers must also shoulder responsibilities and do so in good faith.'⁶³

The three organizations developed the following rights and obligations. Taxpayers have the right to integrity and equality, certainty, efficiency and effectiveness, appeal and the right to dispute resolution, appropriate assistance, confidentiality and privacy, pay the correct amount of tax based on tax laws, representation, proportionality, and to be presumed honest in the absence of any evidence to the contrary. The obligations are to be truthful, provide information, be cooperative, make payment, comply with the law, maintain records, take due care, retain responsibility for tax advisers, show courtesy and comply cross border. The definitions of integrity and equality and efficiency and effectiveness contain the word 'fair'. 'The tax system shall be designed and administered fairly, honestly and with integrity, according to the law, without bias or preference' and 'The tax system will be designed and administered fairly and cost effectively taking into account the attainment of its purpose.' There is no legitimacy for the good partner theory if taxpayers do not have the impression the tax system is fair, not only in economic terms, but also from the perspective of being treated fair in terms of justice.

3.2 IOs and SOs: Economical Fairness (Pay Fair Share), Fairness as Justice (Taxpayer Behaviour) and Political Fairness

The concept of fairness has been addressed by IOs such as the OECD, IMF, the World Bank, and the UN and SOs such as the EU, and by organizations of Tax Administrators such as the ATAF, which latter organizations are one of the three pillars of the OECD in translating the BEPS Action Plan into practical support for lower capacity developing countries.⁶⁴ These organizations approach the concept of fairness mainly from an economic perspective in that it requires the payment

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⁵⁸ The Dutch Association of Investors for Sustainable Development (VBDO) works to create a sustainable capital market, a market that considers not only financial criteria but also non-financial, social and environmental criteria. <http://www.vbdo.nl/en/>.

⁵⁹ A foundation stimulating processes of change in Dutch society.

⁶⁰ (1) Define and communicate a clear tax strategy. (2) Tax must be aligned with the business and is not a profit centre by itself; (3) Respect the spirit of the law. Tax compliant behaviour is the norm; (4) Know and manage taxes risks; (5) Monitor and test tax controls; (6) Provide tax assurance.

⁶¹ VBDO/Oikos, Good Tax Governance in Transition, Transcending the Tax Debate to CSR, at 13, http://www.vbdo.nl/files/media/VBDO_A5_Good_Tax_Governance_D.pdf.

⁶² <http://www.taxpayercharter.com/index.asp>.

⁶³ <http://www.taxpayercharter.com/page.asp?id=10>.

⁶⁴ OECD (2015), *The BEPS Project and Developing Countries: from Consultation to Participation*, <http://www.oecd.org/ctp/strategy-deepening-developing-country-engagement.pdf>.

of the fair share by multinationals and fair competition between countries. In addition, for developing countries these organizations aim to raise revenue to deliver public services by making the tax administration more efficient and fair and by tackling corruption and aggressive tax planning. This approach to fairness is consistent to some extent with the (output) legitimacy approach of Scharpf since it aims to solve problems through collective solutions.⁶⁵ Some reports of these organizations also reflect a philosophical and political perspective.

3.2.1 OECD: Economic (Fair Competition Is Harmed) and Political Perspective (Citizens Have Become More Sensitive to Tax Issues)

In its 1998 Ottawa Taxation Framework Conditions the OECD formulated the following Ottawa principles of taxation, which to a high extent reflect Adam Smith Canons and thus an economic perspective: neutrality, efficiency, certainty and simplicity, flexibility, and effectiveness and fairness. The principle of fairness is explained as: 'The potential for tax avoidance and evasion should be minimalised while keeping counter-acting measures proportionate to the risks involved.'⁶⁶ Whether this statement has an economical,⁶⁷ a juridical⁶⁸ or a political⁶⁹ background is not clarified.

In 2013 the G20 meeting of St. Petersburg⁷⁰ addressed the 'fairness of the tax system' including also that taxpayers should pay their fair share of taxes. This political meeting also endorsed the BEPS and its Action Plan. In the Action Plan with 15 Actions, the OECD stated that aggressive tax planning has reduced the tax burden of multinationals and that this situation has 'led to a tense situation in which citizens have become more sensitive to tax fairness issues'.⁷¹ The OECD also stated that all parties, governments, and individual taxpayers are harmed

including also business since 'fair competition is harmed by the distortions induced by BEPS'.⁷² In Action 2 addressing hybrid mismatches, the OECD also referred to fairness by stating that 'there is a reduction of the overall tax paid by all parties involved as a whole, which harms competition, economic efficiency, transparency and fairness'.⁷³ No reference to fairness was made in the other actions. This description shows that the focus of the OECD is on the political and economical perspective of fairness.

The OECD did not address the question whether BEPS will contribute to more economic fairness by reducing the incentive of multinationals to use aggressive tax planning. This question has to some extent been addressed by academic research. For example, Martin Thomsen and Christoph Watrin's findings do not support the need for coordinated international tax policy to prevent base erosion nor suggest that multinational companies should be blamed. They did not find any evidence that multinationals are more tax aggressive than domestic firms. They call for governments to carefully consider the steps they take to address the OECD's BEPS project as well as for future research clarifying the concept of tax avoidance for international tax policy debates.⁷⁴

Whether and how the BEPS Project and Action Plan will contribute to fairness from the perspective of justice in the BEPS 44 group⁷⁵ and in developing countries that are participating as BEPS Associates in the BEPS Inclusive Framework is not clear. Up to our best knowledge no research is available on this issue.

In its 2014 Report to G20 Development Working Group on the impact of BEPS in low income countries Part 1 and Part 2 remarkably the OECD does not provide for a definition of what is fairness in relation to taxation, nor to whether fairness is perceived similar in developing countries as in developed countries. The only references to fairness are found in Part 1 of the Report: payment of management/technical fees should represent a fair return

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⁶⁵ See for the approach of Scharpf: Fairness as 'legitimacy' in s. 2.3.4.

⁶⁶ OECD, *Implementation of the Ottawa Framework Conditions the 2003 Report*, <http://www.oecd.org/tax/administration/20499630.pdf>; Referred to also in the 5 Oct. 2015 Report on BEPS Action 1 Addressing the Challenges of the Digital Economy, <http://www.oecd.org/ctp/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report-9789264241046-en.htm>, Annex A and Annex C.

⁶⁷ The potential for tax evasion and avoidance should be minimized in order to achieve that tax is paid to the state in which the economic activities take place.

⁶⁸ The potential for tax evasion and avoidance should be minimized in order to achieve equality and for legitimacy purposes.

⁶⁹ Citizens who benefit from the cooperative efforts of others have obligations to cooperate as well and therefore citizens should obey the law because of moral obligations.

⁷⁰ G20 Leaders Declaration meeting in St. Petersburg including the Tax Annex to G20 leaders declaration. <https://www.oecd.org/g20/summits/saint-petersburg/Tax-Annex-St-Petersburg-G20-Leaders-Declaration.pdf>.

⁷¹ Action Plan at 8. <https://www.oecd.org/ctp/BEPSActionPlan.pdf>.

⁷² *Ibid.*, at 8.

⁷³ *Ibid.*, at 15.

⁷⁴ M Thomsen & C. Watrin, *Do We Really Need the BEPS Project?*, <https://business.illinois.edu/accountancy/wp-content/uploads/sites/12/2015/09/Tax-2015-Thomsen-Watrin.pdf>.

⁷⁵ The BEPS 44 group consist of G20 countries, OECD countries including OECD accession countries. These countries were on equal footing in the decision making process of the BEPS Project. Countries outside the BEPS 44 have been invited to participate on equal footing in the implementation of the BEPS Project as BEPS Associate. As of 21 June 2017, fifty-six countries outside the BEPS 44 have joined the inclusive framework of BEPS, for a total of eighty-five countries (BEPS 44+ 40 outside the group). <http://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>.

for valuable services provided (p. 15), the exportation of minerals should be at a fair price (p. 16) and the OECD Task Force as an advisory group has as a role to help to collect taxes fairly and effectively (p. 32). What the OECD does address is that developing countries have other needs than developed countries both in respect of tax design and tax administration and the view of developing countries that the BEPS issues may manifest differently for these countries given the specialties of their legal and administrative framework. Most important BEPS issues for developing countries are Actions 4, 6, 7, 10, 11 and 13.⁷⁶ Least important are Action 2, 3 and remarkably also 15⁷⁷

3.2.2 UN: Economic Perspective (Unfair That Local Business Is Uncompetitive), Fairness Within States and Between States

Like the OECD Reports the perspective of fairness reflected in these UN reports is an economic perspective. Other than the OECD the UN also addresses the issue of fair taxation between states.

The UN created in October 2013, a subcommittee on BEPS (still active).⁷⁸ This Subcommittee published in 2014 an information note⁷⁹ to developing countries on BEPS issues for developing countries.⁸⁰ In this note the UN stated: 'efficient administration of many income tax systems depends upon the voluntary compliance of taxpayers. Voluntary compliance is adversely impacted by perceptions of unfairness. If multinationals don't pay their share of tax this is perceived as unfair and that perception may undermine voluntary compliance by other taxpayers'.⁸¹ Thus, according to the UN Subcommittee local business may perceive as unfair that they are facing comprehensive taxation business in comparison to multinationals, and therefore, local business are uncompetitive.⁸² The UN made no reference to statistical evidence or numbers regarding the amount of tax burden

of local business and multinationals that might support this argument of fairness.

Further reference to fairness was also made by the UN when explaining BEPS Action 13, stating that the information provided in the transfer pricing documentation (profits earned and tax paid, assets owned and number of employees) may be useful for 'tax authorities trying to identify whether an MNE is leaving an amount of income in a jurisdiction that fairly reflects the economic activity undertaken in that country'.⁸³ There was no reference to fairness regarding other Actions from the BEPS Action Plan.

In its 'World Investment Report 2015: Reforming International Investment Governance'⁸⁴ the United Nations Conference on Trade and Development (UNCTAD) addressed another issue of fair taxation between states:

Tax avoidance practices by MNEs lead to a substantial loss of government revenue in developing countries. The basic issues of fairness in the distribution of tax revenues between jurisdictions that this implies must be addressed. At a particular disadvantage are countries with limited tax collection capabilities, greater reliance on tax revenues from corporate investors, and growing exposure to offshore investments. Therefore, action must be taken to tackle tax avoidance, carefully considering the effects on international investment.

3.2.3 IMF: Economic (Equal Treatment of Taxpayers, Burden-Sharing and Economic Opportunities, Raising Tax Revenue) and Legitimacy (Unfair Tax Affects Level of Compliance) Perspective

Like in the OECD and UN reports focus of the IMF is on the economic perspective of fairness. However, IMF occasionally also refers to the legitimacy perspective.

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⁷⁶ Respectively Limit base erosion via interest deductions and other financial payments; Prevent tax abuse: Prevent the artificial avoidance of PE status; Assure that transfer pricing outcomes are in line with value creation-other high-risk transactions; Establish methodologies to collect and analyse data on BEPS and the actions to address it; Re-examine transfer pricing documentation.

⁷⁷ Respectively Neutralize the effects of hybrid mismatch arrangements; Strengthen controlled foreign company rules, Develop a multilateral instrument.

⁷⁸ The main objectives are to help informing developing countries on BEPS issues, to help facilitate the input of developing countries and views into the ongoing UN work as appropriate and to help facilitate the input of developing countries experiences and views into the OECD/G20 Action Plan on BEPS. Information available <http://www.un.org/esa/ffd/tax/subcommittee/Beps.htm>.

⁷⁹ Note available at http://www.un.org/esa/ffd/tax/BEPS_note.pdf.

⁸⁰ This note asked feedback from developing countries by 2 May 2014. Unfortunately, in addition to Brazil, Chile, China, India, Malaysia, Mexico, Singapore, Thailand, and NGOs' such as Christian Aid and Action Aid and economic Justice Network and Oxfam South Africa, few developing countries provided this feedback, i.e. Ghana, Tonga and Zambia. Therefore, another request for further feedback on BEPS issues for developing countries was made and also with a new deadline extended until Aug. 2014. <http://www.un.org/esa/ffd/tax/Beps/index.htm>.

⁸¹ Note at 3. http://www.un.org/esa/ffd/tax/BEPS_note.pdf.

⁸² The IMF also made this argument of fairness of the aggressive tax planning by multinationals and its impact on competitiveness of local business and all taxpayers when addressing tax design issues. See argument of T. Dubut (IMF External Consultant) below.

⁸³ Note at 16, http://www.un.org/esa/ffd/tax/BEPS_note.pdf.

⁸⁴ UNCTAD, World Investment Report 2015: Reforming International Investment Governance, at xiv, http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

IMF addressed the issue of fair tax systems amongst others in a Report in which it carried out a study addressing fair taxation in the Middle East and North Africa aiming to address the tax systems and the problems of unequal income distribution.⁸⁵ This study provides recommendations to these countries to achieve greater equality and fairness. For the IMF, a tax fair system 'contributes crucially to defining the relation between the citizen and the state in terms of equal treatment, burden-sharing, and economic opportunities'⁸⁶ For this purpose, the IMF recommends, among others, to make the tax administration more efficient and fair by strengthening 'the administrative capacity and enhanced compliance and efficiency reduce corruption and level the playing field for companies while promoting foreign investment and competitiveness and raising tax revenue'.⁸⁷

In its July 2016 Report on Peru addressing among others the challenges for Peru regarding international taxation IMF stated that 'while collective action is generally a positive move, it is still an open question whether all BEPS recommendations are equally relevant to developing countries, or if some of the issues need to be looked at more carefully from the perspective of these countries'.⁸⁸ In this context, it is submitted that the discussion of fairness in the BEPS Project needs to be legitimate in terms of the benefits for developed and developing countries.

The issue of fairness has also been addressed at the IMF Fiscal Forum 2016 'Strengthening the International Tax System: Roundtable Discussion-Future of International Taxation.' In this Roundtable discussion, Winnie Byanyama, Executive Director of Oxfam International, stated – taking the perspective of fairness within the state – a fair tax system is a system maximizing the opportunity to raise tax revenue. Aggressive tax planning undermines this possibility.⁸⁹

In a Kluwer publication IMF consultant Thomas Dubut⁹⁰ addressed the issue of aggressive tax planning and the impact on competitiveness of local business and all taxpayers within a country from an economical and legitimacy perspective. Dubut states:

aggressive tax planning reduces the tax burden of multinational businesses and thus implies a loss of tax revenues in the place where the income is realized. This phenomenon has a negative impact on the funding of public policies, on the competitiveness of other (mainly local) businesses and, last but not least, on the tax burden of all taxpayers, which may be perceived as unfair and thus affect the level of tax compliance. He states this is a big challenge for developing countries that urgently need to increase tax revenues for the funding of public expenditures and to improve the degree of tax compliance.⁹¹

3.2.4 World Bank: *Economical (Efficient, Equitable and Administratively Inexpensive Tax Design, Tax Competition, Fair Taxation for Digital Economy) and Legitimacy (Voice of Developing Countries in Debate, Regional and Global Cooperation) Perspective*

Scholars working for the World Bank (as well as for IMF) on tax technical assistance have addressed fairness or equity as a key issue in designing a tax regime: thus the economic perspective of fairness. For these scholars, the 'tax system can be viewed as a mechanism to take money away from the private sector in as efficient, equitable and administratively inexpensive way as possible'.⁹²

In July 2015, the World Bank launched a new initiative with the IMF to help developing countries to strengthen their tax systems and to achieve the sustainable development goals (SDGs). This announcement came before the Financing for Development conference in Addis Ababa, Ethiopia. For the World Bank Group President 'We very much want to help developing countries raise more revenues through taxes because this can lead to more children receiving a good education and more families having access to quality health care. If everyone pays their fair share developing countries can close their financing gaps and promote inclusive growth'.⁹³

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⁸⁵ <http://www.imf.org/external/pubs/ft/sdn/2015/sdn1516.pdf>.

⁸⁶ *Ibid.*, at 9.

⁸⁷ *Ibid.*, at 24.

⁸⁸ Peru Selected Issues. IMF, 3 June 2016. Estevão et al. Country Report No. 16/235. At 57. <http://www.imf.org/external/pubs/ft/scri/2016/cr16235.pdf>.

⁸⁹ https://www.imf.org/external/POS_Meetings/SeminarDetails.aspx?SeminarId=128.

⁹⁰ IMF External Consultant.

⁹¹ T. Dubut, *Chapter 5 Designing Anti-Base Erosion Rules for Developing Countries: Challenges and Solutions*, in *Tax Design Issues Worldwide. Series on International Taxation* vol. 51, 142 (G. Michielse & V. Thurony eds, the Netherlands: Kluwer Law International 2015).

⁹² Bird & Zolt, *supra* n. 13.

⁹³ <http://www.worldbank.org/en/news/press-release/2015/07/10/world-bank-and-the-imf-launch-joint-initiative-to-support-developing-countries-in-strengthening-tax-systems>.

This initiative has two pillars, to wit deepening the dialogue with developing countries on international tax issues and developing improved diagnostic tools to help member countries to evaluate and strengthen their tax policies. The latter objective is being achieved by means of the IMF technical assistance projects (over 120 countries) and the World Bank current tax programs (over 48 developing countries). The first objective aims to bring the voice of developing countries including small countries into the debate on international tax policy. This objective reflects also a legitimacy approach since it aims to provide participation and representation of all countries including developing countries in the design of the international tax system.

An example of this new dialogue for developing countries is the May 2016 Conference: 'Winning the Tax Wars: Global Solutions for Developing Countries.'⁹⁴ The discussion in this conference addressed philosophical (and political) questions concerning fair and effective taxation from an international perspective. The World Bank states that:

the global tax agenda has mainly focused on these issues from the fiscal revenue generation perspective (tax base erosion and tax rate 'race to the bottom') and efficiency viewpoint (uncertainty of tax regimes for foreign direct investment and long term profitability of firms). Less attention has been given to how these tax trends are affecting developing countries and who the winners/losers are at the global level.⁹⁵

In respect of corporate taxation,⁹⁶ the topics discussed in this conference were among others tax competition, tax cooperation and transparency from the perspective of developing countries including also questions such as (1) how tax competition affects particularly the ability of developing countries to enforce a legitimate contract between government and taxpayer; (2) how global tax rules could be improved to keep pace with a rapidly changing global business environment; (3) whether tax competition is needed; and (4) whether tax cooperation including possible regional and global arrangements is

necessary. The debate on these topics has been made available on the World Bank website and it is clear that the World Bank wants to take a leading role in the debate regarding developing countries.⁹⁷ However, it is not yet clear how the findings of this conference will reflect in concrete proposals for developing countries.

In respect of fair taxation, the World Bank furthermore is concerned with the fact that governments in many developing countries have taxed the information and communication technology sector at rates significantly higher than other services. World Bank president Jim Yong Kim remarked at the World Bank-IMF Spring Meeting 2016 that one of the three possible ways for Ministers of Finance to contribute to the 'Global Connect Initiative's target of 1.5 billion people added to the internet by 2020' is 'Fair taxation of the telecom sector'. 'Governments need to ensure more reasonable and predictable tax levels.'⁹⁸

3.2.5 *Four IOs: OECD, UN, IMF and World Bank: Economical (Fair Tax Design and Implementation) Juridical (Preventing Corrupt Tax Administrators) and Political (Participation of Developing Countries in BEPS Discussion, International Cooperation for Establishing Fair Tax Systems That Citizens Can Trust) Approach*

The Four IOs not only provide recommendations separately in the field of taxation. They also cooperate by publishing joint reports and setting up Platforms. Below we give four examples of initiatives in which the four IOs referred to fair tax systems.

In 2011 at the request of the G-20 the four IOs published their report 'Supporting the development of more effective tax systems' for developing countries, prepared in cooperation with regional organizations such as ATAF and the Inter-American Center of Tax Administrations (CIAT⁹⁹), developing countries, Civil Society Organizations, business community and academics. The word 'fair' is used in combination with tax system design,¹⁰⁰ tax policies, weak tax administration,

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⁹⁴ Program of the conference, <http://www.worldbank.org/en/events/2016/04/29/winning-the-tax-wars-global-solutions-for-developing-countries#2>.

⁹⁵ Invitation to the conference available at the website of the World Bank. <http://www.worldbank.org/en/events/2016/04/29/winning-the-tax-wars-global-solutions-for-developing-countries>.

⁹⁶ Other topics also discussed are taxing to promote public goods, tobacco taxes, taxing to promote public goods, carbon taxes.

⁹⁷ <http://live.worldbank.org/winning-the-tax-wars>.

⁹⁸ Remarks by World Bank President Jim Yong Kim at the Global Connect Initiative, World Bank-IMF Spring Meetings 2016, <http://www.worldbank.org/en/news/speech/2016/04/14/remarks-by-world-bank-group-president-jim-yong-kim-at-the-global-connect-initiative>.

⁹⁹ We did not find any reference to the concept of fairness in the publications of CIAT published on the Internet.

¹⁰⁰ Supporting the Development of More Effective Tax Systems, *A Report to the G-20 Development Working Group by the IMF, OECD, UN and World Bank* (2011), at 8 'Tax system design is also closely linked to domestic and international investment decisions, including in terms of transparency and fairness.'

at 17 'To this end, combining improvements in revenue administration with supportive – efficient, fair, effective – tax policies is essential.'

at 18 'While it may be too much to assert, as the adage has it, that in developing countries, "tax administration is tax policy" – tax policy sets the framework within which the revenue administration must operate – in practice, the distinction between administration and policy is especially hard to make in developing countries. But there is no doubt that weak and often corrupt tax administrations, inadequately paid officials, extensive non-compliance and informality, weak organisational structures and political interference remain a fundamental barrier to effective and fair taxation, and to building wider trust between government and citizens.'

weak institutional capacity, inadequately paid officials, extensive non-compliance and informality, weak organizational structures and political interference and building wider trust between government and citizens.

OECD, IMF, World Bank and UN have referred to fairness from a legal equality, legitimacy and political perspective in their report on the use of tax incentives in developing countries to the G20 Development Working Group in September 2015. According to this report:

good governance requires that the government's decision-making process, its policies and the administration be transparent and subject to scrutiny and evaluation, to ensure that authorities can be held accountable for their actions and remedial action taken when necessary. This limits the scope for corruption, strengthens the trust of investors in government, and enhances confidence of the public that the tax system is fair in design and implementation.¹⁰¹

In April 2016, IMF, OECD, UN and World Bank set up a new platform for Collaboration on Tax.¹⁰² The four IOs stressed, 'significant additional tax revenues, raised in fair and efficient ways, are required to meet the global development challenges'. One of the first tasks of the platform is to 'deliver a number of "toolkits" designed to help developing countries implement the measures developed under the G20/OECD BEPS and on other international tax issues'.¹⁰³

The four IOs 'welcome the increased emphasis on taxation, recognize their responsibility to further support countries' efforts, and see deepening their collaboration

and cooperation as an essential component of strengthening tax systems'.¹⁰⁴

IMF does not refer to fairness from a juridical perspective in respect of exchange of information.

The Collaboration on Tax Platform published (July 2016) a report to the G20 providing recommendations on how support for developing tax capacity in developing countries can be improved.¹⁰⁵ The report stated 'international cooperation is a requisite for establishing fair tax systems that citizens can trust'.¹⁰⁶ The report also stated 'tax capacity development must take account of a complex and multi-layered environment. The purpose of external support is to help countries build robust "tax capacity" – meaning the enabling environment, organizations and skills – equipping them to raise the revenue they need in ways that are conducive to stability, growth, good governance, and fairness'.¹⁰⁷

3.2.6 EU: *Economical (Equitable Distribution of Tax Burden, Funding Issues, Competitiveness Issues, Legal Certainty Needed for Investment, Pay Taxes Where Profits Are Generated, Level-Playing Field), Justice (Public Discontent) and Philosophical (Social Contract) Perspective*

According to the European Commission in its Action Plan for fair and efficient corporate taxation in the EU adopted on 17 June 2015. Europe needs a framework for fair and efficient taxation of corporate profits, in order to distribute the tax burden equitably, to promote sustainable growth and investment, to diversify funding sources of

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at 22 'Against a background of relatively weak institutional capacity and poor cultures of tax compliance, most developing countries face a long struggle to improve revenue performance in an efficient, fair and consensual way.'

¹⁰¹ *Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment*. A report to the G-20 Development Working Group by the IMF, OECD, UN and World Bank 23 (Sept. 2015), <http://www.oecd.org/tax/tax-global/options-for-low-income-countries-effective-and-efficient-use-of-tax-incentives-for-investment.pdf>.

¹⁰² <http://www.oecd.org/tax/concept-note-platform-for-collaboration-on-tax.pdf>.

¹⁰³ <http://www.oecd.org/tax/beps/international-organisations-take-major-step-to-boost-global-co-operation-in-tax-matters.htm>. The first of these toolkits focusing on tax incentives has already been delivered in Nov. 2015. <http://www.oecd.org/tax/tax-global/options-for-low-income-countries-effective-and-efficient-use-of-tax-incentives-for-investment.pdf>.

¹⁰⁴ At 3 <http://www.oecd.org/tax/concept-note-platform-for-collaboration-on-tax.pdf>. Their aim is to:

- Develop appropriate tools for developing countries in the taxation of Multinational Enterprises (MNEs), including in relation to the new measures from the BEPS reports;
- Support interested developing countries to participate in the implementation of the BEPS package and input into future global standard setting on international taxation;
- Jointly work on capacity issues;
- Improve awareness to build comprehensive and effective exchange of information mechanisms;
- Give guidance to policy makers and tax administrators on how to improve awareness on building comprehensive and effective exchange of information mechanisms;
- Act as venue for coordination and information sharing on a set of high priority tax issues.

¹⁰⁵ This report builds on a 2011 report from the IFM, OECD, World Bank and UN to the G20 on building effective tax systems in developing countries. This new report has been prepared in July 2016 for submission to G20 Finance Ministers in the framework of the Platform for Collaboration on Tax. This 2016 report is titled: 'Enhancing the Effectiveness of External Support in Building Tax Capacity in Developing Countries' and it is a response to the request by the G20 to 'recommend mechanisms to help ensure effective implementation of technical assistance programs, and recommend how countries can contribute funding for tax projects and direct technical assistance and report back with recommendations'. This new report addresses the adoption of country by country reporting as the new standard and the development of tax administrations tools such as the TADAT Tax Administration Diagnostic Tool 'as a standardized tool for assessing the performance of tax administration systems'. However, some of the recommendations in the 2011 (Annex 1 to the report) to deepening international tax cooperation by strengthening tax systems and by contributing to the fair and efficient mobilization of domestic tax resources are still valid in 2016. At 10. <http://pubdocs.worldbank.org/en/858011469113510187/Enhancing-the-Effectiveness-of-External-Support-in-Building-Tax-Capacity>.

¹⁰⁶ At 9. <http://pubdocs.worldbank.org/en/858011469113510187/Enhancing-the-Effectiveness-of-External-Support-in-Building-Tax-Capacity>.

¹⁰⁷ At 10. <http://pubdocs.worldbank.org/en/858011469113510187/Enhancing-the-Effectiveness-of-External-Support-in-Building-Tax-Capacity>.

the European economy, and to strengthen the competitiveness of Europe's economy. Complex and not transparent tax rules are inefficient. They put smaller businesses, which are the backbone of Europe's economy, at a disadvantage. They create uncertainties when businesses need legal clarity to invest 'The fact that certain profitable multinationals appear to pay very little tax in relation to their income, while many citizens are heavily impacted by fiscal adjustment efforts, has caused public discontent. This perceived lack of fairness threatens the social contract between governments and their citizens, and may even impact overall tax compliance.'¹⁰⁸

In January 2016, the EU addressed the agenda for fairer, simpler and more effective corporate taxation in the EU. The anti-avoidance package provides for 'concrete measures to prevent aggressive tax planning, to boost transparency and create a level playing field for all business in the EU'.¹⁰⁹ Two documents are relevant for this article; the first one is the Chapeau Communication on Anti-Tax Avoidance Package and the EU Communication on an External Strategy for Effective Taxation. The documents show the EU approaches fairness from an economical and philosophical perspective, but though it formulated an external tax strategy not from a political perspective.

The Chapeau Communication refers to the priority of the Commission to 'develop a deeper and fairer Internal Market, which is fundamental to delivering a thriving economy that benefits all'.¹¹⁰ For the EU Commission companies should pay taxes where profits are generated and this principle has been undermined by aggressive tax planning.¹¹¹ Therefore, the EU Commission provides for the introduction of general and specific anti-tax avoidance provisions to be applicable in the European Union and in its external strategy with third countries.

The 2016 EU Communication on an External Strategy addresses the EU's approach towards third countries in

respect of good governance fair tax competition. The EU Commission in previous Communications has developed the standards of good governance and fair competition.¹¹² According to the EU Commission, third countries should be encouraged to adhere to 'the internationally agreed good governance standards, ensure a level playing-field for EU business and reduce the opportunities for out-bound profit shifting'.¹¹³ This 2016 EU Communication introduces the requirement of a good governance and fair competition standard in the bilateral and regional agreements concluded by EU countries and by the EU with third countries including developing countries.

In respect of fairness, the approach of the EU may raise problems in terms of fairness as legitimacy for third countries Third countries will have to change their tax policy to comply with the EU standards if these countries want to conclude economic, trade and partnership agreements with EU countries and with the EU. From the EU Communication, it is clear that the introduction of these standards will benefit EU countries but no research has been carried out on how the introduction of these standards will benefit developing countries and on whether these standards will result in restrictions to developing countries in their tax incentive policy.

3.2.7 ATAF: *Economical (Robust and Equitable Domestic Tax Policies, Fair and Effective International Tax System, Fair and Efficient Tax Administrations, No Harmful Tax Competition) and Philosophical (Social Contract) Perspective*

The 19 March 2014 Discussion Paper 'The Global Tax Agenda and its implications for Africa'¹¹⁴ ATAF statement reflects an economical approach to fairness:

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¹⁰⁸ A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final, at 2, <http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX%3A52015DC0302>.

¹⁰⁹ See EU Commission Website for anti-avoidance package, http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm.

¹¹⁰ Communication from the Commission to the European Parliament and the Council. Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater transparency in the EU. COM (2016) 23 final. Date 28 Jan. 2016. At 2 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0023&from=EN>.

¹¹¹ For the Commission, 'The majority of businesses do not engage in aggressive tax planning and suffer a competitive disadvantage to those that do. The aggressive behaviour of these companies distorts price signals and allows them to enjoy lower capital costs, disrupting the level playing field in the Single Market. Small and medium sized businesses are particularly affected by this phenomenon.' Communication from the Commission to the European Parliament and the Council. Anti-Tax Avoidance Package: Next steps towards delivering effective taxation and greater transparency in the EU. COM (2016) 23 final. Date 28 Jan. 2016. At 2 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0023&from=EN>.

¹¹² At EU level, the concept of fairness has been used by the European Commission to address fair tax competition in the 2012 EU communication on an Action Plan to strengthen the fight against tax fraud and tax evasion. In addition, the European Commission published in Dec. 2012 a recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters. The recommendation encouraged Member States to use minimum standards of good governance in tax matters in their relationship and treaties with third (non-EU countries). These standards included transparency, exchange of information and fair tax competition. EU countries were allowed to include a set of measures to be applied to third countries that do not meet the minimum standards. Among these measures are the adoption of public blacklist of third countries not complying with the standards, and the renegotiation, suspension or termination of the double tax convention with the said country. Commission Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters. 6 Dec. 2012 C (2012) 8805 final, (https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/c_2012_8805_en.pdf).

¹¹³ Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation. 28 Jan. 2016 COM (2016) 24 final. At 5. http://eur-lex.europa.eu/resource.html?uri=cellar:b5aef3db-c5a7-11e5-a4b5-01aa75ed71a1.0018.02/DOC_1&format=PDF.

¹¹⁴ Discussion Paper the Global Tax Agenda and its implications for Africa presented at the ATAF Consultative Conference on New Rules of the Global Tax Agenda, Johannesburg, South Africa 18-19 Mar. 2014 available at the website of the African Tax Research Network. http://ataftax-dev.co.za/images/atrn_documents/Global%20Tax%20Agenda%20-%2020ATAF%20Discussion%20Paper.pdf.

In developing countries, beyond its fiscal role, the tax system has a more substantive role: it is an important tool for good governance and the basis for the social fiscal contract between governments and its citizens and corporations. Tax revenues are vital to finance their development agenda and the redistribution of incomes, thus contributing the poverty alleviation. In a context where the recent global financial crisis has reduced the importance of official development assistance (ODA) as a reliable source for financing post-2015 Millennium Development Goals (MDGs), developing countries are beginning to realise that the achievement of the MDGs and economic goals (i.e. market reforms, promotion of private sector investment, industrialisation, and promotion of regional programmes and development, etc.) will depend heavily on domestic tax revenues. Consequently, creating robust and equitable domestic tax policies and implementing a fair and effective international tax system through international cooperation become primordial.

ATAF is also concerned about a fair tax design and fair tax administrations, as is reflected in a Joint Statement on Cooperation between the African Development Bank and the ATAF:

‘Convinced that taxation is essential to sustainable development, and that all sectors of society should work together to promote fair and efficient tax systems and administrations that will ensure that each country receives the fruits of its own economic achievement and, at the same time, improves its overall governance.’ This statement reflects an economical and political approach to fairness.

3.3 Governments: Economical Approach to Fairness (Fair Share)

Some countries have changed their legislation in response to the global discussion on fairness in the context of the BEPS discussion.

In 2015, the United Kingdom and Australia decided to include a new tax i.e. Diverted Profit Tax to ensure that multinationals are paying ‘their fair share of tax’. The approach of Australia and the United Kingdom focuses on payment of multinationals of the fair share

even though these multinationals have paid their taxes in according to the law. In Australia, the new tax ‘prevent multinational corporations selling goods and services to Australian residents from avoiding Australian tax by artificially limiting their taxable presence in Australia’.¹¹⁵ In the United Kingdom, the main objective of the Diverted Profit Tax is to counter ‘aggressive tax planning as used by many multinational enterprises (MNEs) to transfer profits from the United Kingdom’s jurisdiction’.¹¹⁶ In short, both Australia and the United Kingdom aim to prevent aggressive tax planning and therefore an additional tax will be levied for these aggressive tax planning structures so that multinationals pay their fair share. Up to the authors’ knowledge no other country has introduced similar taxes.¹¹⁷

These unilateral initiatives have received criticism from the OECD, Its Director of the Centre for Tax Policy and Administration, Pascal Saint-Amans states:

what is clear is that without coherent, global approaches, problems like those that gave rise to BEPS are likely to arise again – it is the mismatches and gaps between national tax systems, along with the international rules, that have facilitated these types of tax planning arrangements and allow the location of taxation to be separated from the underlying economic activity. To effectively maintain their tax sovereignty in a globalised world, governments can no longer just consider their domestic system if they want their tax policies to be effective.¹¹⁸

4 CONCLUSIONS AND RECOMMENDATIONS

Fairness in taxation has an economical, juridical, philosophical and political perspective. Our analysis shows that whereas NGOs primarily perceive fairness from a philosophical perspective and associations of tax advisers address fairness as justice, IOs, SOs, governments and an organization of tax administrators (ATAF) primarily approach fairness from an economic perspective. Revenue issues, tax competition issues and costs of tax administrations are their primary focus.

Only occasionally IOs make remarks that reflect concern on other perspectives of fairness can be found. IMF

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¹¹⁵ M.St. J. R. Butler, A. Jennison & R. Neilson, *Important International Tax Developments – Foreign Capital Gains Withholding Tax, and Anti-Google, Netflix and Amazon Taxes*, 22 Asia-Pac. Tax Bull. 2 (2016), Journals IBFD. See also Budget 2016–2017: Making our Tax Systems More Sustainable so we can cover the Governments’ responsibilities for the next generation explaining the measures introduced by Australia to tackle multinational tax avoidance in Australia http://budget.gov.au/2016-17/content/glossies/tax_super/html/tax_super-01.htm.

¹¹⁶ R. Tomazela Santos, *The United Kingdom’s Diverted Profits Tax and Tax Treaties: An Evaluation*, 70 Bull. Int’l Tax’n 7 (2016), Journals IBFD.

¹¹⁷ However, another tax that could also have issues of fairness is the (2016) proposed Equalization Levy to impose tax on specific digital transactions. This levy aims to allocate a ‘fair share’ on the tax of the income obtained in digital transactions. It is not yet clear whether this Equalization Levy will be approved by the Legislative and if it will survive the constitutional challenge in India. It is also not clear how the tax treaties will provide relief to this levy since this levy does not form part of the Indian Income Tax Act of 1961. See for an analysis of this levy. S. Wagh, *The Taxation of Digital Transactions in India: The New Equalization Levy*, 70 Bull. Int’l Tax’n 9 (2016).

¹¹⁸ Interview to OECD Pascal Saint-Amans Mar. 2016. <https://taxlinked.net/blog/march-2016/beeps-oecd-pascal-saint-amans-answers-questions>.

and World Bank refer to legitimacy issues: it is unfair that local business is uncompetitive/voice of developing countries in debate, regional and global cooperation. The EU and ATAF refer to the social contract between taxpayer and state (philosophical approach). The OECD mentions that citizens have become more sensitive to tax issues, which shows concern on the political dimension of fairness.

The four IOs also express concerns regarding the political dimension of fairness: participation of developing

countries in BEPS discussion, international cooperation for establishing fair tax systems that citizens can trust. As each of these approaches to fairness should be taken into account in the design of a sustainable global tax systems we urge for more research on global perceptions of fairness and for formulating an agenda for discussing this issue by IOs, SOs, NGOs and Governments. Therefore, we applaud the initiative of the EU for its Tax Fairness conference held on 28 and 29 June 2017 in Brussels.¹¹⁹

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¹¹⁹ Topics discussed were:

- (1) Troubled Times for democracies: what role for social justice?
- (2) Social Justice through taxation: balancing between fairness and efficiency requirements;
- (3) Applying the principles of fairness to policy making;
- (4) Stakeholders' role in shaping taxation policies.