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CORPORATE MIGRATIONS AND TAX TRANSPARENCY AND DISCLOSURE

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INTRODUCTION

Migration generally refers to the movement of peoples across borders. But the broader look at migration in this conference incorporates the movement of business across borders. This expanded concept enables us to better understand the complex jurisdictional relationships between and among nations and their members. The latter part of the twentieth century, in particular the period from the 1980s onward, saw notable growth in business expansion across borders.[1] Such expansion, though certainly not without precedent, was spurred by a number of factors including reduced currency and investment restrictions, and increased ability to manage global activities through technology and communications.

Twenty plus years into this business globalization, we have also witnessed the rise of transparency and disclosure rules and regimes that have dominated much of global international tax reform.[2] Debates over tax transparency and disclosure have permeated public discussions and the advocacy platforms of nongovernmental organizations. With regard to corporate taxpayers, the primary concern has been the ability of multinationals to pursue various tax structures and planning strategies that, though perhaps not constituting evasion, nonetheless constitute a form of tax avoidance that is not, or should not be, permitted. Accompanying the various substantive law reforms targeting such tax

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1. *See, e.g.*, sources cited *infra* notes 9, 11, 20.

2. *See, e.g.*, Diane Ring, *Article 26: Exchange of Information*, *in* IBFD, GLOBAL TAX TREATY COMMENTARIES §§ 1.2.3, 1.2.5.9, 1.2.5.9.1 (2017) [hereinafter Ring, *Article 26*]; Diane Ring, *Transparency and Disclosure*, *in* UNITED NATIONS HANDBOOK ON SELECTED ISSUES IN PROTECTING THE TAX BASE OF DEVELOPING COUNTRIES 497, 497 (Alexander Trepelkov, et al. eds., 2015) [hereinafter Ring, *Transparency and Disclosure*].

avoidance have been a series of transparency and disclosure mechanisms aimed at supporting the effort to curtail tax base erosion.

Among the most prominent examples of such transparency and disclosure mechanisms, either enacted or being considered, are: (1) country-by-country reporting of tax information (from the Organisation for Economic Co-operation and Development ("OECD") Base Erosion and Profit Shifting ("BEPS") Project), (2) automatic exchange of tax rulings among jurisdictions, and (3) disclosure of beneficial ownership of entities.[3] Additional high-profile measures, predominantly aimed at the conduct of individual tax evaders, include the Common Reporting Standard ("CRS") for automatic exchange of certain financial account information and Intergovernmental Agreements ("IGAs") calling for automatic sharing of certain information by foreign financial institutions with the United States.[4] These measures come at some cost to taxpayers and third parties, which must gather, collate, review, and report the data.[5] Additionally, taxpayers express concern over the possibility that the newly reported data will be made public illegally, or perhaps legally in the future, and thus harm their business competitiveness.[6]

In this Essay, I suggest that the contemporary focus on transparency and disclosure is substantially due to the ease of corporate migration and movement across borders. Increased transparency and disclosure are the price for the increased business border flexibility. International transactions have always been part of the economic picture.[7] But to the extent taxpayers and transactions were historically domestically focused, tax authorities had more access to information and more ability to control all of the relevant tax law.

3. Ring, *Article 26*, *supra* note 2, §§ 1.2.5.7, 1.2.5.10, 1.2.5.14; Ring, *Transparency and Disclosure*, *supra* note 2, at 497–98.

4. Ring, *Article 26*, *supra* note 2, §§ 1.2.5.5, 4.4.2.1; Ring, *Transparency and Disclosure*, *supra* note 2, at 497–98; *see also* Shu-Yi Oei, *The Offshore Tax Enforcement Dragnet*, 67 EMORY L.J. (forthcoming 2018) (manuscript at 5) (on file with author); Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. (forthcoming 2018) (manuscript at 16, 68) (on file with authors).

5. NAT'L TAXPAYER ADVOCATE, 2015 ANNUAL REPORT TO CONGRESS 353–62 (2015); NAT'L TAXPAYER ADVOCATE, 2014 ANNUAL REPORT TO CONGRESS 331–43 (2014); NAT'L TAXPAYER ADVOCATE, 2013 ANNUAL REPORT TO CONGRESS 238–48 (2013); Oei, *supra* note 4, at 56, 70; Oei & Ring, *supra* note 4, at 67.

6. *See, e.g.*, JASON J. FICHTNER & ADAM N. MICHEL, MERCATUS CTR., COMMENT ON THE IMPLEMENTATION OF COUNTRY-BY-COUNTRY REPORTING BY THE INTERNAL REVENUE SERVICE 4 (2016), https://www.mercatus.org/system/files/Fichtner-Country-by-Country-PIC-v1.pdf [https://perma.cc/3B5T-E9EJ] ("Assembling a new, centralized database of highly sensitive corporate financial information increases the vulnerability of proprietary business data. It would take just one breach of the system, in any one of the party jurisdictions, for all the information to be exposed."); Margaret Burow, *CbC Could Be a 'Nightmare' for Corporate Tax Departments*, 77 TAX NOTES INT'L 674, 674–75 (2015).

7. *See, e.g.*, Michael J. Graetz & Michael O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L.J., 1021, 1022–24 (1997); Philip R. West & Amanda P. Varma, *The Past and Future of the Foreign Tax Credit*, TAXES, Mar. 2012, at 27, 27.

With the advent of globalization, the information necessary to understand and evaluate taxpayers has become harder to secure because more data is outside the United States and because tax planning now implicates both domestic and foreign tax law. This observation does not justify any specific form of disclosure and reporting requirement. It does explain why such reporting has become increasingly important in recent years. Moreover, it suggests that the BEPS momentum and its focus on certain categories of tax planning are not the core drivers for transparency and disclosure developments. Rather, modern business migration is the fundamental force underpinning the creation of new reporting and disclosure regimes. The regimes' precise shape and timing are then a function of convulsive triggers such as tax leaks and/or financial crises that trigger specific moments of reform.

I. THE RISE OF BORDER MOBILITY

The globalization literature generally, as well as analyses of trends in finance, currency, and investment specifically, note the impact of "de-regulation" that began in the late 1970s but gathered momentum in the 1980s and continues through to the present.[8] This deregulation facilitated the movement of capital and investment across borders. A rise in technology, including information technology and communication, further eased border mobility. It is important to reiterate that there is no claim that cross-border commerce was heretofore unknown. Active and extensive commerce reaching across Africa, Asia, and Europe occurred certainly by the post-classical period.[9] Yet the changes taking shape in the 1980s contributed to a new level of cross-border investment and business activity, both in kind and volume. The following Sections provide a very brief overview of these developments.

8. *See generally* Nicholas A. Ashford, Ralph P. Hall & Kyriakos Pierrakakis, *Globalization: Technology, Trade Regimes, Capital Flows, and International Economy*, *in* NICHOLAS A. ASHFORD & RALPH P. HALL, TECHNOLOGY, GLOBALIZATION, AND SUSTAINABLE DEVELOPMENT: TRANSFORMING THE INDUSTRIAL STATE 183, 185 (2011); Richard O'Brien & Alasdair Keith, *The Geography of Finance: After the Storm*, 2009 CAMBRIDGE J. REGIONS, ECON. & SOC'Y 245, 247–48; Lucio Sarno & Mark P. Taylor, *Exchange Controls, International Capital Flows and Savins-Investment Correlations in the UK: An Empirical Investigation*, 134 WELTWIRTSCHAFTLICHES ARCHIV [REV. WORLD ECON.] 69, 69 (1998) (Ger.) ("Since the late 1970s, it has become common among economists to describe the world financial system as characterized by perfect capital mobility."); Oussama Kanaan, *Tanzania's Experience with Trade Liberalization*, FIN. & DEV., June 2000, at 30, 31, 33; Daisuke Ikemoto, Re-Examining the Removal of Exchange Control by the Thatcher Government in 1979, at 3–5 (2016) (unpublished manuscript), https://www.psa.ac.uk/sites/default/files/conference/papers/2016/Removal%20of%20exchange%20control%20by%20the%20Thatcher%20Government_0.pdf [https://perma.cc/HBE4-QVUV].

9. *See, e.g.*, Peter N. Stearns, GLOBALIZATION IN WORLD HISTORY 82–84 (2d ed. 2017).

A. Currency, Foreign Direct Investment, and Technology

1. Currency and Capital Controls

From the mid-1980s onward, there has been "a surge in capital flows" between developed countries and between developed and developing countries.[10] Central to such flows has been liberalization of currency and exchange controls[11] across jurisdictions. For example, in 1979 the United Kingdom abolished exchange controls.[12] Prior to this decision, the U.K. Exchange Control Act of 1947 closely regulated the direct and portfolio investment capital transactions of British residents.[13] The removal of exchange controls in countries such as the United Kingdom and Japan contributed to financial globalization and to multinationals' ability to pursue cross-border activities.[14] Other countries, from France to Tanzania, liberalized their exchange controls during the 1980s as well. In France, currency regulations were gradually "dismantled" in the latter part of the 1980s, and within a period of six years were gone.[15] During the 1980s, Tanzania relaxed some foreign exchange limitations as part of a broader effort to reduce trade restrictions.[16]

In some countries, liberalization of capital controls became more plausible once fixed exchange rates were "abandoned" with the collapse of the Bretton Woods system in 1973.[17] It has been argued that the combination of floating exchange rates and information technology and communications developments foreshadowed the elimination of capital controls.[18] Regardless, the resulting

10. Eswar Prasad et al., *Effects of Financial Globalization on Developing Countries: Some Empirical Evidence*, *in* INT'L MONETARY FUND, INDIA'S AND CHINA'S RECENT EXPERIENCE WITH REFORM AND GROWTH 201, 201 (Wanda Tseng & David Cowen eds., 2005).

11. "Exchange controls are put in place by governments and central banks in order to ban or restrict the amount of foreign currency or local currency that can be traded or purchased." *Exchange Control*, INVESTOPEDIA.COM, http://www.investopedia.com/terms/e/exchangecontrol.asp [https://perma.cc/3EDF-DX2X].

12. Ikemoto, *supra* note 8, at 1. *See generally* Richard Davies et al., *Evolution of the UK Banking System*, 50 BANK ENG. Q. BULL. 321, 327–28 (2010), http://www.bankofengland.co.uk/publications/Documents/quarterlybulletin/qb 100407.pdf [https://perma.cc/3DZ3-FHKV].

13. Ikemoto, *supra* note 8, at 1.

14. *Id.* at 2; *see also* ERIC HELLEINER, STATES AND THE REEMERGENCE OF GLOBAL FINANCE: FROM BRETTON WOODS TO THE 1990S, at 7–8 (1994); Rei Masunaga, The Deregulation Process of Foreign Exchange Control in Capital Transactions in Post-War Japan 3, 6 (Jan. 1997) (unpublished manuscript), http://www.jcif.or.jp/pdf/9701E.pdf [https://perma.cc/5SKF-KVZE] (discussing Japan's liberalization steps undertaken in the 1980s).

15. Francoise Drumetz, *France's Experience of Exchange Controls and Liberalisation*, *in* BANK FOR INT'L SETTLEMENTS, CHINA'S CAPITAL ACCOUNT LIBERALISATION: INTERNATIONAL PERSPECTIVES 99, 99 (BIS Papers No. 15, 2003).

16. Kanaan, *supra* note 8, at 31.

17. *The End of the Bretton Woods System (1972–81)*, INT'L MONETARY FUND, https://www.imf.org/external/about/histend.htm [https://perma.cc/2YMF-2RG7].

18. *See* Ashford et al., *supra* note 8, at 185; *see also infra* Section I.A.3.

world, with floating exchange rates and freely moving capital, has contributed to globalization and the expansion of multinationals across borders.

2. Foreign Direct Investment and Trade Liberalization

Beginning in the late 1980s, both developed and developing economies began to experience a significant overall growth in their foreign direct investment.[19] Although the net effects on countries may have varied,[20] the liberalization involved a familiar set of changes including: (1) tariff reductions, (2) elimination of quotas, and (3) relaxation of restrictions on foreign direct investment.[21] The precise contours of these changes varied by jurisdiction. For example, when Kenya undertook (in the late 1980s) more serious trade reforms with some external donor pressure, it shifted from import licenses to tariffs as a mechanism for controlling trade and then gradually reduced the tariffs.[22] India also liberalized import licensing by expanding the list of goods on its Open General License list, thereby facilitating imports.[23] Additionally, India reduced the number of imports over which the government had a monopoly. Between the periods 1980-81 and 1986-87, the percentage of imports in this government monopoly category decreased from sixty-seven percent to twenty-seven percent.[24]

3. Technology

The technology innovations that began to take hold in the 1980s reflected the broader rise of the knowledge-based economy and the importance of information technology for both industrial production and for movement of

19. *See* Table of *Foreign Direct Investment: Annual Inward and Outward Flows and Stock, 1970-2016*, UNCTAD, http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=96740 [https://perma.cc/2H2L-79N7].

20. *See, e.g.*, THE WORLD BANK, *Trade Liberalization: Why So Much Controversy?*, *in* ECONOMIC GROWTH IN THE 1990S: LEARNING FROM A DECADE OF REFORM 131, 131–32 (2005); ("Reforms in the 1980s and 1990s were the origin of a strong expansion in international trade."); S.M. SHAFAEDDIN, TRADE LIBERALIZATION AND ECONOMIC REFORM IN DEVELOPING COUNTRIES: STRUCTURAL CHANGE OR DE-INDUSTRIALIZATION? 2 (U.N. Conference on Trade & Dev., Discussion Paper No. 179, Apr. 2005), http://unctad.org/en/docs/osgdp20053_en.pdf [https://perma.cc/HYU7-7VTD] (evaluating the impact of "trade liberalization and market-oriented economic reform that had started in many developing countries in early 1980s [and that] intensified in the 1990s").

21. *See, e.g.*, THE WORLD BANK, *supra* note 20, at 134.

22. Geoffrey Gertz, *Kenya's Trade Liberalization of the 1980s and 1990s: Policies, Impacts, and Implications* 3 (Carnegie Endowment for Int'l Peace, 2008), http://carnegieendowment.org/files/kenya_background.pdf [https://perma.cc/RT7Q-6BFL].

23. Arvind Panagariya, *India in the 1980s and 1990s: A Triumph of Reforms* 14 (Int'l Monetary Fund, Working Paper No. 04/43, 2004), https://www.imf.org/external/pubs/ft/wp/2004/wp0443.pdf [https://perma.cc/SY9Y-K263].

24. *Id.*

financial information and assets.[25] Technology and globalization have been characterized as "mutually reinforcing."[26] Central to this dynamic are the following factors: (1) microprocessors, (2) communications, (3) biotech, (4) lighter materials, and (5) a shift from physical to intellectual factors of business production.[27] Market leaders in technology and globalization (including businesses improving efficiency, quality, customer service, and response time) can force competitors to follow or sacrifice market share.[28] For a business expanding beyond its initial jurisdiction, developments in information technology have brought improvements in business logistics and inventory management.[29] Moreover, technology allows a broader range of participants to pursue globalization.[30] Relatedly, technology has also spurred development in complex financial instruments, such as derivatives,[31] and has made financial transactions more efficient and less costly.[32]

B. Business Border Mobility

For purposes of examining the impact on tax enforcement of this post-1970s rise in business border-mobility,[33] it is important to make two observations. First, whether this increased mobility was positive or negative for specific countries and actors is a separate question from that of its effects on tax enforcement. This Essay makes no claims about the net benefits of liberalization in currency, capital controls, trade or investment. Regardless of their impact elsewhere, the changes did create new and increased challenges for tax enforcement to which governments have responded, as examined below in Part II.

Second, the liberalizations described above[34] allowed businesses to pursue both commercial and financial movement across borders, with varying degrees of substance. Thus, for example, on the commercial side businesses found new

25. Ashford et al., *supra* note 8, at 184.

26. Raj Aggarwal, *Technology and Globalization as Mutual Reinforcers in Business: Reorienting Strategic Thinking for the New Millennium*, 39 MGMT. INT'L REV. (SPECIAL ISSUE) 83, 83 (1999).

27. *Id.* at 86.

28. *Id.* at 90.

29. *Id.* at 92.

30. *Id.* at 93 ("Networked systems are making it easier for technology to cross traditional national and organizational boundaries allowing even small and new firms . . . to leap frog and pose competitive challenges . . . .").

31. Aggarwal, *supra* note 26, at 94; *see also* Edward LiPuma & Benjamin Lee, *Financial Derivatives and the Rise of Circulation*, 34 ECON. & SOC'Y 404, 422 (2005) (noting that prior to 1973, financial derivatives were "[v]irtually nonexistent").

32. Aggarwal, *supra* note 26, at 94; *see also* LiPuma & Lee, *supra* note 31, at 424.

33. *See, e.g.*, UNCTAD, *supra* note 19.

34. *See supra* Section I.A. (discussing liberalizations in the regulation of currency, foreign direct investment, and trade law).

or broadened import and export markets, new manufacturing locations, and new investment opportunities. These activities typically involved real and meaningful movements in goods, services, assets, and production. However, the liberalizations also facilitated "shifts" across borders whose substance tax authorities have been inclined to challenge. These scenarios typically include offshore entities: (1) with few functions or employees; (2) inserted in a chain of transactions without a clear role; or (3) serving as holding companies for intangibles. Recognition of the distinction between real migration and more illusory migration helps anticipate the kinds of information needs and constraints experienced by home-country tax authorities as they seek to bring into focus the picture of contemporary multinational enterprise ("MNE") business models.

II. EMERGING TRANSPARENCY AND DISCLOSURE REGIMES

Not only has the latter part of the twentieth century brought increased business border flexibility, it has also ushered in a period of increased tax transparency and disclosure.[35] Part III considers the connection between the two trends and the implications for tax policy, but in anticipation of that discussion, this Part outlines the basic contours of the contemporary disclosure trend.

Before the current round of transparency and disclosure mechanisms introduced in the past fifteen years and discussed below, there were long-standing global and domestic tools to facilitate tax authorities' access to information. For example, both the OECD and the U.N. Model Income Tax Treaties have historically included an Article 26 detailing procedures for exchange of information between tax authorities.[36] In reality, the effective scope of these Article 26 provisions was often quite limited. Nonetheless, they represented a clear recognition that in a world of cross-border business activity a tax authority may need assistance from other jurisdictions.[37] Additionally, individual countries adopted their own domestic reporting requirements

35. *See* Ring, *Article 26*, *supra* note 2, § 1.2.3; Ring, *Transparency and Disclosure*, *supra* note 2, at 499.

36. *See, e.g.*, XAVIER OBERSON, INTERNATIONAL EXCHANGE OF INFORMATION IN TAX MATTERS: TOWARDS GLOBAL TRANSPARENCY 14–16 (2015) ("Since its first publication in 1963, Art. 26 of the OECD Model still represents the most relevant legal basis for international exchange of information.").

37. OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL 2014 (FULL VERSION), at C(26)-1 (2015) (giving commentary on Article 26 of the OECD Model); U.N. DEP'T OF ECON. & SOC. AFFAIRS, UNITED NATIONS MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES 435–36 (2011), http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf [https://perma.cc/2SNJ-YT7F]. Both models have undergone change over their decades of existence, including a variety of more recent changes aimed at improving exchange of information (such as the removal of a "bank secrecy" grounds for declining to provide information). *See, e.g.*, Ring, *Article 26*, *supra* note 2, § 1.1.1.

designed to obtain a more complete picture of a multinational's activities abroad. Thus, for example, since the 1960s, the United States has required taxpayers to complete Form 5471 (or its predecessors),[38] an information return for U.S. taxpayers who are shareholders, directors, or officers in certain foreign (controlled) corporations.[39] Since 1984, a Form 926 must be filed by a U.S. transferor upon the transfer or exchange of property to a foreign corporation.[40]

However, not all countries had comparable information reporting provisions, and even those provisions in the United States were not all-encompassing. Nor did any of these provisions generate publicly available information, or the prospect of it. Against this backdrop, the introduction of multiple avenues for tax transparency and disclosure in recent years has attracted significant attention and generated momentum for a culture of transparency and disclosure. Although the foundation for this trend is the fundamental fact of business migration, more episodic events, including a series of leaks regarding taxpayer and government conduct, have dictated the precise timing and contours of the reforms.[41] Thus, this Essay will turn directly to a consideration of key exemplars of the new transparency and disclosure trend.

A. Country-by-Country Reporting

The OECD's BEPS Action Plan introduced in 2013 included an agenda item to review and reinvigorate transfer pricing documentation as part of Action 13.[42] The Final Report for Action 13 included recommendations for three related disclosure obligations to be imposed on larger multinationals: (1) a master file, (2) a local file, and (3) a country-by-country ("CbC") report based on a template.[43] The master file is expected to provide "standardised information relevant for all MNE group members" on topics including organizational structure, business descriptions, intangibles held by the group, intercompany

38. Melissa Redmiles & Jason Wenrich, *A History of Controlled Foreign Corporations and the Foreign Tax Credit*, 27 SOI BULL. 129, 134 & n.7 (2007), https://www.irs.gov/pub/irs-soi/historycfcftc.pdf [https://perma.cc/2HUR-UPSR].

39. *Id.* at 134; *About Form 5471, Information Return of U.S. Persons with Respect to Certain Foreign Corporations*, INTERNAL REVENUE SERV. (Aug. 27, 2017), https://www.irs.gov/uac/form-5471-information-return-of-u-s-persons-with-respect-to-certain-foreign-corporations [https://perma.cc/YUM4-D6PL].

40. *Form 926 – Filing Requirement for U.S. Transferors of Property to a Foreign Corporation*, INTERNAL REVENUE SERV. (Aug. 27, 2017), https://www.irs.gov/individuals/international-taxpayers/form-926-filing-requirement-for-us-transferors-of-property-to-a-foreign-corporation [https://perma.cc/T8QF-P6XE].

41. *See, e.g.*, Oei & Ring, *supra* note 4, at 4.

42. OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 23 (2013), https://www.oecd.org/ctp/BEPSActionPlan.pdf [https://perma.cc/3BXR-J4VN].

43. OECD, TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTRY REPORTING, ACTION 13 - 2015 FINAL REPORT 15–17 (2015).

financial activities, and financial and tax positions of the multinational.[44] The local file provides jurisdiction-specific information, with a focus on information regarding transactions between the MNE's entity in the local jurisdiction and other related parties.[45] Information provided includes financial data on the transactions, comparability analysis for transfer pricing, and "selection and application of the most appropriate transfer pricing method."[46]

But it has been the third component of the Action 13 disclosure package that has generated the most interest: CbC reporting. Based on a template provided by the OECD BEPS Action 13 Final Report, covered multinationals are expected to provide data on the following categories of information: (1) revenue; (2) profit (loss) before income tax; (3) cash tax; (4) current year tax accruals; (5) stated capital; (6) accumulated earnings; (7) number of employees; and (8) tangible assets.[47] This data should be provided by the MNE on a country-by-country (not entity-by-entity) basis.[48]

The two major concerns voiced by taxpayers regarding the data are the level of burden in compiling the information (primarily with regard to the CbC report) and the roster of potential recipients of the data.[49] As regards burden, the OECD did reduce the number of CbC reporting categories from a high of seventeen in January 2014 and has sought to provide additional guidance on the content of the reporting categories.[50]

With respect to the question of who will receive the data, the Final Report specifies that the MNE parent should make the master file and the local file available to their local affiliates, who will in turn make the files available to local authorities.[51] In contrast, the CbC report should be filed with the tax authorities in the jurisdiction of the MNE's parent. Then, that parent jurisdiction would share the CbC report via treaty information exchange mechanisms with the jurisdictions in which the MNE has local affiliates. However, the stability of this disclosure arrangement is unclear. First, given the value of CbC information, some jurisdictions advocated for direct delivery of the report to them by the

44. *Id.* at 15–16.

45. *Id.* at 16.

46. *Id.*

47. *Id.* at 34–35.

48. OECD, *supra* note 43, at 11.

49. *See, e.g.*, C.N. Macfarlane, *TEI Seeks Consistency in Proposed U.S. Country-by-Country Reporting Regs*, WORLDWIDE TAX DAILY, Mar. 21, 2016, LEXIS, 2016 WTD 55-42; Burow, *supra* note 6, at 674.

50. Ring, *Transparency and Disclosure*, *supra* note 2, at 513 n.22 (showing that the reporting categories were reduced following feedback on the original OECD draft).

51. OECD, *supra* note 43, at 21; *see also* Ryan Finley, *Lawmaker Urges Limiting Exchange of CbC Reports*, 81 TAX NOTES INT'L 751, 751 (2016) (noting Vice President of Tax and Domestic Economic Policy at the National Association of Manufacturers expressed concern over the direct filing of the master report with local tax authorities because the information would not be protected by the U.S. Treasury Department's safeguards in place for the exchange of the CbC reports).

multinationals, similar to the delivery plan for the master report and the local report.[52] Direct delivery bypasses the need for a treaty with the MNE parent jurisdiction and the treaty process itself. Second, and explicitly contrary to BEPS guidance on the subject, a number of actors in the international community have advocated for public disclosure of some or all of the CbC report data—and some jurisdictions have considered this option.[53]

B. Automatic Exchange of Tax Rulings

Following the LuxLeaks scandal in 2014, in which information on approximately 500 Luxembourg tax rulings regarding 300 multinationals was published by the International Consortium of International Journalists ("ICIJ"),[54] the EU reacted with the introduction of an enhanced disclosure mechanism. At the heart of the scandal was the assertion that Luxembourg was intentionally using its tax ruling process to help multinationals reduce income tax in other jurisdictions (where assets and operations were located) by running transactions through Luxembourg.[55] These rulings were characterized as inappropriately facilitating the MNEs' worldwide tax avoidance and minimization strategies.[56] In response, the EU Member States unanimously agreed in October 2015 to automatically exchange information on cross-border tax rulings every six months.[57] The scandal also triggered further investigation by the European Parliament and creation of two special committees to investigate tax rulings practices (TAXE 1 and TAXE 2).[58] In their respective reports, the committees identified transparency along with other measures (such as substantive law reform) as important tax base protection steps.[59]

52. *See, e.g.*, Ring, *Transparency and Disclosure*, *supra* note 2, at 520.

53. *See, e.g.*, William Hoke, *The Year in Review: Demands for Greater Tax Transparency Escalate in 2016*, 85 TAX NOTES INT'L 27, 27–29 (2017) (considering recent developments in corporate and individual tax transparency).

54. Oei & Ring, *supra* note 4, at 22. The leaked data was initially taken from PriceWaterhouseCoopers by its employee, Antoine Deltour. Additional documents were taken by a second PwC employee, Raphael Haley, and also delivered to the press. *Id.* at 22 & n.85.

55. Omri Marian, *The State Administration of International Tax Avoidance*, 7 HARV. BUS. L. REV. 1, 1–2; *see also* Oei & Ring, *supra* note 5, at 21.

56. Marian, *supra* note 55, at 3, 46.

57. European Commission Press Release IP/15/5780, Tax Transparency: Commission Welcomes Agreement Reached by Member States on the Automatic Exchange of Information on Tax Rulings (Oct. 6, 2015). Additionally, there have been bilateral agreements between certain states, such as that between Germany and the Netherlands. Teri Sprackland, *Germany, Netherlands Agree to Share Tax Rulings*, 79 TAX NOTES INT'L 203, 203–04 (2015).

58. *See, e.g.*, Stuart Gibson, *Ending Abusive Tax Schemes—TAXE II Committee to the Rescue*, 82 TAX NOTES INT'L 721, 721 (2016).

59. *Id.*

C. Beneficial Ownership

Another recent transparency and disclosure innovation emerged from the wake of a tax leak (here, the "Panama Papers" leak). In May of 2016, the ICIJ released a database containing 11.5 million records (covering forty years of data) from the Panamanian law firm Mossack Fonseca.[60] Through the data, more than 214,000 offshore entities were linked to individuals in over 200 countries and territories.[61] Many of these links were otherwise unknown, and in some cases represented investment and ownership stakes that had not been declared by the owners as required by applicable domestic law.[62] In some cases, the political reverberations from the leak were notable. Leaked documents revealed links between offshore entities and major political leaders including Chinese President Xi Jinping,[63] U.K. Prime Minister David Cameron,[64] Argentine President Mauricio Macri,[65] and Icelandic Prime Minister Sigmundur Davio Gunnlaugsson.[66] Ultimately, the Icelandic Prime Minister resigned due to the scandal created by the leak's disclosure of his undeclared offshore entity holding $4,000,000 in bonds.[67]

In reaction to the Panama Papers leak, a number of countries (including France, Germany, the United Kingdom, Australia, New Zealand, and Ireland) have explored or have committed to registration requirements for beneficial ownership of offshore trusts and other entities.[68] In April 2016, the G-5

60. OFFSHORE LEAKS DATABASE, HTTPS://OFFSHORELEAKS.ICIJ.ORG/ [HTTPS://PERMA.CC/4WED-7AWX]; *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 3, 2016), https://panamapapers.icij.org/20160403-panama-papers-global-overview.html [https://perma.cc/93DY-JZ2T]; *see also* Josh Meyer, *Panama Papers: Database Released, Dozens of Americans Listed*, NBC NEWS (May 10, 2016, 6:13 AM), https://www.nbcnews.com/storyline/panama-papers/panama-papers-database-released-dozens-americans-listed-n570771 [https://perma.cc/7U25-TB5B].

61. Oei & Ring, *supra* note 4, at 26; *see also* INT'L CONSORTIUM, *supra* note 60.

62. *See* Oei & Ring, *supra* note 4, at 4 ("[The leaks] revealed the secret offshore financial holdings of high-net-worth individuals and the tax evasion and minimization practices of various taxpayers, financial institutions, and tax havens.").

63. William Hoke & Stephanie Soong Johnston, *Panama Papers Expose Thousands of Offshore Accounts*, 82 TAX NOTES INT'L 103, 103 (2016); *see also* INT'L CONSORTIUM, *supra* note 60.

64. Oei & Ring, *supra* note 4, at 26.

65. *Id.*

66. *Id.*; *see also* INT'L CONSORTIUM, *supra* note 60.

67. Steven Erlanger, Stephen Castle & Rick Gladstone, *Iceland's Prime Minister Steps Down Amid Panama Papers Scandal*, N.Y. TIMES (Apr. 5, 2016), https://www.nytimes.com/2016/04/06/world/europe/panama-papers-iceland.html?_r=0 [https://perma.cc/5268-QML8]; Oei & Ring, *supra* note 4, at 26.

68. Alexander Lewis, *Independent Inquiry Urges Foreign Trust Disclosure Rules Update*, 83 TAX NOTES INT'L 34, 34–35 (2016); Alexander Lewis, *U.K. Setting Up Panama Papers Task Force*, 82 TAX NOTES INT'L 249, 249 (2016); Stephanie Soong Johnston, *More Countries Commit to Public Beneficial Ownership Registries*, 82 TAX NOTES INT'L 649, 649 (2016); Teri Sprackland,

announced to the G-20[69] their commitment to establishing a global system for automatic exchange of beneficial ownership information.[70] The European Commission already has taken action, adopting a plan for public disclosure of beneficial ownership registries.[71]

D. Extractive Industries and Beyond

Global transparency and disclosure steps with links to taxation have also been taken in arenas formally outside of tax. For example, U.S. securities law requires businesses engaged in extractive industries (e.g., exploration, extraction, processing and export of oil, natural gas or minerals) to report certain payments made to foreign governments.[72] Covered payments include "taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits."[73] Although the SEC adopted final rules effective September 2016[74] implementing the statutory mandate, the Senate's February 3, 2017 resolution under the Congressional Review Act disapproved the final rules and rendered them effectively nonexistent.[75] The statutory mandate remains in place, though, leading to uncertainty as to its planned enforcement.

At a global level, the Extractive Industries Transparency Initiative ("EITI") advances a two-sided approach for reporting in the extractive industries sector.[76] Businesses would report their payments to each jurisdiction, and the governments would then report the payments that they received, effectively providing both clarity and a check on inaccurate reporting by either side.[77]

German Transparency Registry Proposal Derided as 'Joke,' 82 TAX NOTES INT'L 154, 154 (2016); Oei & Ring, *supra* note 4, at 28.

69. HM Treasury & The Rt Hon George Osborne, *G5 Letter to G20 Counterparts Regarding Action on Beneficial Ownership*, GOV'T U.K. (Apr. 14, 2016), https://www.gov.uk/government/publications/g5-letter-to-g20-counterparts-regarding-action-on-beneficial-ownership [https://perma.cc/G6AS-BRF9].

70. Ryan Finley, *EU Countries Announce Beneficial Ownership Exchange Plan*, 82 TAX NOTES INT'L 238, 238 (2016).

71. Alexander Lewis, *EU Adopts Public Registries of Beneficial Ownership Information*, 83 TAX NOTES INT'L 100, 100 (2016).

72. Ring, *Transparency and Disclosure*, *supra* note 2, at 525, 552.

73. Securities Exchange Act of 1934, 15 U.S.C. § 78m(q)(1)(C)(ii) (2012).

74. Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,359 (July 27, 2016) (to be codified at 17 C.F.R. pts. 240 and 249b).

75. Eric Lipton, *G.O.P. Hurries to Slash Oil and Gas Rules, Ending Industries' 8-Year Wait*, N.Y. TIMES (Feb. 4, 2017), https://www.nytimes.com/2017/02/04/us/politics/republicans-oil-gas-regulations.html [https://perma.cc/VY7S-S2KT].

76. EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, EITI FACTSHEET 1–2 (2014), http://eiti.org/sites/default/files/documents/2014-07-03_Factsheet_English.pdf [https://perma.cc/9L8U-48G4].

77. *Id.*; *see* Table of *EITI Countries*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://eiti.org/countries [https://perma.cc/23RR-AXP2] (EITI countries and country reports available).

Reaching beyond extractive industries, the EU has sought to introduce basic country-by-country reporting within the financial services sector.[78] A 2013 Directive calls for covered financial institutions to report the following information on a country-by-country basis: profit (loss) before tax, tax paid, subsidies received, and average number of employees.[79] Implementation is required at the member-state level through enactment of domestic rules requiring this financial institution reporting.[80]

E. Public Disclosure

Finally, it is worth noting a trend within a trend: advocacy for *public* disclosure and not simply disclosure to the government in the context of various transparency and disclosure mechanisms.[81] The move reflects a desire to guard against several risks including corruption, enforcement bias, collusion, and limited government resources. Thus, for example, the EITI Standard "requires EITI Reports that are 'comprehensible, actively promoted, publicly accessible, and contribute to public debate' (EITI Requirement 7.1)."[82] Relatedly, the EITI reports on links between a country's participation in the EITI project and declining corruption.[83]

With respect to beneficial ownership, a public registry is already part of the EU platform, and some countries have undertaken the necessary legal reform.[84] In the context of BEPS Action 13 CbC reporting, the possibility of public disclosure of some or all of a multinational's report has been the subject of much

78. Ring, *Transparency and Disclosure*, *supra* note 2, at 552.

79. Directive 2013/36 of the European Parliament and of the Council of 26 June 2013 on the Access to the Activity of Credit Institutions and the Prudential Supervision of Credit Institutions and Investment Firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, 2013 O.J. (L 176) 338, 384–85.

80. *See, e.g.*, The Capital Requirements (Country-by-Country Reporting) Regulations 2013, SI 2013/3118, art. 1, 2 (Eng.) (reporting rules in the United Kingdom of Great Britain and Northern Ireland came into effect in January 2014, with the first reporting required by 1 July 2014.); *see also* HM Treasury, *Capital Requirements (Country-by-Country Reporting) Regulations 2013: Guidance*, GOV'T U.K. (Dec. 10, 2013), https://www.gov.uk/government/publications/capital-requirements-country-by-country-reporting-regulations-2013-guidance/capital-requirements-country-by-country-reporting-regulations-2013-guidance [https://perma.cc/GNR8-AUM5].

81. *See, e.g.*, Oei & Ring, *supra* note 4, at 23.

82. *Open EITI Data*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, https://eiti.org/explore-data-portal [https://perma.cc/CZ7H-RYD6].

83. Elissaios Papyrakis, Matthias Rieger & Emma Gilberthorpe, *Corruption and the Extractive Industries Transparency Initiative*, 53 J. DEV. STUD. 295, 295–309 (2017) (citing specific research linking participation in the EITI project by mineral-rich jurisdictions to a positive effect on corruption).

84. *See, e.g.*, COMPANIES HOUSE AND DEP'T FOR BUS., ENERGY, & INDUS. STRATEGY, GOV'T U.K., SUMMARY GUIDE FOR COMPANIES – REGISTER OF PEOPLE WITH SIGNIFICANT CONTROL 1 (2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/555657/PSC_register_summary_guidance.pdf [https://perma.cc/72N3-4ZMN].

debate. Although the OECD has explicitly stated that the reports should be kept confidential,[85] public awareness of multinational tax planning and the potential for base erosion has prompted calls for public disclosure of the CbC reports.[86] Some jurisdictions have already taken steps toward public disclosure;[87] however, the ultimate outcome remains uncertain. The more salient point for purposes of this Essay is the degree to which the trend for transparency and disclosure has included a related, though not wholly embraced nor executed, push for public transparency and disclosure.

III. THE CONNECTION BETWEEN THE INCREASED BORDER FLEXIBILITY OF BUSINESS AND THE NEW FOCUS ON TRANSPARENCY AND DISCLOSURE

While neither global business activity nor disclosure requirements in international tax are new, both have experienced a surge in recent years, as detailed above.[88] Part III argues that this confluence is not a coincidence and that we might best understand the new transparency and disclosure trend as the natural consequence—or price—of business migration. Against the baseline pressure for information created by business migration, the episodic forces of

85. OECD, *supra* note 43, at 20–21.

86. *See, e.g.*, CIVIL SOC'Y 20 [C20], C20 POSITION PAPER: GOVERNANCE (2014), https://star.worldbank.org/star/sites/star/files/c20_governance_position_paper_australia_june_2014.pdf [https://perma.cc/NFG7-7L5N] (urging a commitment to make country-by-country reporting public thereby "ensuring that poorer countries can easily access this information to address BEPS in their contexts"); Christian Aid, *Christian Aid Submission*, *in* 1 OECD, DISCUSSION DRAFT ON TRANSFER PRICING DOCUMENTATION AND CBC REPORTING (2014), https://www.oecd.org/ctp/transfer-pricing/volume1.pdf [https://perma.cc/MKM3-LJQS] (articulating its "belief that the Country by Country (CbC) report be made public" in order to hold both governments and taxpayers more accountable through such tax information); Trade Union Advisory Comm. to the OECD, *OECD Public Consultation on Draft Revised Guidance on Transfer Pricing Documentation and Country-by-Country Reporting: Comments by the TUAC*, *in* 4 OECD, DISCUSSION DRAFT ON TRANSFER PRICING DOCUMENTATION AND CBC REPORTING (2014), http://www.oecd.org/cup/transferpricing/volume4.pdf [https://perma.cc/D23H-JJ8Y] (supporting public disclosure on the grounds that it would be helpful for developing countries to access the information and "would also help inform other stakeholders, who are affected by the activities and operations of MNEs, including workers, local communities, civil society groups and of course citizens at large").

87. *See* Andrew Goodall, *U.K. Ministers Reject MPs' Call to Action on Transparency*, WORLDWIDE TAX DAILY, Jan. 19, 2017, LEXIS, 2017 WTD 13-3. In 2016, the U.K. government was granted statutory authority to require multinationals to publish CbC reports with data on profits and taxes. *Id.* However, there has been subsequent debate regarding whether and how the government should exercise this new-found power. *Id.*; *EU Council Reviews Status of Income Tax Information Disclosure Proposal*, WORLDWIDE TAX DAILY, Dec. 19, 2016, LEXIS, 2016 WTD 244-21. The EU has been considering an income tax disclosure proposal. *EU Council*, *supra* note 87. At the end of 2016, the French Constitutional Council determined that public CbC reporting would not be constitutional in France. Alexander Lewis, *French Constitutional Council Finds Public CbC Reporting Unconstitutional*, WORLDWIDE TAX DAILY, Dec. 9, 2016, LEXIS, 2016 WTD 238-7.

88. *See supra* Part I.

tax leaks have forged the unique design and timing of specific transparency and disclosure regimes.

A. The Link

One way to appreciate the connection between increased border flexibility and transparency and disclosure is to consider what a tax authority loses when business activity moves offshore: (1) close proximity to information, and (2) the ability to control key sources of abuse. The first point may be more obvious—to the extent a taxpayer and all of its activities are based in one jurisdiction, the domestic tax authorities have greater ability to secure needed information, whether from the taxpayer, from third parties, or from direct observation. Information, of course, can be difficult to secure even in a wholly domestic context and may require formal reporting requirements and legal interventions (such as warrants). However, to the extent the entire process occurs within the confines of a single jurisdiction, the tax authority is physically closer to information, has only domestic law constraints on information gathering, and is unimpeded by language barriers. All of these factors pose a greater challenge to tax enforcement when business taxpayers begin to cross borders.

The second point, regarding the ability to control key sources of abuse, may be less obvious at first but is powerful. One significant way in which taxpayers may aggressively (but legally) engage in tax planning—or alternatively cross the line into tax abuse—is through reliance on gaps and conflicts in existing law. Historically, there are numerous examples in U.S. tax law of “opportunities” that emerged in the domestic law to create advantages for taxpayers that were not intended by Congress.[89] As noted, in some cases the advantages may have been entirely legal, but once apparent to Congress and tax authorities, were removed from the law (e.g., the interaction between the investment tax credit and accelerated depreciation in 1981 that was reversed in 1982).[90] Other “advantages” may be considered entirely inappropriate by the tax authorities, but once identified, can be tackled through a combination of audit, legal clarification, or additional reporting requirements (e.g., listed transactions

89. For example, in the corporate tax context, the interplay between the dividends received deduction under I.R.C. § 243 and deduction losses by corporate shareholders on the sale of stock created an arbitrage opportunity. This was ultimately addressed through changes in the law including the addition of I.R.C. §§ 246, 1059. *See, e.g.*, TAX SECTION, N.Y. STATE BAR ASS’N, REPORT ON REGULATIONS TO BE ISSUED UNDER SECTION 246(C) RESTRICTING THE DIVIDENDS RECEIVED DEDUCTION 1–6 (Report #750, 1993), https://www.nysba.org/Sections/Tax/Tax_Section_Reports/Tax_Reports_1993/Tax_Section_Report_750.html [https://perma.cc/KGB2-BNMZ].

90. *See, e.g.*, Stephen A. Meyer, *Tax Policy Effects on Investment: The 1981 and 1982 Tax Acts*, BUS. REV., Nov./Dec. 1984, at 3, 6.

rules).[91] However, all of these options are more realistic precisely because the domestic tax authority can eventually see all of the moving parts—the various rules on which the taxpayer is building its reporting position—because they are contained within one system.

Once some of the transactions, assets, and business activities migrate offshore, a key source of planning includes arbitrage between and among the domestic tax system and that of one or more other jurisdictions. In such cases, the domestic tax authorities may not be aware of the foreign tax rules at play (or may not know how they are being applied in specific taxpayer cases) and may not be able to identify the resulting tax arbitrage. The opportunity for domestic tax authorities to respond to abuse becomes less likely and more attenuated when the arbitrage is conducted with foreign law. Although this argument could be framed as an informational one (i.e., point one above), it may be more useful to identify it as a separate concern. The problem does not concern difficulty securing access to information about the taxpayer's activities, assets, and income simply because they are less proximate. Rather, the problem is that a key to tax planning and abuse is arbitrage and inconsistency outside the domestic regime. Better information about this foreign law problem allows a jurisdiction to consider options including domestic law reform, application of economic substance or similar regimes to the taxpayer's transaction, or negotiation with another country. Moreover, interest in the potential abuse in cross-border tax planning extends beyond domestic tax authorities to domestic civil society. Some members of the public, as well as nongovernmental organizations and news agencies, have the capacity to evaluate these issues but, similarly, may struggle to the extent taxpayer planning involves otherwise less obvious interactions between domestic and foreign tax law.

With these two observations about the genesis of problems facing domestic tax authorities in international transactions, we can appreciate how the new trends in transparency and disclosure respond to these underlying and inherent limitations. For example, CbC reporting would automatically require multinationals to provide a quick and more complete (and potentially uniform) overview of their global operations, including data about assets, activities, and transactions outside the ready reach of domestic tax authorities. Exchange of tax rulings offers a quick window into the arbitrage potential and the intersection of domestic law with "guaranteed" foreign tax treatment. Using such information, tax authorities can more completely assess taxpayers' reporting positions and even identify potential domestic substantive law reforms that may be warranted in light of potential arbitrage.

91. STAFF OF JOINT COMM. ON TAXATION, 97TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, at 35 (Joint Comm. Print 1982).

B. The Implications

As outlined above in Section I.B, corporations have pursued a variety of migration options. They have used the increased border flexibility created by changes in law (currency, capital controls, foreign direct investment ("FDI"), and trade) along with advances in information technology and communications to engage in a genuine re-design and/or expansion of their underlying commercial enterprise.[92] Additionally, however, some businesses have used the same changes to pursue paper migrations across borders that are less substantive. In both cases, when information, assets, and activity are offshore, they pose the information constraints outlined above.

Seen through this lens, tax authorities' need for new and different information is not an outgrowth (desirable or not) of efforts such as the OECD BEPS project. Instead, the fundamental catalyst of the transparency and disclosure trend is business migration. This primary force is then complemented by the secondary effects of convulsive events such as tax leaks that dictate the distinct terms and timing of the reforms.

Awareness of the elemental motivations for and pressures compelling the new transparency and disclosure regimes may also help frame and explain the continual contemplation of public disclosure of multinational tax data. Calls for such disclosure appear across of range of data categories (e.g., CbC reports, beneficial ownership registries, disclosure of tax, and related subsidies). Although the details of what is sought and how public it should be do differ, the root problem is business migration across borders. This is the new normal in business, and it may ultimately create a new normal—at least for some players—in corresponding tax compliance commitments through transparency and disclosure.

CONCLUSION

Just as the migration of individuals presents a host of new issues for tax systems, the migration of businesses from the 1980s onward introduced new enforcement and information challenges for tax authorities. With the reduction in currency, capital, trade, and FDI restrictions that gained traction in the 1980s, and the simultaneous rise of information technology and communication capacity, multinationals found a new ability to move across borders. Although such movement was certainly not new, the scope and volume of such migration represented a sea of change.

Tax administrations witnessed the impact of this change on their ability to gain a clear picture of MNEs' global operations. Ultimately, countries introduced multiple mechanisms, including both direct disclosure and third-party reporting, to fill the gaps in their knowledge of taxpayer income, activities,

92. *See supra* Section 1.B.

transactions, and opportunities for arbitrage. This resulting transparency and disclosure revolution, with its roots firmly in the reality of corporate migration, is unlikely to fade even though its precise formulations remain subject to the continuing forces of tax leaks, international relations, and domestic politics.