Global Minimum Corporate Tax – Developing Countries Beware

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SUMMARY

In July 2021, under the auspices of the Organisation for Economic Co-operation and Development and the Group of Twenty Countries (the G20), a group of 130 countries reportedly representing more than 90 per cent of global gross domestic products joined in establishing a two-pillared package. This package aims to curb base erosion and profit shifting and ensure that large Multinational enterprises (MNEs) pay taxes where they operate and earn profits. The aim was to add much-needed certainty and stability to the international tax system. Pillar One relocates some MNE profits to the user or market jurisdiction. Pillar Two proposes a global minimum corporate tax which is intended to neutralise the incentives to shift profits based solely on tax outcomes. The author finds that despite its global impact, the global minimum tax has been designed by, and for only a small number of wealthy countries. As a result, the benefits thereof can only be viewed from the perspective of those benefitting countries, before one considers any residual benefits for the unintended participants, the developing countries. This article explores the effects and disadvantages of the proposed minimum tax, with a specific focus on developing countries, and concludes that the benefits of minimum tax for developing countries are not patent, clear, or determinable. The disadvantages of the global minimum tax for developing countries include challenges to fiscal sovereignty, depriving developing countries of the ability to use taxes to compete with developed countries as well as the high cost of implementation. The article explores alternatives to the minimum tax and concludes by proposing various options that developing countries should consider to curb international tax avoidance.

1 INTRODUCTION

In 2021, in an attempt to address base erosion and profit shifting (BEPS) the Organisation for Economic Co-operation and Development (OECD) in conjunction with The Group of Twenty Countries (the G20) developed the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (Inclusive Framework) that proposed and later resulted in the adoption of a global minimum tax. It is proposed that the minimum tax be adopted by all countries, developing and developed countries alike. There are, however, potential challenges specifically for developing countries, and such countries may rapidly and blindly adopt the minimum tax without proper analysis of peculiar disadvantages for those countries. Regardless of the various oft-

advertised anecdotal benefits of the minimum tax globally, to developed high-income countries and developing low-income countries alike, the reality of such benefits to developing countries is scant. This article explores the effects and disadvantages of the proposed minimum tax, with a specific focus on developing countries. The article then explores alternatives to the minimum tax and concludes by proposing various options that developing countries should consider.

2 BACKGROUND

Multinational enterprises (MNEs) have over the years been making foreign investment decisions by placing a disproportionately major focus on the tax regimes of, and, in particular, the tax rates imposed by, potential host countries.[1] While the key determinants of such an investment decision should be economic, social, and political factors, the tax tail has been wagging the business dog publicly and unashamedly. Tax avoidance strategies in terms of which profits are moved to low tax jurisdictions and expenses to high tax jurisdictions, thereby depriving high tax jurisdictions of their full taxing rights have been rampant. It is reported that these BEPS strategies have over the years cost countries between $100 to $240 billion in lost revenue annually.[2]

The Inclusive Framework project was undertaken in an effort to tackle tax avoidance; develop and improve the coherence of international tax laws/rules; ensure a more transparent tax environment; and address the tax challenges that arise as a result of the digitalisation and globalisation of the economy.[3] In July 2021, a group of 130 countries reportedly representing more than 90 per cent of global gross domestic products joined in establishing a two-pillared package. This package aims to ensure that large MNEs pay tax where they operate and earn profits while adding much-needed certainty and stability to the international tax system.[4]

3 INCLUSIVE FRAMEWORK

The Inclusive Framework package consists of Pillar One and Pillar Two.

3 1 Pillar One

Pillar One comprises a set of proposals to revisit tax allocation rules in a digitalised and globalised economy. It suggests that a portion of

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[1] Cho "Sustainable Tax Behavior of MNEs: Effect of International Tax Law Reform" 2020 *MDPI* 1–2; International Monetary Fund "International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots" 2018 *Working Paper* 18/168 6–8; Oguttu *International Tax Law: Offshore Tax Avoidance in South Africa* (2015) 8–10.

[2] Organisation for Economic Co-operation and Development "International Collaboration to End Tax Avoidance" (2021) https://www.oecd.org/tax/beps/ (accessed 2023-07-26).

[3] *Ibid*.

[4] OECD "130 Countries and Jurisdictions Join a Bold New Framework for International Tax Reform" (2021) https://www.oecd.org/tax/beps/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm (accessed 2023-07-15).

multinationals' residual profit (generated by capital, risk management functions, and/or intellectual property) should be taxed in the jurisdiction where revenue is sourced.[5] Thus, Pillar One relocates some MNE profits to the user or market jurisdiction. This aims to address the concerns that MNEs generate value from market jurisdictions through interaction with consumers and access to user data but the associated revenue is subject to minimal tax in those jurisdictions due to the lack of physical nexus required under current rules.[6]

3 2 Pillar Two

Pillar Two contains model rules that provide governments with a precise template for taking forward the two-pillar solution to address the tax challenges arising from digitalisation and globalisation of the economy.[7] Pillar Two proposes a global minimum corporate tax (minimum tax) which is intended to neutralise the incentives to shift profits based solely on tax outcomes. It is trite that countries competing to attract inward investment may offer tax incentives or lower tax regimes.[8] In addition, differences between domestic tax rules often create opportunities for multinationals (particularly those that derive significant value and profit from intangibles) to move income and profit to low-tax jurisdictions. This creates inappropriate tax competition and results in a "race to the bottom".[9]

Pillar Two applies where, even after the effect of Pillar One (if any), multinationals are regarded as undertaxed by reference to an agreed minimum level of taxation. It applies a minimum effective tax rate of at least 15 per cent at the jurisdictional level. The minimum tax will apply to MNEs with revenue above EUR 750 million and is estimated to generate around USD 150 billion in additional global tax revenues annually.[10]

Pillar Two addresses BEPS challenges and is designed to ensure that large MNEs pay a minimum level of tax regardless of where they are headquartered or the jurisdictions they operate. It achieves this through a number of interlocking rules that seek to (i) ensure minimum taxation while

[5] KPMG "The OECD Pillar 1 and 2 Blueprints" (2020) https://home.kpmg/ky/en/home/insights_new/2020/10/the-oecd-pillar-1-and-2-blueprints-on-a-page0.html (accessed 2023-09-23).

[6] Geiger "Global Minimum Tax: An Easy Fix?" (2021) https://home.kpmg/xx/en/home/insights/2021/05/global-minimum-tax-an-easy-fix.html#:~:text=At%20a%20global%20minimum%20tax%20rate%20of%2012.5%25%2C,to%2021%25%20would%20have%20changed%20this%20dynamic%20significantly (accessed 2023-07-14).

[7] OECD "OECD Releases Pillar Two Model Rules For Domestic Implementation of 15% Global Minimum Tax" (2021) https://www.oecd.org/tax/beps/oecd-releases-pillar-two-model-rules-for-domestic-implementation-of-15-percent-global-minimum-tax.htm (accessed 2023-07-15).

[8] Geiger https://home.kpmg/xx/en/home/insights/2021/05/global-minimum-tax-an-easy-fix.html#:~: text=At%20a%20global%20minimum%20tax%20rate%20of%2012.5%25%2C,to%2021%25%20would%20have%20changed%20this%20dynamic%20significantly.

[9] *Ibid*.

[10] OECD https://www.oecd.org/tax/beps/oecd-releases-pillar-two-model-rules-for-domestic-implementation-of-15-percent-global-minimum-tax.htm.

avoiding double taxation or taxation where there is no economic profit; (ii) cope with different tax system designs by jurisdictions as well as different operating models by businesses; (iii) ensure transparency and a level playing field; and (iv) minimise administrative and compliance costs.[11]

The principal mechanism to achieve this outcome is a set of rules guiding countries on how to treat amounts that are prone to BEPS. These rules are the income inclusion rule (IIR),[12] the undertaxed payments rule (UTPR),[13] the switch-over rule (SOR),[14] and the subject to tax rules (STTR).[15]

4 GENERAL EFFECT OF MINIMUM TAX

Pillar two endorses the creation of a globally agreed-upon minimum tax that would ensure countries tax corporate income at least at a base level.[16] Governments could still set whatever local corporate tax rate they want. However, if companies pay lower rates in a particular country, their home governments could "top-up" their taxes to the minimum rate, eliminating the advantage of shifting profits.[17] Inevitably a minimum tax will put pressure on those countries who have headline rates below the global minimum to increase their domestic rates, especially if not doing so will effectively export tax revenues.[18]

One of the main driving forces behind a minimum tax is to ensure that countries do not lure multinational corporations with low tax rates. The implementation and full functionality of a global tax is to ensure that countries are on the same footing in terms of the levying of tax. This will also combat the shifting of profits and tax revenues by multinationals as a result of low tax rates.[19] "A global approach would allow a multinational to blend

[11] OECD "Tax Challenges Arising From Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS" (2020) https://assets.kpmg/content/dam/kpmg/uk/pdf/2020/10/pillar-two-global-minimum-taxation.pdf (accessed 2023-07-14) par 8.

[12] OECD "The Pillar Two Rules in a Nutshell" (2021) https://www.oecd.org/tax/beps/pillar-two-model-rules-in-a-nutshell.pdf (accessed 2022-09-20) 4; OECD "Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS: Income Inclusion and Switch over Rules" (2022) https://www.oecd-ilibrary.org/sites/86a05393-en/index.html?itemId=/content/component/86a05393-en (accessed 2023-07-23).

[13] OECD https://assets.kpmg/content/dam/kpmg/uk/pdf/2020/10/pillar-two-global-minimum-taxation.pdf 1.

[14] OECD https://assets.kpmg/content/dam/kpmg/uk/pdf/2020/10/pillar-two-global-minimum-taxation.pdf 1; KPMG "Pillar Two: Global Minimum Taxation" (2020) https://assets.kpmg/content/dam/kpmg/uk/pdf/2020/10/pillar-two-global-minimum-taxation.pdf (accessed 2023-07-14) 1.

[15] KPMG https://assets.kpmg/content/dam/kpmg/uk/pdf/2020/10/pillar-two-global-minimum-taxation.pdf 1.

[16] Mboweni, Indrawati, Scholz, Yellen and Gutiérrez "Why We Support A Global Minimum Tax Rate of 15%" (2021) https://www.news24.com/fin24/opinion/mboweni-yellen-why-we-support-a-global-minimum-tax-rate-of-15-20210610 (accessed 2023-07-23).

[17] Schoeman-Louw "A Global Minimum Tax? What Could It Mean?" (2021) https://www.golegal.co.za/global-minimum-tax/ (accessed 2023-07-03).

[18] Geiger https://home.kpmg/xx/en/home/insights/2021/05/global-minimum-tax-an-easy-fix.html#:~: text=At%20a%20global%20minimum%20tax%20rate%20of%2012.5%25%2C,to%2021%25%20would%20have%20changed%20this%20dynamic%20significantly.

[19] *Ibid.*

high tax and low tax profits, effectively allowing taxes paid in higher tax jurisdictions to shield lower taxed income."[20] The hope is that as a result, multinational corporates will no longer engage in profit shifting and will limit the shopping of lower rates by multinationals in low-tax countries. In effect, a minimum tax will ensure that multinationals will pay a standardised tax rate and will ensure that multinationals are not taking advantage of the tax incentives of certain countries.[21]

The undeniable truth is that, despite the question of whether minimum tax is a sound policy to be adopted and that the agreement between the 140 countries to implement it "represents a once-in-a-generation accomplishment for economic diplomacy,"[22] the minimum tax gained momentum and popularity during the time that countries sought to boost their revenues following the effects of the COVID-19 pandemic. Whether explicitly stated or not, this global phenomenon must have played a substantial role in the individual decision-making considerations of the countries' representatives. Thus, whether the policy is sound or not, the primary purpose remains higher tax collections globally.[23]

5 ADVANTAGES OF MINIMUM TAX

Some of the key advantages of the minimum tax are the following:

(a) Curb the race to the bottom;[24]

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[20] *Ibid*.

[21] See OECD/G20 Base Erosion and Profit Shifting Project "Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy" (2021) https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf (accessed 2023-07-23) 1–2.

[22] See US Department of the Treasury "Statement from Secretary of the Treasury Janet L Yellen on the OECD Inclusive Framework Announcement" (2021) https://home.treasury.gov/news/press-releases/jy0394 (accessed 2023-07-17).

[23] See Laffitte, Martin, Parenti, Souillard and Toubal "International Corporate Taxation after COVID-19: Minimum Taxation as the New Normal" (2020) https://voxeu.org/article/minimum-effective-tax-rate-global-multinational-profits (accessed 2022-02-17); Sheffrin "A Minimal Role for Minimum Taxes" 2002 *Tulane Economics Working Paper Series* http://repec.tulane.edu/RePEc/pdf/tul2002.pdf (accessed 2023-07-22) 1–39 21.

[24] Goldstein "The Case for a Global Minimum Corporate Tax" (2021) https://www.atlanticcouncil.org/blogs/new-atlanticist/the-case-for-a-global-minimum-corporate-tax/ (accessed 2023-08-01); Oxfam "Tax Battles: The Dangerous Global Race to the Bottom on Corporate Tax" (2016) https://www-cdn.oxfam.org/s3fs-public/bp-race-to-bottom-corporate-tax-121216-en.pdf (accessed 2023-07-23) 5–7; Johannesen "The Global Minimum Tax" 2022 *CESifo Working Paper* 1–22; Ocampo and Faccio "A Global Tax Deal for the Rich, Not the Poor Project Syndicate" (2021) https://www.projectsyndicate.org/commentary/g7-corporate-tax-agreement-unfair-todeveloping-countries-by-jose-antonio-ocampo-and-tommaso-faccio-2021-06 (accessed 2023-07-28); ATAF "The Inclusive Framework's Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy" 2021 *Technical Note* CBT/TN/08/21 8; Oguttu "Preventing International Tax Competition and the Race to the Bottom: A Critique of the OECD Pillar Two Model Rules for Taxing the Digital Economy – A Developing Country Perspective" 2022 76 *Bulletin for International Taxation* 1–19 14; Ehl "Why African Nations Doubt OECD Tax Plan" (2021) *Deutsche Welle*

(b) Provide certainty of tax rates;[25]
(c) Encourage MNEs to engage in sound business practices;[26]
(d) Inspire countries to focus on real economic improvement;[27]
(e) Raise additional tax revenue;[28]
(f) Address the challenges of the fourth industrial revolution;[29] and
(g) Modernise the double taxation agreements' spectrum.[30]

6 DISADVANTAGES OF A MINIMUM TAX

The key disadvantages of the global minimum tax are the following:

6 1 Challenge to tax sovereignty

A minimum tax would threaten the flexibility of the tax structures used by some countries to attract foreign direct investment. Some countries have used their freedom to set corporation tax rates as a way to attract such

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https://www.dw.com/en/why-african-nations-doubtoecd-tax-plan/a-59653146 (accessed 2023-07-28).

25 Aslam and Coelho "The Benefits of Setting a Lower Limit on Corporate Taxation" (2021) https://blogs.imf.org/2021/06/09/the-benefits-of-setting-a-lower-limit-on-corporate-taxation/ (accessed 2023-07-29); Bunn "A Global Minimum Tax And Cross-Border Investment: Risks & Solutions" (2021) *Fiscal Fact* https://files.taxfoundation.org/20210616153028/A-Global-Minimum-Tax-and-Cross-Border-Investment-Risks-Solutions.pdf (accessed 2023-08-01) 1–2.

26 Business Day Live TV "Global Minimum Tax Proposal Misses the Mark" (2023) https://www.youtube.com/watch?v=VYj12nn2C1E (accessed 2023-07-04).

27 *Ibid.*

28 Thomas "136 Countries Have Agreed to a Global Minimum Tax Rate. Here's What it Means" (2021) https://www.weforum.org/agenda/2021/11/global-minimum-tax-rate-deal-signed-countries/ (accessed 2023-07-06); Haldenwang and Laudage "What the Global Tax Reform Means for Developing Countries" (2021) *Deutsches Institut fur Entwicklungspolitik* (*DIE*) https://www.die-gdi.de/en/the-current-column/article/what-the-global-tax-reform-means-for-developing-countries/ (accessed 2023-07-15); Barake, Neef, Chouc and Zucman "Collecting the Tax Deficit of Multinational Companies: Simulations for the European Union" (2021) *EU Observatory* https://www.taxobservatory.eu/wp-content/uploads/2021/06/TaxObservatory_Report_Tax_Deficit_June2021.pdf (accessed 2022-09-21); see also Financial Transparency Coalition "G7 Agrees to a Global Corporate Minimum Tax – But Developing Countries Don't Appear to Have Much to Gain" (2021) *Financial Transparency Coalition* https://financialtransparency.org/g7-agrees-minimum-global-corporate-tax-developing-countries-dont-appear-much-gain/ (accessed 2023-07-06); Parada "Global Minimum Taxation: A Strategic Approach for Developing Countries" (2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4280669 (accessed 2023-07-27).

29 NADA "NADA Pleads to the SARB to Consider Lowering Interest Rates" (2019) https://cover.co.za/global-minimum-corporate-tax-rate-has-benefits-for-sa/n (accessed 2023-07-27); Monsellato, Pritchard, Hatherel and Young "Tax Governance in the World of Industry 4.0: Adapting Global Tax Regulation for Connected Enterprises" (2018) https://www2.deloitte.com/us/en/insights/focus/industry-4-0/why-global-tax-governance-is-critical-for-industry-4-0.html (accessed 2023-07-02).

30 Arnold and McIntyre International *Tax Primer* (2002) 104–106; SARS and National Treasury "Overview of International Agreements" (2014) https://static.pmg.org.za/140827sars.pdf (accessed 2023-07-15) 1.

businesses.[31] There are examples of low corporation tax regimes around the world, from Ireland (12.5 per cent) to Moldova (12 per cent), from Paraguay (10 per cent) to Uzbekistan (7.5 per cent).[32] In a world where there are huge disparities in the income levels of different countries, a minimum tax rate could crowd out those who are not especially attractive but for the fact that they can offer lower rates.[33]

More generally, a minimum tax would remove the flexibility for different countries to pursue policies that best suit them.[34] This would limit the country's sovereignty in the name of updating a global taxing framework.[35] In addition, this may result in raising the cost of doing international business for some corporations. For example, with the minimum rate of 15 per cent a corporation that is not resident, but has a presence, in Ireland, would have to pay 2.5 percentage points more corporation tax on trading in Ireland than it does at present.[36] This will not only possibly make Ireland (or any low-tax jurisdiction) less attractive, but it also means that the costs will be passed on to other stakeholders involved such as the company's suppliers or its customers.[37] Adopting the minimum tax will, the argument continues, not discourage corporations from aggressive tax planning nor will it help with tax evasion.[38]

6 2 Resistance to a minimum tax

The proposal of a minimum tax has not been starved of resistance: of the world's 195 countries, only 137 have so far signed the framework. Developing countries such as Nigeria, Hungary, and Kenya did not sign the framework.[39] The resistance has been due to several reasons from different countries and in consideration of each country's corporate tax rates and circumstances.

A minimum tax will change the reality of what the corporate tax of a single country is and would further challenge the reality of what tax is as we know it. The amount of influence that a minimum tax would have on a country will

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31 Mboweni *et al* https://www.news24.com/fin24/opinion/mboweni-yellen-why-we-support-a-global-minimum-tax-rate-of-15-20210610.

32 Khalid "Commentary: Why the Call for Global Minimum Corporate Tax is a Bad Move" (2021) https://www.channelnewsasia.com/commentary/global-minimum-corporate-tax-rate-yellen-evasion-haven-digital-217306 (accessed 2023-08-01).

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 Applying this logic to the selected low-tax countries mentioned above the additional tax percentage for Moldova would be 3 per cent, Paraguay 5 per cent, and Uzbekistan 7.5 per cent.

37 Khalid https://www.channelnewsasia.com/commentary/global-minimum-corporate-tax-rate-yellen-evasion-haven-digital-217306.

38 *Ibid.*

39 Henney "Global Minimum Tax Spurned by 9 Countries, Complicating New Deal" (2021) *Foxi Business* https://www.foxbusiness.com/economy/global-minimum-tax-rejected-nine-countries (accessed 2023-08-02).

entail that a country's ability to make tax policies would be limited.[40] The intricate process of drafting, approving, and implementing tax policies considers several factors and is usually tailored to the needs of a specific country. The limitation to exercise such a right limits the sovereignty of a state[41] and the limitation may negatively impact the tax climate of a state and may have a harmful effect on the influence of taxation on investments.[42] Each country creates domestic tax rules in consideration of the tax climate and overall circumstances of that specific country. A minimum tax is a one-size-fits-all instrument that is not considerate of individual countries' circumstances and may therefore disadvantage developing countries.

A challenge with implementing such a proposal pertains to those countries that act as havens with lower tax rates and how they will be required to adopt the policy.[43] For the proposal to work, it will be important for countries adopting the policy to pressure those countries which do not want to become part of the agreement.[44] Otherwise, partial implementation would result in investment destinations being made exclusively based on countries that do not implement.

As observed with the introduction of the BEPS Action Plan, many developing countries chose to be silent and reluctant participants.[45] That was because BEPS implementation processes sought to meet the specific needs of developing countries not by lowering standards for them but rather by helping them meet the standard.[46] The implementation of minimum tax is taking the same approach of neglecting, deliberately or inadvertently, the interests and concerns of developing countries. In addition, there are currently many immeasurable impacts including that of complexity in the tax system that must be considered simultaneously by developing countries before they could implement minimum tax.[47] As a result, developing countries are well within their rights to take a cautiously optimistic stance to

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[40] Investec "Implications of a Global Minimum Tax Rate" (2022) *Investec South Africa* https://www.investec.com/en_za/focus/money/what-plans-for-a-global-minimum-tax-rate-mean.html (accessed 2023-08-01).

[41] See Ring "Democracy, Sovereignty, and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation" (2009) *Florida Tax Review* 555.

[42] OECD "Policy Framework for Investment User's Toolkit" (2015) *Organisation for Economic Co-operation and Development* https://www.oecd.org/en/topics/investment.html (accessed 2024-07-29).

[43] Business Day Live TV https://www.youtube.com/watch?v=VYj12nn2C1E.

[44] *Ibid.*

[45] Christensen, Hearson and Randriamanalina "At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations, International Center for Tax and Development" (2020) https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15853/ICTD_WP115.pdf?sequence=9&isAllowed=y- (accessed 2023-08-28).

[46] Shaheen "Pascal Saint-Amans Defends OECD's Common Reporting Standard Despite Loopholes Identified by TJN" (2014) *International Tax Review* https://www.internationaltaxreview.com/article/2a698wtf6493d5ki4iwap/exclusive-pascal-saint-amans-defends-oecds-common-reporting-standard-despite-loopholes-identified-by-tjn (accessed 2023-07-26).

[47] Tandon "Policy Note: Assessing the Impact of Pillar Two on Developing Countries" 2022 50 *Intertax* 923–935 924.

not adopt the minimum tax, regardless of the threats of being punished for not doing so.

6 3 Tax as a distinguishing and competition tool – what's wrong with the "race to the bottom"?

One of the biggest factors for resistance and a major disadvantage for the implementation of a minimum tax is the possible eradication of tax incentives and the undermining of investment incentives that countries have put in place to offer low tax rates to attract some of the biggest multinational corporations. Tax havens allow multinationals to operate in countries that impose lower tax rates which will allow the companies to operate in a favourable tax position. The implementation of a minimum tax will disadvantage countries that rely on low tax regimes to mostly attract multinational companies and benefit from the financial gains of implementing such regimes.[48]

In most instances, tax incentives allow smaller and developing countries to compete with developed countries in terms of attracting multinational corporations to conduct business in smaller and developing countries which simultaneously allows tax competition and possible growth. The possible complete eradication of tax competition will place some countries in a disadvantaged position and would mean that countries would have to deploy other means of attracting such corporations such as favourable trade and tariff provisions, subsidised utility rates, and exceptions to other regulations to offer competitive incentives to potential investors.[49] Indeed "global minimum tax will limit appropriate tax competition between nations and that this will have massive ramifications for smaller nations who may now no longer be able to compete with larger nations that have inherent economic advantages".[50] It will place developing countries that rely heavily on tax incentives in a disadvantaged position because it will eradicate tax as a factor when multinationals decide where to conduct business. Developed countries already have resources and additional incentives that will attract multinationals in the absence of tax competition whereas developing countries would have to employ further incentives at additional costs.

Where an MNE may seek to invest in a developing country not solely based on a tax incentive and which tax incentive seeks to reduce the tax rate, the MNE will still be required to pay the top-up tax thus leaving the country in a worse-off state in which it has effectively subsidised another country's revenue collection, the latter generally being a developed country.

Tax competition is disadvantageous to tax collections in the countries that would otherwise collect taxes and not to those that would not have any tax to

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[48] Williams "Developing Countries Refuse to Endorse G7 Corporation Tax Rate" (2021) *Forbes* https://www.forbes.com/sites/oliverwilliams1/2021/06/30/developing-countries-refuse-to-endorse-g7-corporation-tax-rate/?sh=20291b0c4f0c (accessed 2023-08-01).

[49] Kritz "The Pros and Cons of a Global Corporate Tax Rate" (2021) *The Manila Times* https://www.manilatimes.net/2021/05/20/business/columnists-business/the-pros-and-cons-of-a-global-corporate-tax-rate/874138 (accessed 2023-08-01).

[50] *Ibid.*

collect anyway. Tax competition is not harmful to taxpayers, be it corporate or individual taxpayers. Like competition in many other spheres (like prices, goods, services), competition improves the quality of the offerings while at the same time keeping the cost of the goods and services low. When corporates pay less tax, they can reduce the price of their goods and services, which translates to lower costs for the end consumers.

The race to the bottom is undesirable to the developed economies. While it might not necessarily be advantageous to developing countries, in the main, the benefits of using tax as a competition tool might outweigh the disadvantages. After all, in many instances, many developing economies have no other bargaining tool than tax. Their economies are disadvantaged by colonialism by the very developed countries, most of them are politically, economically, and socially unstable and their infrastructure is nowhere near capable of enabling them to compete with the developed economies. Thus, for these developing economies, the race to the bottom means no harm especially since they are already at the bottom in respect of every other economic attribute anyway. In any event, Sheffrin argues that alternative minimum taxes are particularly problematic because they tend to stray from their true purpose to become a destabilising factor in the overall tax system.[51] As stated earlier, the low rate of 15 per cent would likely cause a new race to the bottom in Africa where the average tax rates are much higher.[52]

As Tandon avers, regulatory competition exists not just exclusively in tax law but there are instances of these in other areas of law, such as insolvency law, securities regulation, contract law, and corporate law. Fair competition in other counts fundamentally assumes recalibrating other legal frameworks of all jurisdictions involved, the developed and developing alike. The outcome of such fair competition would only be credible and relevant if one assumes that tax competition creates welfare losses that exceed other forms of regulatory competition.[53]

6 4 Cost of implementation of a minimum tax

The negotiations of a minimum tax are seemingly simple and reaching an agreement has been the core issue up to now. However, the implementation of such a global tax with its overwhelming mandate is likely going to be an administrative catastrophe.[54] The implementation of a minimum tax will need a rigorous restructuring and compliance process. It will impact domestic tax legislation with regard to tax rates, base, collection, compliance, management, and incentives. The process of fully implementing a minimum tax across the world will involve countries readjusting their current taxes to

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[51] Sheffrin (2002) *Tulane Economics Working Paper Series* http://repec.tulane.edu/RePEc/pdf/tul2002.pdf (accessed 2023-08-01) 1–39.

[52] Ehl (2021) *Deutsche Welle* https://www.dw.com/en/why-african-nations-doubtoecd-tax-plan/a-59653146 (accessed 2023-08-01).

[53] Tandon 2022 *Intertax* 929.

[54] Jianguo “Global Minimum Tax Should Think of Benefits of Developing Countries” (2021) *Global Times* https://www.globaltimes.cn/page/202107/1227972.shtml (accessed 2023-07-17).

bring them in line with the global tax. Furthermore, countries will have to selectively repeal current tax incentives in their respective domestic tax laws to ensure they are in line with the global minimum rate. The issues that will arise are in line with the repealing of such tax incentives which may be done unilaterally but, in some cases, may be subject to the stabilisation provisions[55] and may entail the revision of bilateral treaties. The implementation of a minimum tax is the first of its kind which means that compliance and administrative procedures will be complex and demanding. This might require further compliance costs, and this might take a longer period to ensure that all countries are compliant and adhering to the minimum tax rules.[56]

The adoption of the minimum tax per developing country may be costlier from a financial point of view as well as from an administrative efficiency perspective. Wamuyu, Liotti, and Owens suggest that when such African countries choose to adopt the global minimum tax they should do so as a regional approach.[57] Titus adds that countries of the East African Community could adopt such a conditional minimal tax as a regional bloc of seven countries. In this way, she proposes, the countries would be able to share the administrative burden placed upon their staff and resources across the seven revenue authorities in the region.[58] According to Wamuyu, Liotti, and Owens, "a regional approach to addressing the recent changes in the international tax arena has the potential to ensure the development of a region as a whole and intensify economic integration."[59]

6 5 Smaller economies would be hit inordinately

With the implementation of a minimum tax and therefore in the absence of tax-rate differentials, large countries would become more attractive to investors than small countries due to market-size effects. Overall, the

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[55] Readhead, Lassourd and Mann "The End of Tax Incentives: How Will a Global Minimum Tax Affect Tax Incentives Regimes in Developing Countries?" (2021) *Investment Treaty News* https://www.iisd.org/itn/en/2021/06/24/the-end-of-tax-incentives-how-will-a-global-minimum-tax-affect-tax-incentives-regimes-in-developing-countries/ (accessed 2023-07-26).

[56] Knowledge@Wharton "Will a Global Minimum Corporate Tax Work?" (2021) https://knowledge.wharton.upenn.edu/article/blouin-g7-corporate-tax/ (accessed 2023-07-30); Jones "Switzerland Plans Subsidies to Offset G7 Corporate Tax Plan" (2021) https://www.swissinfo.ch/eng/switzerland-plans-subsidies-to-offset-g7-corporate-tax-plan/46696800 (accessed 2023-07-30). Other aspects to consider pertain to the administration part of actually paying the taxes by an MNE should the policy be implemented as well as the type of assurances to be put into place to prevent circumventing such policy. In planning for the implementation of such a policy, MNEs located in Switzerland have already begun consulting on developing methodologies to offset any changes which will be brought about by an adjustment in the tax rate. It would appear that policymakers view the collection of taxes above that of investment and growth.

[57] Wamuyu, Liotti and Owens "Challenges at the Intersection Between Investment Provisions in Regional Trade Agreements and Implementation of the GloBE Rules under Pillar Two Transnational Corporations" (2023) https://unctad.org/system/files/official-document/diaeia2023d1a2_en.pdf (accessed 2023-07-06).

[58] Titus "Pillar Two and African Countries: What Should Their Response Be? The Case for a Regional One" 2022 *Intertax* 711–720.

[59] Wamuyu *et al* https://unctad.org/system/files/official-document/diaeia2023d1a2_en.pdf (accessed 2023-07-30).

elimination of tax-rate differentials would undermine small countries' attractiveness to international businesses and induce domestic businesses to relocate to larger countries with the gravity of larger markets. Therefore the implementation of a minimum tax would have detrimental effects on smaller countries with more open economies.[60] As a result, MNEs may no longer view smaller countries as being attractive and in essence lose out on the presence of an MNE to a larger country.[61] The crux of the disadvantages pertains to small countries no longer being able to seem attractive for MNEs together with domestic businesses based therein to rethink their approach and perhaps move to a larger country where larger markets exist.[62] Where MNEs house entities in small countries that are geared towards research and development and innovation, negative effects may result in the form of future investment in such activities being halted and relocated to another jurisdiction.[63]

The author concurs with Magalhães that despite its global impact, the global minimum tax has been designed by, and for only a small number of wealthy countries.[64] As a result, the benefits thereof can only be viewed from the perspective of those benefiting countries, before one considers any residual benefits for the unintended participants, the developing countries. While it is clear that the benefits of the global minimum tax will largely be sowed by developed countries, there is a rhetoric that urges the proposition that developing countries would also benefit. Be that as it may, those suggested benefits may not apply to all developing countries or equally to developing countries. Parada suggests that whether a developing country will benefit depends on the elasticity of investment in such a country. Developing countries with less elastic investment and more competitive advantage are more likely to benefit from imposing a domestic minimum tax.[65]

One other main reason why a global minimum tax would not benefit developing countries is that developing countries are subject to international agreements, private contracts, and national laws that will frequently prevent them from removing tax incentives promised to investors. Any attempt at collecting top-up tax in terms of the minimum tax may violate the agreement and expose the country to costly international arbitration. This creates a two-edged sword situation because if the developing country does not collect the

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60 Bauer "Why a Global Minimum Corporate Tax Rate May Never Be Implemented" (2021) *Brussels Report* https://www.brusselsreport.eu/2021/07/13/why-a-global-minimum-corporate-tax-rate-may-never-be-implemented/ (accessed 2023-07-30).

61 Bauer "Unintended and Undesired Consequences: The Impact of OECD Pillar I and II Proposals on Small Open Economies" (2021) *ECIPE Occasional Paper* https://ecipe.org/wp-content/uploads/2020/07/ECI_20_OccPaper_04_2020_LY05.pdf (accessed 2023-07-30).

62 *Ibid.*

63 *Ibid.*

64 Magalhães "What Is Really Wrong with Global Tax Governance and How to Properly Fix It" 2018 10 *World Tax Journal* 511.

65 Parada "Tailoring Developing Country Advice: A Response to Noam Noked" 2022 105 *Tax Notes International* 783–784.

minimum tax, the home country of the corporate parent must collect and keep the tax. [66]

On the issue of international agreements, some developing countries have treaties that include tax-sparing provisions, in terms of which the residence country allows their residents to retain the advantages of tax incentives by pretending that tax was levied and thus sparing the taxation of foreign source income of such residents. Minimum tax provisions would impact these tax-sparing provisions because spared taxes are not considered to be covered taxes for calculating the effective tax rate of the constituent entity. This may result in tax disputes, which will impact the ability of developing countries to use tax-sparing provisions to encourage foreign direct investment. To implement the minimum tax, such countries would have to renegotiate and remove tax-sparing provisions from their tax treaties.[67]

6 6 Transparency in competition, or lack thereof

It is advocated that the implementation of a minimum tax would curb or reduce international tax competition.[68] International competition for low effective corporate tax rates will not be eliminated completely. Short of that, international tax competition is likely to continue but in a less transparent manner. A minimum tax rate would result in much more complex corporate tax laws globally, severely undermining transparency and government accountability. It would become close to impossible for outsiders, including government officials and elected politicians, to objectively assess fiscal flows and tax justice in and beyond the corporate world.

France and China are formidable examples of the hypocrisy in the current debate about corporate tax avoidance. For example, the French government is pushing for a minimum tax, but at the same time, it has a fiscal arrangement in place that provides for a 10 per cent maximum tax on income from intellectual property rights.[69] With this exemption, the French government explicitly aims to encourage technical innovation by supporting technological development and R&D activities in France. It is concerning when large countries are in the process of introducing incentives at a time when they should be preparing their tax regimes to operationalise the minimum tax. Another example is China where the Chinese government

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[66] Brown "A Global Minimum Tax: Is Pillar Two Fair for Developing Countries?" (2023) *International Centre for Tax and Development* https://www.ictd.ac/blog/global-minimum-tax-pillar-two-fair-developing-countries/ (accessed 2023-09-27).

[67] Oguttu 2022 *Bulletin for International Taxation* 16.

[68] Johannesen "The Global Minimum Tax" (2022) *Journal of Public Economics* https://www.sciencedirect.com/science/article/pii/S0047272722001116 (accessed 2023-07-27) 1; UNCTAD "The Impact of a Global Minimum Tax on FDI" (2022) https://unctad.org/system/files/official-document/wir2022_ch03_en.pdf (accessed 2023-01-27); Chaisse "The Global Minimum Tax: How the Latest Tax Reform Will Impact Business" (2022) *Financier Worldwide* https://www.financierworldwide.com/the-global-minimum-tax-how-the-latest-tax-reform-will-impact-business (accessed 2023-09-27).

[69] Bauer *Brussels Report* (2021) https://www.brusselsreport.eu/2021/07/13/why-a-global-minimum-corporate-tax-rate-may-never-be-implemented/ (accessed 2023-07-21).

recently extended its super tax deduction regime for domestic manufacturers, aiming to further support growth and technological innovation within Chinese borders.[70] This all suggests that corporate tax competition would, if at all, only stop when taxes on corporate income are completely abolished.

6 7 Failure to allocate taxing rights to the source jurisdiction

The allocation of taxing rights on under-taxed income to the jurisdiction of the parent company is potentially problematic as such parent company may not be located within the jurisdiction of the economic activity that generates the initial profits. In the South African context, this is especially problematic given that the mining and resource extractive industry accounts for the bulk of profit generation and shifting activities.[71]

6 8 Reduced global investment in future operations

A disadvantage posited that policymakers may have not considered relates to reduced global investment in future operations.[72] A direct result of such a policy would be a concomitant reduction in foreign direct investment with a commensurate sluggish growth from an economic aspect.[73] The ability of a country to generate sufficient employment opportunities illustrates an economy's performance.[74] The impact that a minimum tax may have could lead to certain jurisdictions incurring negative employment opportunities.

7 IMPACT OF A MINIMUM TAX ON DEVELOPING COUNTRIES

It is reported that developing countries lose around $100 billion annually as a result of corporate tax avoidance schemes.[75] The race to the bottom and the reduction of corporate taxes have allowed multinationals to engage in tax avoidance schemes and the impact of such schemes has a far wider impact, with drastic effects on developing countries. The race to the bottom reduces

[70] OECD "R&D Tax Incentives: China" (2021) https://www.oecd.org/sti/rd-tax-stats-china.pdf (accessed 2023-07-21) 1.

[71] Statistics South Africa "Four Facts About the Mining Industry" (2019) https://www.statssa.gov.za/?p=14682 (accessed 2023-01-23); OECD "Local Content Policies in Minerals-Exporting Countries: The Case of South Africa" (2017) https://www.oecd.org/trade/topics/trade-in-raw-materials/documents/trade-raw-materials-south-africa-country-note.pdf (accessed 2023-07-27)1–2.

[72] International Labour Organisation "Employment Rich Economic Growth" (2019) https://www.ilo.org/global/topics/dw4sd/themes/employment-rich/lang--en/index.htm (accessed 2023-07-23).

[73] *Ibid.*

[74] *Ibid.*

[75] The Guardian "NGOs Claim Poor Countries Lose $100bn Annually Due to Tax Dodges by EU Firms" (2013) https://www.theguardian.com/global-development/2013/sep/18/poor-countries-tax-dodges-eu-firms (accessed 2023-07-21).

the tax burden on multinational companies that yield profits and pay less taxes in these developing countries. It is advocated that minimum tax will eradicate the race to the bottom, abolish tax havens, and possibly increase revenue for African countries.[76]

The effective tax rate is the total taxes on corporate profits paid to government authorities, or "cash tax" (the numerator), as a proportion of the tax base, which is based on accounting profits (the denominator) expressed as a fraction.[77] In each income year, if a subsidiary's effective tax rate is below the minimum globally agreed rate, its parent company must pay a "top-up tax" on its proportionate share of the income of the low-taxed subsidiary, to the country where it is located (usually referred to as the home or residence country).[78] Under certain circumstances, the liability for the top-up tax shifts to one or more other members of the multinational group. As a result, the primary beneficiaries of a minimum tax would be capital-exporting countries, where multinational companies are typically headquartered, who are given first priority to tax undertaxed profits.

In principle, MNEs operating in developing countries should find the 15 per cent minimum tax easy to pay, as most developing countries have much higher statutory corporate tax rates, ranging from 20 to 40 per cent. However, without the minimum tax in developing countries, companies may pay less than the minimum tax rate when they benefit from tax incentives. There are two categories of tax incentives that developing countries often grant to foreign investors. The first one is incentives that create temporary, or timing differences between companies' financial statements, which declare profits according to international accounting standards (accounting profits), and their taxable income, calculated based on domestic tax rules e.g., accelerated depreciation of capital assets. These incentives do not reduce the total amount of taxes owed; they merely postpone them. They tend to be efficient in attracting investment: they lower the cost of capital and make less profitable investments viable. The OECD, through the Inclusive Framework, has committed to finding a workable solution to prevent these types of incentives from triggering a top-up tax, although the details are yet to be determined.[79]

The second category of tax incentives plainly reduces or eliminates taxes paid on profits, often for a set period e.g., tax holidays, preferential tax rates,

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[76] Protto, Heitmüller, Baine, Ndajiwo, Tandon and Dai "Perspectives on the Progress of Global Corporate Tax Reform" (2021) *International Centre for Tax and Development* https://www.ictd.ac/blog/perspectives-progress-global-corporate-tax-reform-inclusive-framework-beps/ (accessed 2023-07-27).

[77] Readhead *et al* (2021) *Investment Treaty News* www.iisd.org/itn/en/2021/06/24/the-end-of-tax-incentives-how-will-a-global-minimum-tax-affect-tax-incentives-regimes-in-developing-countries/.

[78] *Ibid*.

[79] International Institute for Sustainable Development "The end of tax incentives: How will a global minimum tax affect tax incentives regimes in developing countries?" (2021) https://www.iisd.org/itn/en/2021/10/07/the-end-of-tax-incentives-how-will-a-global-minimum-tax-affect-tax-incentives-regimes-in-developing-countries-alexandra-readhead-thomas-lassourd-howard-mann/ (accessed 2023-08-01).

tax credits, investment allowances, or income exemptions.[80] These incentives are considered less efficient than the first category of tax incentives and more likely to result in profit shifting.[81] They are the types of incentives targeted by the reform. The minimum tax will make many of them ineffective because any multinational company that benefits from an incentive such that its tax rate is less than the minimum rate will simply have to pay the balance to a foreign jurisdiction (often the residence country of the company that receives the incentive).

The minimum tax will only affect taxes calculated on the profit of multinational companies.[82] This would include corporate income taxes, withholding taxes on cross-border payments of dividends or interests, and any profit-based levy such as a profit-based mineral royalty or tax on economic rent. It will have no impact on taxes and charges not based on corporate income such as VAT, customs duties, payroll taxes, revenue-based taxes such as mineral royalties, and production sharing arrangements, and no impact on any incentives granted by governments on these revenue streams. This prompts the question of whether countries will compete for investment by lowering these types of taxes in the future. It would be advisable not to, especially considering that these taxes are more reliable, and easier to collect than taxes on income.

It is important to note that the implementation of a minimum tax would only target MNEs with a gross annual turnover exceeding 750 million Euros.[83] This excludes the majority of MNEs operating in developing countries from the application of the minimum tax. As a result, regardless of the implementation of minimum tax, most organisations would not be affected thereby. This necessitates a dual system of corporate tax for those MNEs that meet the threshold and those that do not. This then necessitates additional resources to be invested into the corporate tax administrative and compliance systems, which may not be affordable to most countries, especially developing countries. Due to the number of MNEs involved in developing countries, the tax revenue to be raised from those MNEs which would be under the minimum tax would not be substantial enough to justify the investment that would be required to be placed into its operation within a developing country.

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80 UNCTAD-CIAT "Design and Assessment of Tax Incentives in Developing Countries" (2018) https://www.un.org/esa/ffd/wp-content/uploads/2018/02/tax-incentives_eng.pdf (accessed 2023-08-01) iii.

81 Platform on Tax Collaboration "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" (2015) https://www.imf.org/external/np/g20/pdf/101515.pdf (accessed 2023-09-03) 3.

82 *Ibid.*

83 OECD "Economic Impact Assessment of the Global Minimum Tax: Summary" (2024) https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/cross-border-and-international-tax/summary-economic-impact-assessment-global-minimum-tax-january-2024.pdf (accessed 2023-09-03) 1.

8 ALTERNATIVES TO GLOBAL MINIMUM TAX

The main objective of Pillar Two, and therefore minimum tax, is to address the tax challenges arising from digitalisation and globalisation of the economy.[84] With the objectives being this clearly defined, the question is whether this objective could not be achieved by using any other means and whether the introduction of minimum tax is the most efficient method of achieving this. The reach and extent of a minimum tax is expansive, and international consensus not only in theory but in practice and operation is required. However, an introduction of targeted rules in different countries could achieve the same goal, especially because the different countries are facing many other different and varied challenges that may not be addressed by a minimum tax.

Most developing countries struggle with administration and enforcement, illicit financial flows, transfer pricing, taxation of the digitalised economy, and taxation of the ever-prevalent small businesses in developing countries.[85] A lot of work still needs to be done in Africa in particular with regard to these challenges. For example, focusing on the digital economy: it is found that in Africa digital technologies are generally under-used and misused relative to their potential. According to Moore, [86] these digital technologies–

> "…tend to be deployed in a rather fragmented way and for 'taxpayer facing' activities, rather than for internal control purposes. They have much under-exploited potential to support additional revenue collection, to make the collection process less unpleasant and fairer and to address the problem of weak oversight and accountability of tax administrations."

In this regard, the natural focus of the developing world is to activate the full potential of digital technologies before considering the tax implications thereof, or the tax avoidance activities attendant thereto.

Another example is with regards to the last-mentioned challenge of taxing small businesses and often also large businesses. In this space, the real struggle in developing countries is that many, if not most, national tax administrations have large proportions of inactive taxpayers – individuals and companies who are registered with the tax administration, but who do not actually pay tax. Their taxpayer registers are often inaccurate.[87] Moore

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[84] OECD https://www.oecd.org/tax/beps/oecd-releases-pillar-two-model-rules-for-domestic-implementation-of-15-percent-global-minimum-tax.htm.

[85] See Ngwenya "The Spill-Overs of Illicit Financial Flows" in Owens, McDonnel, Franzsen and Jude (eds) *Inter-agency Cooperation and Good Tax Governance in Africa* (2018) 43–60; Oguttu "Tax Base Erosion And Profit Shifting in Africa – Part 1: Africa's Response to the OECD BEPS Action Plan" (2016) ICTD *Working Paper* https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/12802/ICTD_WP54.pdf?sequence=1 (accessed 20-07-23) 54; Warris "Measures Undertaken by African Countries to Counter Illicit Financial Flows: Unpacking the African Report of the High-Level Panel on Illicit Financial Flows" in Owens *et al Inter-agency Cooperation and Good Tax Governance in Africa* (2018) 1–15.

[86] Moore "What's Wrong with African Tax Administration?" (2022) *ICTD Working Paper* 111 https://blog.sodipress.com/wp-content/uploads/2021/01/what-is-wrong-with-african-tax-administration.pdf (accessed 2023-07-30) 3.

[87] *Ibid.*

states that a "major reason for both the large numbers of inactive taxpayers and the inaccuracy of the registers is that considerable efforts are continually made to register new taxpayers, even though experience indicates that few will actually end up paying tax."[88] These are some of the major challenges that developed countries do not necessarily share with developing countries. Pertinent hereto, therefore it would be more apposite for developing countries to focus resources on implementing current laws than to introduce yet another instrument that is less likely to be properly administered.

Concerning the globalisation of the economies, it is submitted that adherence to treaty principles would assist countries in adequately allocating taxing rights. It is a basic principle of international tax treaties that the profits of an enterprise of a contracting state are taxable only in that state unless the enterprise carries on business in the other contracting state through a permanent establishment situated therein.[89] Strictly applied, this principle should ensure equitable tax administration in most countries. It is mostly the lack of enforcement of these rules that results in tax avoidance and evasion. Once again, instead of creating or introducing new rules, taxing authorities should seek to enforce the already existing rules.

Furthermore, governments that have not already, could introduce a specific digital services tax to tax digital corporations.[90] This could be a tax on selected revenue streams of multinational digital companies.[91] As an example of this, a digital services tax implemented in Australia to date has a very high tax-free threshold which ensures that the tax only applies to large MNEs that are thought to make a significant amount of profit in the domestic country.[92] In this way, countries would be able to generate more revenue than they are presently, without adversely impacting local and multinational small and medium enterprises. Making the rules poignant and strict would result in less tax avoidance from MNEs.

In 2021 Kenya introduced a digital services tax (DST), in lieu of adopting the minimum tax. This is against the international pressure for Kenya to conform to the global multilateral minimum tax proposal.[93] The DST was introduced in the Finance Act 2020 and became effective on 1st January 2021.[94] It is payable on income derived or accrued in Kenya from services offered through a digital marketplace.[95] The rate of DST is 1.5 per cent of the

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88 *Ibid.*

89 Oguttu "The Challenges of Taxing Profits Attributed to Permanent Establishments: A South African Perspective" 2009 21 *SA Merc LJ* 773.

90 A Digital Services Tax (DST) is a tax on selected revenue streams of multinational digital companies. See Tax and Transfer Pricing Institute "Digital Services Taxation: An Introduction and Policy Options for Australia" 2020 7 *Policy Brief* 73.

91 Tax and Transfer Pricing Institute 2020 *Policy Brief* 3.

92 *Ibid.*

93 Bloomberg "OECD Urges Kenya to Drop Plan to Double Digital-Services Tax" (2022) https://www.bloomberg.com/news/articles/2022-04-14/oecd-urges-kenya-to-drop-plan-to-double-digital-services-tax?leadSource=uverify%20wall (accessed 2023-01-27).

94 Kenya Revenue Authority "Introducing the Digital Services Tax" (2020) https://kra.go.ke/images/publications/Brochure-Digital-Service-Tax-Website.pdf (accessed 2023-01-27) 1.

95 A digital marketplace is a platform that enables direct interaction between buyers and sellers of goods and services through electronic means. See Kenya Revenue Authority

gross transaction value. The gross transaction value in the case of the provision of digital services is the payment received as consideration for the services; and in the case of a digital marketplace, it is the commission or fee paid to the digital marketplace provider for the use of the platform. The gross transaction value is exclusive of VAT.

The benefit of DST as a unilateral measure is that its application, implementation, and administration are solely within the control of the Kenya Revenue Authority. It does not need international consensus to be administered, nor does it need approvals to adjust as and when the need arises. Reforms are underway to increase the rate to 3 per cent. Kenya believes that its DST would bring in revenues from many more companies – an estimated 89 compared to just 11 under the OECD deal according to the Kenya Revenue Authority's Commissioner, Terra Saidimu.[96]

There is also a reform proposal from the United Nations to consider which is aimed specifically at digital services businesses. This proposal is based on taxing companies' digital revenues where they are generated, rather than where the MNE is resident, on a country-by-country basis.[97] A growing number of emerging economies, including India, Argentina, Nigeria, and Vietnam, support this UN proposal.

Finally, perhaps a shift in the taxing event should be considered. Under the minimum tax, corporate tax would still be charged on profits. However, there are multitudes of multinationals whose revenue and market capitalisation have increased dramatically but whose profit margins have remained below the recommended 10 per cent cut-off.[98] Under the current construct of the minimum tax, these groups will not be subjected to the minimum tax. In this regard, Saez and Zucman[99] have proposed another way to achieve a more equitable tax distribution. Rather than taxing profits, their proposal would impose a 0.2 per cent tax on the stock market capitalisation of publicly listed companies – the value of their shares. But, more importantly, this system would not wait for profits to reach a specific level before paying out – it would do so far sooner. Taxes raised might be distributed proportionally to sales made in each country, including non-G20 countries.

Some commentators believe that alternatives to global minimum taxes should be specialised domestic minimum taxes. Noked suggests that

(2020) https://kra.go.ke/images/publications/Brochure-Digital-Service-Tax-Website.pdf (accessed 2023-01-27) 1.

96 VATCalc "Kenya to Raise DST from 1.5% to 3% Despite OECD Agreement for 2023 Global Corporate Tax Reforms" (2022) https://www.vatcalc.com/kenya/kenya-plans-to-double-digital-sales-tax-to-3/ (accessed 2023-07-12).

97 Financial Times "IMF Proposes 'Solidarity' Tax on Pandemic Winners and Wealthy" (2021) https://www.ft.com/content/5dad2390-8a32-4908-8c96-6d23cd037c38 (accessed 2023-07-13).

98 Wilson "The G7's Global Corporation Tax: Bringing Big Tech to Heel" (2022) *Money Week* https://moneyweek.com/investments/stocks-and-shares/tech-stocks/603379/the-g7s-global-corporation-tax-bringing-big-tech (accessed 2023-07-20).

99 Saez and Zucman "A Wealth Tax on Corporations' Stock" (2002) *Economic Policy* https://academic.oup.com/economicpolicy/article/37/110/213/6656187 (accessed 2023-07-27) 217.

developing countries should consider designing their own domestic minimum taxes that would apply in a targeted fashion that would only be triggered once the domestic company's income would otherwise be subject to tax in another jurisdiction as per the GLoBE rules. He also suggests that in addition developing countries should impose a domestic minimum tax modeled on the GLoBE rules that would apply to the subsidiaries of the MNEs subject to the GLoBE rules.[100]

The biggest challenge with Noked's proposal is that it would result in extensive financial and administrative costs for developing countries. Parada took the liberty to directly respond to this and stated that he is

> "hesitant to agree that calling on all developing countries to implement a domestic GLOBE can be the holy grail for the challenge of GLOBE rules. Instead, some developing countries, especially those with less competitive advantages and high investment elasticities, could start thinking about more sensitive domestic reforms to their tax incentive regimes, including alternative forms of competition. Perhaps that way they can still ride the wave of minimum global corporate income taxation that the world seems to be in."[101]

Finally, Shaviro emphasises that minimum taxes, in general, are deeply flawed and should only be implemented as a last resort when other better options would not be possible.[102]

9 CONCLUSION

Once, or if, fully implemented, a minimum tax will inevitably redefine what is an acceptable tax base and what is an acceptable tax rate. As such, it does not necessarily attempt to harmonise taxes, but instead, it sets boundaries within which a country is expected to operate. There is an anticipated potential profit loss as a result of increased tax liability in head office companies (unbudgeted), due to the potential top-up where the income from the subsidiary is taxed at below 15 per cent. In the long run, and as a progressively lower minimum tax rate becomes more palatable, the gradual convergence of global corporate income tax rates to a minimum tax, regardless of geographic location, can be reasonably expected to neuter the rationale for profit shifting. A key result of this could be the relocation of mobile economic assets to the originating or parent company jurisdiction.

In the unlikely event that the minimum tax could be adopted by all countries, it could be effective. If adopted by the majority, it would be imposed on those countries that do not adopt it, via the top-up rule. If it is adopted by a few, it will not work. Regardless, it runs a risk of being sabotaged by a lack of transparency and clandestine deals between tax authorities and taxpayers.

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[100] Noked "Potential Response to GLOBE: Domestic Minimum Taxes in Countries Affected by the Global Minimum Tax" 2021 102 *Tax Notes International* 943.

[101] Parada (2022) *Tax Notes International* 1.

[102] Shaviro "What are Minimum Taxes, and Why Might One Favor or Disfavor Them?" (2020) *NYU Law and Economics Research Paper No 20–38* https://ssrn.com/abstract=3604328 (accessed 2023-11-10) 3.

However, countries that do not adopt may continue with business as usual. Developing country to developing country deals could still be at incentivised rates because if they are not incentivised rates, they run the risk of their MNEs preferring the more advanced economies for investment, as they (the developing countries) cannot compete with developed countries on key business location determinants. In the end minimum tax is likely to have far-reaching implications for developing countries and it is key that each country analyses how it should respond to the pending global instrument. Unfortunately, as things now stand, countries, including developing countries, are racing to introduce and implement minimum tax, through domestic legislation with no obvious plan to address the inability of developing countries to collect tax in terms of the minimum tax.[103] Tandon urges developing countries to carefully assess the impact that Pillar Two may have not just on the present taxes but also on the implications of importing such a rule within its domestic tax law.[104]

The main takeaways from this article for developing countries can be summarised as follows:

1. The minimum tax was designed for and by developed high-income countries;
2. Empirical evidence shows that it is the developed countries that will benefit financially from minimum tax;
3. By reducing taxes from the high ranges of 25 per cent to 35 per cent, a minimum tax of 15 per cent engenders a new legitimised race to the bottom;
4. There is no patent evidence that minimum tax will bear any benefit for developing countries;
5. The administrative costs of adopting minimum tax will be disproportionately higher for developing low-income countries than they would be for developed high-income countries;
6. The punitive provisions such as the top-up tax are an acknowledgement that not all countries would find other benefits in adopting a minimum tax. Developing countries are lulled into believing that there is a benefit to them because the minimum tax depends on mass adoption for it to work, hence the sanction.
7. The adoption of minimum taxes may result in developing countries defaulting on their international agreements;
8. Minimum tax is premised on the assumption that developing countries' incentives are ineffective for the countries’ purposes and that the economic playing field is plain;
9. Many countries are rushing into adopting minimum taxes without proper analysis of the impact on developing countries. The effects of hasty adoption may be irreversible; and

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[103] International Centre for Tax and Development “A Global Minimum Tax: Is Pillar Two Fair for Developing Countries?” (2023) https://www.ictd.ac/blog/global-minimum-tax-pillar-two-fair-developing-countries/ (accessed 2023-11-10).

[104] Tandon 2022 *Intertax* 935.

10. Minimum taxes are flawed, or imperfect at best. Various countries have abandoned them.

Based on the foregoing, developing countries should examine their own tax regimes against their developmental needs and adjust the tax regime or opt to maintain their tax *status quo*. There is no one-size-fits-all solution in international tax. As demonstrated in this article, the benefits of minimum tax for developing countries are not patent, clear, or determinable.