PROMOTING "TAX HAVEN" HUMAN RIGHTS AND THE EIGHTH MDG IN TRADE-TAX COOPERATION

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I. INTRODUCTION

The developed country group known as the Organization for Economic Cooperation and Development (the "OECD"), threw itself into the arena of small island development and tax competition with caustic effect in 1998. From the very beginning, the OECD's 'Harmful Tax Competition Initiative' (the "HTCI") displayed no intention of being restricted solely to OECD membership, but rather included a comprehensive plan to engage in non-membership "dialogue" to "encourage [non-member 'tax haven' countries] to associate themselves with the recommendations set out in the Report."[1] Later, this non-membership tax policy 'outreach' would come to be branded as a form of fiscal colonialism by numerous developing countries and their supporters.

Many of the Small Island Developing States (the "SIDS") countries, including Least Developed Country ("LDC") SIDS such as Vanuatu and Samoa, fought against the OECD's tax haven branding (or 'black-listing').[2] These LDC SIDS claim this branding is unjustly and disproportionately applied to small island nations, many of which are developing or least-developed countries. While under assault by the OECD for their fiscal policy choices, several LDC SIDS countries, particularly Samoa and Vanuatu, struggled to meet trade policy commitments in order to gain full membership to the World Trade Organization (the "WTO"). The significance of this trade and tax policy dual consideration rests in the uniquely limited scope of LDC SIDS sustainable economic opportunities by comparison to every other nation in the world.

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[1] Organization for Economic Cooperation and Development, *Harmful Tax Competition Initiative*, Apr. 9, 1998, at 66 ¶ 4, *available at* http://www.oecd.org/tax/transparency/44430243.pdf [hereinafter OECD98 Report].

[2] The SIDS countries were formally recognized as a distinct group during the discussion of Agenda 21 at the United Nation's Conference on the Environment and Development, for more information *see* United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States, About SIDS, http://unohrlls.org/about-sids/ [hereinafter *UNOHRLLS*] (last visited Dec. 10, 2014).

Throughout development, trade and, in some cases, tax literature, there is acknowledgement that geographic circumstances often significantly impact the trade and tax policies implemented by governments. Recognition of resource scarcity as a core aspect in governmental policy considerations and that scarcity's relationship to trade and tax policy decision making in developing countries often leads to multilateral trade and tax policy conflicts.[3] SIDS countries exhibit a significant level of dependency on multilateral (developed country dominated) institutions, such as the WTO, yet are unable to fully participate in those institutions due to certain fiscal/tax and trade policy issues, thus hindering their economic growth and development.

Such deficiencies often surface when a developing country's approach to taxation, although tailored to fit the economic geography of the developing country, invites severe criticism from the holders of the multilateral development purse strings. Disagreements then emerge between developing countries engaged in economic self-determination and the developed world's tax policies which impact these nations. Consequently, conflicts between economic self-determination and development dependency led to a certain degree of enmity.[4] Reform proposals emerged from the tensions and disagreement between these multilateral institutions' top-down policy proposals and the developing world.[5]

This article intends to evaluate changes in and make policy recommendations based on WTO tax-based trade subsidy and developing country tax policies before and after the OECD's tax haven hunt. Particular attention is paid to the impact on the uniquely positioned SIDS countries. Part I will discuss the economic climate for the majority of SIDS countries, many of which are also classified as least-developed countries by the United Nations,[6] and how this impacts

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[3] Some developing countries pursue economic policies based in the Infant Industry Arguments, which basically state that countries should be allowed to protect newly developing industries (through various trade/tax protectionist measures) from international markets to allow them a chance to survive industrial infancy and later compete on their own. William Easterly, THE ELUSIVE QUEST FOR GROWTH: ECONOMIST'S ADVENTURES AND MISADVENTURES IN THE TROPICS 230 (MIT Press Cambridge, Massachusetts) (2002).

[4] The three institutions traditionally criticized the most include: the World Bank Group, the International Monetary Fund and the World Trade Organization. In terms of the trade and tax issues, most of the criticism in the developing world is targeted at the OECD and the WTO. Some of the more extreme commentaries go so far as referring to the three IGOs as the "Unholy Trinity" of international economic development. *See generally* Richard Peet, UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO (Zed Books 2003).

[5] Tim Jones and Peter Hardstaff, World Development Movement, *Out of Time: The Case for Replacing the IMF and World Bank* (Sept. 2008), *available at* http://www.wdm.org.uk/resources/reports/debt/outoftime14092006.pdf.

[6] *See infra* note 8.

their trade and tax policy choices. Part II will address the inherent and historical conflicts resulting from SIDS FDI-driven tax policies and provide a case study of Vanuatu's struggle with the OECD's anti-tax haven measures and WTO acceptance. Part III assesses the prohibited tax subsidy policies of an OECD leader, the United States of America, in light of the decade long effort by the OECD to end what it considers to be "black-listed" tax havens.[7] Part IV will propose alternative policy considerations and approaches for tax competition within and without the world trade system for developing countries as a means for promoting and ensuring the human rights to self-determination and to development. Lastly, Part V is the conclusion based on the analysis in Part IV.

II. THE ORIGINS OF SIDS TRADE AND TAXATION

Island nations face unique adversity due to their gravely limited natural resources and general dependence on international trade and tourism as the primary drivers of business. While some island nations managed to overcome their geographic difficulties (e.g. the United Kingdom), many others are just now climbing out of economic stagnation and into sustainable economic growth and development. Recognizing that their environmental systems and unique geography are the key to their economic survival, a large number of SIDS banded together to form the Alliance of Small Island States ("AOSIS") spearheaded by the ambassador from the LDC SIDS[8] nation of Vanuatu.[9]

A. The Small Island Developing States (SIDS) Coalition

The origins of the SIDS classification (and later coalition) stems from international environmental conferences regarding global warming and its impact on small islands.[10] Initial recognition in 1992 gradually developed into an international framework to address the unique needs and development circumstances of SIDS countries. In 2005, the U.N. General Assembly ("UNGA") adopted the "Mauritius Strategy" for sustainable development of SIDS countries.[11] Outcome documents

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[7] The OECD created three lists: a "black list" for countries that did not abide by tax policies the OECD membership considered economically acceptable, a "gray list" for countries that agreed to change to the OECD's preferences and a "white list" for countries/territories whose tax incentive systems the OECD deemed deserving of exception. *See* Felicity Lawrence, *Blacklisted Tax Havens Agree to Implement OECD Disclosure Rules*, THE GUARDIAN, Apr. 7, 2009, *available at* http://www.guardian.co.uk/business/2009/apr/07/g20-banking.

[8] Vanuatu is one of several SIDS member nations that is also considered to be one of the "least-developed nations" or "LDCs" as classified under the United Nation's System. Several of the SIDS countries have this classification. For a list of the ten LDC-SIDS, *see* UNCTAD, List of SIDS, http://www.unctad.org/templates/Page.asp?intItemID=3645&lang=1[hereinafter *LDC-SIDS*] (last visited Dec. 10, 2014).

[9] Alliance of Small Island States, *About AOSIS*, http://aosis.org/about-aosis/ [hereinafter *AOSIS*] (last visited Dec. 10, 2014).

[10] *See* UNOHRLLS, *supra* note 2.

[11] United Nations, *Outcome document of the High-level Review Meeting on the*

from the Mauritius Strategy deeply questioned the ability of SIDS countries to meet the Millennium Development Goals ("MDGs").[12] The UNGA recognized the need to incorporate the specific development concerns unique to SIDS countries in pursuing the MDGs.[13] The outcome document urges developed countries to "pay due attention to the unique and particular vulnerabilities of small island developing States in the context of their trade and partnership agreements."[14]

Unlike the SIDS classification, AOSIS formed out of voluntary recognition of common economic and political interests among SIDS countries. Today, AOSIS members include almost a quarter of total UN membership and approximately thirty percent of the UN's developing country membership.[15] Unfortunately, such strong unified representation is not present in other multilateral institutions, such as the WTO and OECD. Recognizing their limited competitive advantages, many SIDS countries adopted less stringent financial laws and tax policies to spur foreign investment and increase economic growth and development. SIDS countries sought to offset indirect tax revenue losses incurred due to trade policy adjustments required to join the WTO. III. Origins of SIDS Tax Competition

One of the earliest modern economic studies on tax competition originates from the work of a 1950s economist named Charles Tiebout. In his study, Tiebout concluded that tax competition enhances society's welfare because the existence of competition encourages policy adhesion to local preferences.[16] This concept of tailoring tax policy results in tax policy differentiation based on a country's unique set of circumstances. As one commentator puts it, "Instead of a one-size-fits-all approach, tax policy must be tailored to economic, political and institutional factors. So, there can be no single model that meets the requirements of any given country." [17] This statement rings particularly true when dealing with the SIDS economies.

Implementation of the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, Oct. 25, 2010, A/RES/65/2, *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/65/2.

[12] *Id*. at ¶ 5.

[13] *Id*. at ¶ 26.

[14] *Id*. at ¶ 27.

[15] AOSIS, *supra* note 9.

[16] *See generally* Charles Tiebout, *A Pure Theory of Local Expenditures*, J. POL. ECON., 416-24, Vol. 64 (1956).

[17] Channing Arndt and Finn Tarp, TAXATION IN A LOW-INCOME ECONOMY: THE CASE OF MOZAMBIQUE 6 (Routledge Studies in Development Economics) (2009) [hereinafter Arndt and Tarp].

Developing country economies often are distinguished by a large informal sector that can contribute to distortions in the economy when joined with directly transposed developed country tax policies. Due to significant political and economic differences, these policies do not account for a developing country's economic structure.[18] Reductions in tax revenues from the elimination of tariffs along with trade liberalization (resulting in decreased trade preferences) created a dependence in SIDS countries on revenue derived from sources such as tourism and foreign investment.[19] Thus, the SIDS countries uniquely shaped their approach to taxation to account for their economic reality.[20] However, the tax and financial systems adopted in many SIDS countries appear to oppose the systems of the developed world.

Many countries pursue protectionist trade and tax policies and, while some policies may be arguably justifiable (e.g. infant industries arguments), they often tend to run afoul of various WTO and other treaty provisions.[21] Other countries, such as the U.S., seek to be exempt from the WTO Dispute Settlement Body ("WTO-DSB") review when it comes to certain otherwise prohibited tax-based trade incentive structures (as can be seen in the most recent revision to the United States Model Income Tax Convention[22]), yet remain highly critical of similar developing country tax-incentive structures. Countries such as the U.S. posit that handling tax issues through bilateral tax treaties is preferred to organizations such as the WTO.

Members of the WTO have found their tax-based incentive structures, primarily export subsidies, increasingly problematic.[23] Such structures conflict with core principles of non-discrimination.[24] Some bilateral tax agreements of certain WTO member countries place WTO membership obligations in conflict with tax treaty obligations.[25] Furthermore, several countries receiving unfavorable outcomes

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[18] *Id.* at 329.
[19] Ronald Craigwell, *Tourism Competitiveness in Small Island Developing States*, United Nations University Research Paper No. 2007/19 (April 2007) *available at* http://www.wider.unu.edu/publications/working-papers/research-papers/2007/en_GB/rp2007-19/_files/78091834348538237/default/rp2007-19.pdf.
[20] SIDS VAT implementation is one example; *See* International Monetary Fund, THE MODERN VAT 5 (2001).
[21] *See infra* Part III.
[22] Internal Revenue Service, *United States Model Income Tax Convention of November 15, 2006 available at* http://www.irs.gov/pub/irs-trty/model006.pdf (Article I (3) relates to obligations of the United States under certain WTO agreements) [hereinafter *2006 US Model*].
[23] S*ee infra* Part III regarding WTO Jurisprudence on prohibited tax-based export subsidies under the SCM and other agreements.
[24] World Trade Organization, Principles of the Trading System, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (regarding MFN and National Treatment rules) [hereinafter *Principles Overview*] (last visited Dec. 10, 2014).
[25] United States Treasury Dept., *Convention Between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double*

from WTO-DSB proceedings on prohibited tax exemptions/credits for exports (referred to as "prohibited export subsidies" in the WTO agreements[26]), attempted to circumvent the rulings. The governments of the countries in question either feigned half-hearted compliance[27] with the WTO-DSB mandated changes or adopted a position of outright belligerence[28] towards the WTO-DSB's findings against them.

IV. CURRENT TRADE & TAX COMPETITION

International trade inherently involves a great deal of taxation in one form or another. The creation of the WTO and its multilateral agreements on trade sought to liberalize trade by removing or minimizing prohibited indirect taxation, subsidies and other barriers to trade. Inevitably, offensive trade subsidies crept in under the cloak of direct taxation measures, calling into question the relationship between the WTO and all forms of taxation.

A. The WTO and Taxation

The WTO[29] and its precursor, the General Agreement on Tariffs and Trade (the "GATT"), truly sundered the barrier that separates the worlds of multilateral international trade and taxation with its foundational agreements. The GATT provided for general rules regarding certain member state tax measures, but more specific tax-based trade prohibitions emerged with the birth of the WTO in 1994. The WTO, formed to ensure a system of streamlined global trade, established certain principles of non-discrimination[30] in trade measures taken by its Member States.[31]As

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Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income Art. 1 ¶ 3(a), Nov. 27, 2006 *available at* http://www.ustreas.gov/offices/tax-policy/library/Belgium06.pdf (Bilateral treaty addressing Art. XVII of GATS) [hereinafter *Belgium Treaty*].

[26] SCM Agreement Art. III (prohibited export subsidies); *accord* GATT Art. XVI.

[27] *See US-FSC infra* note 41.

[28] World Trade Organization, *Canada - Export Credits and Loan Guarantees for Regional Aircraft - Recourse by Canada to Article 22.6 of the DSU and Article 4.11 of the SCM Agreement - Decision by the Arbitrator*, WT/DS222/ARB Arts. 3.119-3.122, Feb. 17, 2003 *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/222ARB.doc (Canada was penalized for outright refusing to accept the decision of the WTO-AB regarding the prohibited export subsidies in question) [hereinafter *Canada Penalty*].

[29] The WTO formed in 1995 from the "Uruguay" round of a previous ad-hoc global trade body formed in 1948 known as the General Agreement on Tariffs and Trade (or the "GATT"). World Trade Organization, *Understanding the WTO* 10 (2008), *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf [hereinafter *WTO Formation*].

[30] *See* Principles Overview, *supra* note 24.

[31] The WTO membership consists of almost every country in the world; currently there are 160 Members in the WTO as of June 26th, 2014 and the OECD is an observer in almost every

a consequence, certain member state income and other tax based trade measures fell within the scope of the WTO's Dispute Settlement Mechanism[32] relating to non-discrimination in trade.[33] One reoccurring issue emerging from this matter related to tax subsidies for export promotion.

A. Agreement on Subsidies and Countervailing Measures

Since 1958, countries that wished to participate in the GATT system were required to cease "the use of subsidies on the export of primary products."[34] Yet, prohibited subsidization of exports through numerous subsidy mechanisms, such as unilaterally favorable income tax measures, remain pervasive in the WTO. Today, discriminatory tax-based export subsidies in international trade, covered primarily under the SCM Agreement,[35] present a continuous source of conflict amongst the WTO membership.

From its inception, the WTO faced the daunting task of addressing problematic export subsidies and the domestic tax policies of its membership.[36] The tax-relevant portion of article one of the SCM Agreement defines a tax subsidy as a:

> financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where: . . .
> (a)(1)(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) . . . or (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and (b) a benefit is thereby conferred.[37]

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organ. *See* World Trade Organization, *Understanding the WTO – The Organization*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Oct. 30, 2014).

[32] The Dispute Settlement Understanding is an "integrated system permitting WTO Members to base their claims on any of the multilateral trade agreements included in the Annexes to the Agreement establishing the WTO." World Trade Organization, *A Summary of the Final Act of the Uruguay Round – Understanding on Rules and Procedures Governing the Settlement of Disputes*, http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding (last visited Oct. 30, 2014).

[33] Principles Overview, *supra* note 24; *see also* GATT Arts. I and III *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf (The MFN and National Treatment on Internal Taxation and Regulation provisions respectively).

[34] World Trade Organization, GATT 1947, Art. XVI ¶ 3, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf.

[35] World Trade Organization, Agreement on Subsidies and Countervailing Measures, Art. I, *available at* http://www.wto.org/english/docs_e/legal_e/24-scm.pdf [hereinafter SCM Agreement].

[36] *See infra* Part III.

[37] SCM Agreement, *supra* note 35, at Art. I; The definition of a subsidy under the SCM

The definition within the SCM Agreement is two-part: (a) requires the voluntary forfeiture by the government of otherwise collectible taxes (b) with such forfeiture resulting in a benefit to the party responsible for the tax.[38] Furthermore, the SCM Agreement explicitly defines a prohibited subsidy based on "export performance" or "use of domestic over imported goods."[39] The seminal case before the WTO-DSB regarding prohibited subsidies involved American income tax provisions that violated multiple WTO articles.[40]

Although earlier disputes addressed the issue of prohibited tax-based subsidies, the *United States-Tax Treatment for "Foreign Sales Corporations"* case ("*US-FSC"*)[41] bore greater significance because of the United States' global approach to taxation[42] and trade levels.[43] The *US-FSC* case tested the robustness of

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agreement includes the definitions and provisions covered under GATT Art. XVI, which specifically addresses export subsidies in detail. *See* GATT Art. XVI, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleXVI.

[38] *Id*.

[39] SCM Agreement Art. III says:

> 3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I5; (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.
>
> 3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

SCM Agreement, *supra* note 35.

[40] *See US-FSC*, *infra* note 41 and discussion in Part III of this article (involving violations of SCM).

[41] World Trade Organization, *United States - Tax Treatment for "Foreign Sales Corporations" - Report of the Panel*, WT/DS108/R, Oct. 8, 1999 *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/108R.doc; for the last action taken by the WTO-AB on this matter, *see* World Trade Organization, *United States - Tax Treatment for Foreign Sales Corporations - Second Recourse to Article 21.5 of the DSU by the European Communities - Report of the Appellate Body*, WT/DS108/AB/RW2, Feb. 13, 2006 *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/108ABRW2.doc; *see also infra* Part III (A) for full discussion of this final action [hereinafter "US-FSC"].

[42] In example, the United States taxes the worldwide income of its citizens. Additionally, the United States takes this a step further by taxing the income of its citizens that work for the international civil service, setting it apart from almost every other member state in the United Nations. For a discussion on international taxation of multilateral civil servants, *see* Rutsel Silvestre J. Martha, TAX TREATMENT OF INTERNATIONAL CIVIL SERVANTS (Martinus Nijhoff Publishers 2009).

[43] United States Dept. of Commerce, U.S. International Trade in Goods and Services (Nov. 4, 2014), http://www.census.gov/foreign-trade/Press-Release/current_press_release/ft900.pdf (Compiles net trade data using a balance of payments method. Exhibit 1 contains data for trade

the WTO-DSB in handling international trade and taxation jointly; however, the question remained whether the WTO-DSB system could effectively handle subsequent cases regarding convergence of the WTO non-discrimination principles[44] with domestic tax provisions.

B. General Agreement on Trade in Services and TRIMS

Although the SCM Agreement directly addresses prohibited tax incentives, the coverage of tax treatment is technically limited in scope to such incentives covering trade in goods only (not services). Cross-border trade in services is not addressed in similar detail in the GATS agreement. Further, the Agreement on Trade-Related Investment Measures (the "TRIMS Agreement") vaguely addresses prohibited tax subsidies through linkages with other agreements, and indirectly by its articles on national treatment and quantitative restrictions.[45] Of the three Agreements, only the SCM Agreement offers explicit restrictions and definitions of prohibited tax, as well as other subsidies.

Protections afforded to parties offended by a tax subsidy/exemption are limited under the GATS. One particular provision in the GATS, Article XV, obligates WTO members to work towards an agreement on regulating tax subsidies and exemptions on trade in services so as to maximize trade benefits.[46] Additionally, all WTO members must not impede market access through the granting of preferential tax or other preferential treatment for services.[47] Despite the aforementioned GATS provisions, the exclusion of more specific coverage of prohibited tax treatment for trade in services continues to generate much frustration.[48]

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in goods and services which would be covered under the GATT and GATS respectively) (last visited Nov. 4, 2014).

[44] *See* Principles Overview, *supra* note 28.

[45] World Trade Organization, Agreement on Trade-Related Investment Measures, Article II: National Treatment and Quantitative Restrictions, *available at* http://www.wto.org/english/docs_e/legal_e/18-trims.pdf.

[46] World Trade Organization, General Agreement on Trade in Services, Article XV: Subsidies, *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf.

[47] World Trade Organization, General Agreement on Trade in Services, Articles XVI-XVII: Market Access, 15-6 *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf (GATS Articles XVI and XVII deal more specifically with the concepts of MFN treatment and Article XVII explicitly states "Formally identical or formally different **treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member** [emphasis added].")

[48] A search of every annual report from 1996-2009 shows that the issue of subsidies for trade in services has surfaced in the very least once a year if not multiple times in a year (such as can be seen in 2003). *Accord* World Trade Organization, Annual Report of the Working Party

Initially, the Working Party on GATS Rules concluded that the SCM Agreement provided the definition of a subsidy within the context of the GATS although this definition has yet to be formally integrated into the GATS.[49] The Working Party asked WTO members to identify all subsidies related to trade in services and to explain the subsidies' functions, recipient eligibility criteria, and underlying policy justifications.[50] Representatives from the U.S. stressed the private sector's apathy regarding the issue stemming from the lack of clarity on what precisely defines a service industry subsidy.[51] More than a decade later, the issue remains unresolved on prohibited service industry tax subsidies.[52]

B. American Tax Bilateralism

American disagreements over international trade and tax policy coordination with WTO measures predate the formation of the WTO. The United States still finds itself in WTO disputes centered on prohibited tax measures, both as a respondent and as a complainant. One particular dispute regarding prohibited tax-based export subsidies in the United States reignited the debate about the ability of the WTO to effectively handle alleged trade distortions generated by domestic tax policies.

The United States lost a series of arguments before the WTO-DSB/AB regarding income tax exemptions for the foreign-source income derived from the international trade of Foreign Sales Corporations, claiming that such measures did not constitute prohibited export subsidies under the SCM Agreement.[53] The lengthy dispute encompassed several years' worth of modifications of US domestic tax law and the interpretative principles developed by the WTO regarding prohibited tax subsidies. In the first WTO-AB recourse decision on the *US-FSC* matter, the dispute panel stated:

We find it difficult to accept the United States' arguments that such

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on GATS Rules to the Council for Trade in Services, S/WPGR/* (*1-19), 1996-2009, *available at* http://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm.

[49] World Trade Organization, The Working Party on GATS Rules to the Council for Trade in Services, Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate, S/WPGR/W/16, *available at* http://docsonline.wto.org/DDFDocuments/t/S/WPGR/W16.WPF.

[50] *Id*.

[51] World Trade Organization, The Working Party on GATS Rules to the Council for Trade in Services, Communication from the United States: GATS Article XV (Subsidies), S/WPGR/W/59, May 28, 2010 [hereinafter U.S. Communication].

[52] *Id*.

[53] SCM Agreement Art. III (what subsidies constitute prohibited export subsidies).

> examination involves an "artificial bifurcation" of the measure. The measure itself identifies the two situations which must be different since the very same property cannot be produced both within and outside the United States . . . We see no reason, in this appeal, to reach a conclusion different from our conclusion in the original proceedings, namely that there is export contingency, under Article 3.1(a), where the grant of a subsidy is conditioned upon a requirement that property produced in the United States be used outside the United States.[54]

This decision relates to a central tenant of the U.S. position on the interactions between domestic tax laws and international agreements. The general U.S. rule regarding such conflicts, as clarified in *Cook v. United States*, involves the date in which the domestic legislation took effect and when the treaty provision in question entered into force coupled with an explicit intent by the legislature to override the treaty provision.[55] The U.S. Internal Revenue Code itself addresses interactions between treaties and domestic tax laws stating: "neither the treaty nor the law shall have preferential status by reason of its being a treaty or law."[56]

Currently, the U.S. has sixty-six bilateral income tax treaties negotiated.[57] The relationship between the changes to the 2006 U.S. Model in terms of WTO obligations and the 2008 OECD Model is an affirmation of the American preference for preserving its own methods of taxing income and classifying exemptions through bilateral treaties. The revision in the 2006 US Model replaces eliminated language with an exception to the GATS article on National Treatment, saying the GATS provision "shall not apply to a taxation measure", unless the "competent authorities" of the parties to the respective income tax treaty based on the US Model "agree that the measure is not within the scope of the 2006 US Model's Article 24 on Non-Discrimination."[58]

These modifications are not found in either the UN Model or the 2008 OECD Model Conventions.[59] Thus, from a bilateral income tax agreement perspective, the revised 2006 US Model contains treaty provisions addressing U.S. concerns for the WTO tax subsidies rules related to the GATS Agreement; however,

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[54] World Trade Organization, *United States - Tax Treatment for Foreign Sales Corporations - Recourse to Article 21.5 of the DSU by the European Communities - Report of the Appellate Body*, WT/DS108/AB/RW ¶¶ 115-18, Jan. 14, 2002 *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/108ABRW.doc.
[55] *Cook v. United States*, 288 U.S. 102, 120 (1933).
[56] I.R.C. Sec. 7852(d).
[57] Internal Revenue Service, *United States Income Tax Treaties A-Z*, http://www.irs.gov/businesses/international/article/0,,id=96739,00.html [hereinafter *IRS Treaties*] (last visited Oct. 10, 2014).
[58] *Id.* at 5-7.
[59] *Id*.

the U.S. Model's modification does not address the SCM Agreement which formed the centerpiece of the *US-FSC* dispute. The U.S. displays little interest in supporting an integrated WTO trade-tax framework through multilateral efforts.[60] However, the United States continues to impose its unilateral tax will internationally, which explains the extensive U.S. bilateral tax treaty network.

C. Developing Country and SIDS Global Tax Competition

While the U.S. does not show much interest in coordinating multilateral policy to avoid tax subsidy conflicts within the WTO, the U.S. does show great interest in the tax policies of select alleged tax havens.[61] To this end, U.S. interest in the tax-related activities of SIDS countries bolsters the OECD's efforts to shut down what OECD membership perceives as unfair tax competition. Despite the OECD's numerous anti-tax haven measures and inflammatory reports citing the dangers of certain island developing nations' 'unfair tax practices', the OECD faces challenge by developing countries' assertion of economic self-determination the right to development. Meanwhile, larger multilateral entities, such as the United Nations and the WTO, recognize the need for special considerations (often at odds with U.S./OECD interests) in international trade and tax policy formation to promote the sustainable economic development of vulnerable developing countries, such as the SIDS countries.

1. Development Driven Policies, the 8th MDG

Developing countries witness many resolutions pass furthering commitments to the MDGs and promoting development cooperation. Yet, motives behind some of these initiatives seemingly operate contradictory to the concept promoted by the Eighth Millennium Development Goal ("MDG8") of development cooperation.[62] For example, in a General Assembly Resolution titled "Role of the United Nations in Promoting Development in the Context of Globalization and Interdependence", one particular operative paragraph states that each country is responsible for its own development; however, those countries should also not rely so much on national strategies.[63] Progress towards achieving the MDGs has been

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[60] S*ee* U.S. Communication, *supra* note 51.
[61] Stop Tax Haven Abuse Act, S. 506, 111th Cong. (2009)(An initial list of thirty-four offshore jurisdictions deemed to be tax havens by the US is provided in the Act, many of which are island nations and several of which are developing countries with at least one country on the list officially classified as an LDC or 'least-developed country').
[62] The official name of the 8th MDG is "Develop a Global Partnership for Development." *See* United Nations Development Programme, Millennium Development Goals, *Goal 8: Develop a global partnership for development*, *available at* http://www.undp.org/mdg/goal8.shtml.
[63] Role of the United Nations in Promoting Development in the Context of Globalization and

slow; further, political and social freedoms declined throughout many areas of the developing world since the launch of the MDGs up to 2008.[64]

Development aid distributions to developing countries have been notably unstable, with the total amount of aid distributed at the MDGs midpoint in 2007 amounting to US$103.7 billion (a 8.4% drop from 2006).[65] Since then, development aid experienced volatility due to the financial crisis with a jump up to US$122.3 billion in 2008 followed by an over 2% drop to US$119.6 billion in 2009.[66] In order for several MDGs to be met, the level of aid for Africa alone required a $12 billion increase from 2008-2009.[67] Developed countries can reach aid targets and fulfill MDG8 through alternative means, such as modifications to international tax and trade policy. Since the purpose of MDG8 is to foster international cooperation of development efforts, multilateral and regional institutions outside of the UN system (e.g. the WTO and OECD) can modify membership participation in the MDGs through institutional policies that enhance development assistance. Elimination of some tax-based trade subsidies will allow access to developed country markets.

A midpoint report on the Eighth Millennium Development Goal stated: "Aid alignment and harmonization are de facto prerequisites for achieving the MDGs. . .[t]he untying of aid is considered to be a key element in making development cooperation more effective, **thus allowing developing countries to make their own decisions** [emphasis added] on the basis of sound procurement policies and practices."[68] This MDG8 progress report points out several interesting outcomes given unorthodox development assistance policies, alluding to promotion of greater trade policy preferences for developing countries (i.e. through expansion of permissible subsidies) and increased market access.

The GATT enshrines the concept of non-discrimination as a core principle of the GATT/WTO system. GATT Art. I, known as "Most-favoured-nation treatment" ("MFN"), states that all States Parties to the WTO/GATT system must treat all participants equally in terms of trade transactions unless certain exceptions

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Interdependence, G.A. Res. 63/222, ¶ 9, U.N. Doc. A/RES/63/222 (Dec. 19, 2008).
[64] Diane Guthrie, *Strengthening the Principle of Participation in Practice for the Achievement of the Millennium Development Goals*, *in* Participatory Governance and the Millennium Development Goals (MDGs) 163-91, at 165 (2008).
[65] United Nations, MDG GAP Task Force Report 2008, *Millennium Development Goal 8: Delivering on the Global Partnership for Achieving the Millennium Development Goals* 6 (2008) [hereinafter MDG GAP].
[66] United Nations, The Millennium Development Goals Report 2010, at 66, *available at* http://endpoverty2015.org/files/MDG%20report%202010.pdf [hereinafter MDG 2010].
[67] MDG GAP, *supra* note 76, at ¶ 7.
[68] United Nations, MDG GAP Task Force Report 2008, *Millennium Development Goal 8: Delivering on the Global Partnership for Achieving the Millennium Development Goals* 12-13 (2008).

are met. [69] The "National Treatment" principle of Art. III, and the "General Elimination on Quantitative Restrictions" found in Art. XI, add additional terms of non-discrimination. .[70] The National Treatment principle requires States Parties to give the same privileges to imported goods that they would give to domestic products.[71] Inequality in developed countries' policy measures, such as an exorbitant export subsidy, leads the WTO-DSB to disallow such measures as National Treatment. Exceptions to the non-discrimination principle are limited in number and serve varying purposes, some of which are pertinent to human rights enforcement. One such exception is covered by the *Decision on Waiver*, which exists to promote economic development by allowing preferential tariff treatment for least-developed countries. [72]

Although broad trade protectionism, implemented by direct tariff or through tax subsidy, is generally considered detrimental, the MDG8 report highlights the need for balance between protectionist measures in developing countries and freer trade. Decreased barriers on the developed country end through the prohibition on certain tax-incentive export structures has significantly helped developing country importers, particularly those that are classified as least-developed countries or LDCs.[73] Developing countries suffered a 31% decline in the value of their exports (an 8% larger decrease compared to the global average) in 2009-2010.[74] Developed countries should foster greater incorporation of enhanced preferences for tax-based trade measures and allowance of tax competition policies that support FDI driven sustainable development. Such policies should be determined by the developing countries themselves with technical assistance from developed nations, if requested.

Allowing developing countries to engage in otherwise prohibited tax-based export subsidies and other forms of tax competition for service industries may help strengthen their economies. The need for international recognition and support for certain tax preferences impacting developing countries is very apparent given the fiscal bullying that has occurred over the last two decades. Sadly, the most vulnerable economies tend to be the easiest targets, lacking the resources to support a comprehensive full-time diplomatic staff at the various multilateral institutions like

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[69] *See generally*, General Agreement on Tariffs and Trade Art. I.
[70] *See generally*, General Agreement on Tariffs and Trade Art. XI (addressing the use of quotas or licenses to discriminate on the importation/exportation of goods).
[71] *See generally*, General Agreement on Tariffs and Trade Art. III.
[72] *See* Principles Overview, *supra* note 24.
[73] MDG 2010, *supra* note 66, at 69 (LDC refers to "least developed country" which represents a group of the poorest countries in the world).
[74] *Id*. at 70.

the WTO or OECD. [75]

2. The OECD's Harmful Tax Competition Initiative

In its first tax haven report, the OECD established four factors to determine whether a country's tax system constituted a tax haven: 1) no or only nominal taxes; 2) lack of effective exchange of information; 3) no transparency in legislative/administrative/legal provisions; and 4) lack of substantial activity requirements.[76] The OECD also listed four factors for "harmful tax regimes" which included all of the above but substituted "ring-fencing of regimes" for the lack of substantial activity factor.[77] The first factor invited attack from SIDS countries operating as offshore financial centers. Critics of the OECD's initial reports pointed out that EU members of the OECD have some of the highest tax rates in the world yet were having difficulty covering government expenditure.[78] Thus, when "the EU members of the OECD recognized that the international private banking market housed some US$16 trillion and they decided that much of this money came from nationals or companies that were subject to tax in their countries", EU countries within the OECD pushed to reclaim this lost tax revenue.[79] Given the incentives that arose from this issue, SIDS countries were targeted and the tax haven pursuit began.

3. Vanuatu's Tax Competition / Trade Compliance Battle

SIDS countries viewpoints' contrasted sharply with those held by most of the OECD membership. Prime Minister Edward Natapei of Vanuatu, a SIDS leader and alleged tax haven, claimed that the OECD's demands impinged on his nation's sovereignty, and were not even being followed by four OECD members. [80] Vanuatu met the requirements to join the WTO in August of 2012 and now must balance the historical tensions between externally problematic trade and tax competition issues.[81]

Similar to many other 'tax haven' SIDS nations, Vanuatu faced economic

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[75] *See* Constantine Michalopoulos, *Developing Countries' Participation in the World Trade Organization*, World Bank Policy Research Working Paper #1906, *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/1998/03/01/000009265_3980429111520/Rendered/PDF/multi0page.pdf.

[76] OECD98 Report, *supra* note 1, at 23.

[77] *Id.* at 27.

[78] Ronald Sanders, *The Fight Against Fiscal Colonialism: The OECD and Small Jurisdictions*, 91 COMMONWEALTH J. INT'L AFF., 325, 330 (2002).

[79] *Id*.

[80] The 4 OECD members were: Switzerland, Luxembourg, Belgium and Portugal; Government of Vanuatu, Press Statement Regarding OECD Harmful Tax Competition Initiative, Feb. 27, 2002, *available at* http://www.itio.org/documents/vanuatu_pr_270202.pdf [hereinafter *VanuatuNo1*].

[81] World Trade Organization, *WTO Membership Rises to 157 with the Entry of Russia and Vanuatu*, WTO Press Release PRESS/671 of Aug. 22, 2012, *available at* http://www.wto.org/english/news_e/pres12_e/pr671_e.htm.

difficulties meeting the demands of WTO accession obligations while fending off OECD demands towards their FDI-driven domestic tax policies. Vanuatu's P.M. Natapei cited four specific justifications for Vanuatu's non-compliance with the OECD's tax policy modification demands: 1) The double standard being applied to OECD members and non-OECD members would surely result in "economic distortions" from the "lack of a level playing field"; 2) No real incentives for Vanuatu to comply with the OECD's demands (i.e. lack of recognition or compensation); 3) No real oversight mechanism to ensure cooperation/participation of ALL members in the OECD initiative; and 4) No indicator of how burdensome compliance with the OECD initiative would be for the public and private sectors.[82]

In May of 2003, following several bilateral and multilateral negotiations, Vanuatu's government relented, but with numerous reservations. The surrender letter submitted by the government of Vanuatu to then OECD Secretary-General Mr. Donald Johnston illustrated the true lack of choice Vanuatu had in the matter. In the letter, Vanuatu's government underscored that four OECD members abstained from adopting the 1998 and 2001 reports and stated how the OECD itself should be mindful of its own commitment to promote 'fair tax competition.'[83] Vanuatu's government stressed how the compliance measures prospectively impacted "the long term development" of Vanuatu due to the "significant adverse cost" associated with their implementation and requested increased development aid from the OECD membership to offset this.[84] The UN classifies Vanuatu as a least-developed country (or "LDC").[85] In the United Nations Development Programme's 2010 Human Development Report nearly every member state within the UN received a Human Development Index ranking except for a handful of impoverished LDC-SIDS countries; Vanuatu's 2010 GNI per capita was US$3,908 and today remains classified as an LDC.[86]

D. The Rights of Self-Determination and Development

Around the same time as Vanuatu's surrender to the OECD, the UN membership released a document, enshrining the rights of developing countries to decide their own path to development. One paragraph of the *Monterrey Consensus*

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[82] *Id*. at 2.
[83] Government of Vanuatu, *OECD Harmful Tax Initiative Non-Compliance Statement*, Facsimile to the OECD Secretary-General, May 7, 2003, *available at* http://www.oecd.org/ctp/harmful/2634587.pdf [hereinafter *VanuatuNo2*].
[84] *Id.* at 2.
[85] LDC-SIDS, *supra* note 8.
[86] United Nations Development Programme, *Explanation note on 2010 HDR composite* indices—*Vanuatu*, *in* Human Development Report 2010, *available at* http://hdrstats.undp.org/images/explanations/VUT.pdf.

addressing the interplay between developing countries and developed countries/ multilateral institutions states:

> stress[es] the need for multilateral financial institutions. . . to work on the basis of sound, **nationally owned paths of reform** [emphasis added] that take into account the needs of the poor and efforts to reduce poverty, and to **pay due regard to the special needs and implementing capacities of developing countries** [emphasis added] and countries with economies in transition[87]

SIDS self-sufficiency is even more important given increasing development aid shortfalls since 2006, with the total amount of aid distributed in 2007 amounted to US$103.7 billion (an 8.4% drop from 2006).[88] Decreasing development assistance combined with mismatched tax policy demands place SIDS in a difficult position. The Monterrey Consensus is just one of many international affirmations of economic self-determination and other human rights encompassed by the broader right to development.

The principles of self-determination found in Arts. I(2) and 55 of the UN Charter form the very first articles in both the International Covenant on Civil and Political Rights (the "ICCPR") as well as the International Covenant on Economic, Social and Cultural Rights (the "ICESCR").[89] Of greatest significance to choice of tax policy in developing countries is the relationship of self-determination to the UN Declaration on the Granting of Independence to Colonial Countries (the "Colonial Declaration")[90] and the Declaration on Principles of International Law Governing Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (the "Relations Declaration").[91]

Operative clause two of the Colonial Declaration states the right of self-

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[87] The Monterrey Consensus of the International Conference on Financing for Development (2002) 19, ¶ 56., *available at* http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf.
[88] United Nations, MDG GAP Task Force Report 2008, *Millennium Development Goal 8: Delivering on the Global Partnership for Achieving the Millennium Development Goals* at 6 (2008).
[89] *Id*. at 240.
[90] United Nations, G.A. Res. 1514, U.N. GAOR Comm., Sess. Supp. No. 21 at 166, U.N. Doc. A/4684 (1960) *available at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/152/88/IMG/NR015288.pdf?OpenElement [hereinafter *Colonial Dec.*].
[91] United Nations, G.A. Res. 2625, Annex, 25 U.N. GAOR Supp. No. 17 at 66, U.N. Doc. A/5217 (1970) [hereinafter *Relations Dec.*]

determination includes the right to independently choose development policies.[92] When combined with operative clause one of the Colonial Declaration, it is further clarified that unwanted foreign interference with a country's selected development path violates self-determination rights and as such "constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations, and is an impediment to the promotion of world peace and co-operation."[93] Vanuatu and other developing countries actively engage in economic self-determination when they design and implement their domestic policies for economic development and growth. Interference by countries such as the U.S. and other members of the OECD in Vanuatu's choice of tax policy is a violation of this recognized human right. The term "fiscal colonialism" appropriate correlates to the emergence of the right of self-determination with the current attack on SIDS countries.

Despite the rancor about tax policies in countries such as Vanuatu, some of largest offenders of the WTO rules regarding unfair tax competition in trade are the U.S. and other members of the OECD. Moreover, countries like Vanuatu receive conflicting advice from the OECD. In a report published by the OECD on promoting competition policies in developing countries the OECD concluded the following:

> It is important that competition agencies in all countries engage in competition advocacy, but the discussions above suggest that it is especially critical for those in developing countries to do so . . . Further, most developing countries lack suitable competition cultures . . . developing countries should be relatively more active in competition advocacy than their counterparts in developed countries.[94]

In its very own report, the OECD encourages developing countries to develop a 'competitive culture', yet in practice reprimands developing countries when that 'competitive culture' is deemed 'too competitive'. Further aggravating such conflict is the engagement in, and in some cases, the continued operation of OECD members' in anti-competitive tax-based trade structures. The OECD formed several member groupings to promote its TIEAs through a *multilateral initiative* **controlled by the OECD** (emphasis added). Now, the OECD membership can more effectively reach SIDS countries and other developing countries to get them to sign on to an OECD-sanctioned TIEA or other agreement which is then converted into a multitude of bilateral agreements between OECD members and the respective developing

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[92] Colonial Dec., *supra* note 90, at ¶ 1.
[93] *Id*. at ¶ 2.
[94] OECD, Competition Advocacy: Challenges for Developing Countries, at 10 *available at* http://www.oecd.org/dataoecd/52/42/32033710.pdf

country. The U.S., one of the leading members of the OECD, WTO, and one of the largest critics of SIDS 'tax haven' tax competition systems made its own mark in the field of tax competition with a trade-distorting tax regime that violated GATT/WTO rules.

V. PROHIBITED U.S. DIRECT TAX-BASED TRADE SUBSIDY MEASURES

In 1984, the U.S. Congress replaced the contentious DISC provisions with new tax provisions creating the Foreign Sales Corporation.[95] The new income tax provisions comprising sections 921-927 of the Internal Revenue Code, granted tax exemptions for a portion of FSC foreign-source income related to exports and of dividends distributed to United States parent companies.[96] Additionally, in order to receive the tax exemptions, the FSC receipts from the export of products must involve at least 50% United States origin by market value.[97]

The EC alleged that the FSC provisions violated both GATT and SCM Agreement rules on prohibited tax export subsidies due to their discriminatory nature.[98] A significant part of the problem with the FSC regime from the WTO-AB perspective was that it permitted U.S. corporate shareholders of an FSC to deduct all of dividends received from distributions made out of the exempted income of an FSC; the net result of such an effect being an unfair tax export subsidy.[99] The WTO-AB made a comment on the differing tax systems (specifically the U.S. concept of worldwide taxation) and their relationship to WTO obligations under WTO agreements stating:

> A Member of the WTO may choose any kind of tax system it wishes - so long as, in so choosing, that Member applies that system in a way that is consistent with its WTO obligations. Whatever kind of tax system a Member chooses, that Member will not be in compliance with its WTO obligations if it provides, through its tax system, subsidies contingent upon export performance

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[95] *Id.*
[96] World Trade Organization, *United States Treatment of "Foreign Sales Corporations" Request for Consultations by the European Communities*, WT/DS/108/1, Nov. 28, 1997 *available at* http://docsonline.wto.org/DDFDocuments/t/G/L/212.WPF.
[97] *Id.*
[98] *Id*. (Alleging specifically that the provisions overall constituted a prohibited export subsidy under SCM Article 3.1 and that the 50% requirement "constitutes a subsidy contingent upon the use of domestic over imported goods contrary to Article 3.1(b) of the ASCM.")
[99] World Trade Organization, *United States Treatment of "Foreign Sales Corporations"-Report of the Appellate Body*, WT/DS/108/AB/R ¶ 18, Feb. 24, 2000 *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/108ABR.DOC.

> that are not permitted under the covered agreements.[100]

The FSC provisions violated both the GATT and SCM Agreement provisions on prohibited export subsidies, which included measures of taxation. The WTO-AB reiterated how Member States, including and not limited to the U.S., shall conform their domestic laws (including certain measures of income taxation) to WTO obligations.

Not long after the release of the report from the WTO-AB, the U.S. responded by passing the "FSC Repeal and Extraterritorial Income Exclusion Act of 2000" (the "ETI Act") to address the problems with the previous FSC provisions. The ETI Act repealed the FSC provisions and amended Section 114 of the U.S. Tax Code to exclude what was now called "extraterritorial income" and added an entire subpart to the code on "qualifying foreign trade income."[101] However, the ETI Act extended the FSC tax break through alternative means and attempted to avoid the discriminatory aspect by expanding the tax exemptions to other types of business entities with qualifying foreign trade income,[102] including 'S' corporations and LLCs; most importantly though - to foreign companies (that elect to be treated as a U.S. corporation for tax purposes).[103]

The ETI Act measures failed to address the concerns of the previously convened WTO panels on US-FSC. Under the ETI Act, the effective dates for removal of the FSC classification option and a gradual phase out period did not result in immediate removal of the prohibited FSC system.[104] Additionally, the ETI Act ran afoul of WTO non-discrimination provisions with its "fair market value" rule involving preference in usage of domestic components to get tax exemptions.[105] The

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[100] *Id.* at ¶ 178.
[101] FSC Repeal and Extraterritorial Income Exclusion Act of 2000, 114 Stat. 2423, Nov. 15, 2000 *available at* http://www.glin.gov/download.action?fulltextId=211093&documentId=74071&glinID=74071 (defined extraterritorial income as "the gross income of the taxpayer attributable to foreign trading gross receipts (as defined in §942) of the taxpayer") [hereinafter *ETI Act*].
[102] *Id.* (The ETI Act provided several IRC amendments that discussed the various aspects of what constitutes qualified foreign trade income and, in particular, qualified foreign sales income in amended §941(c)).
[103] World Trade Organization, *United States - Tax Treatment for Foreign Sales Corporations - Recourse to Article 21.5 of the DSU by the European Communities - Report of the Appellate Body*, WT/DS/108/AB/RW at ¶ 19, Jan. 14, 2002 *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/108ABRW.doc [hereinafter *Recourse 1*].
[104] ETI Act, *supra* note 101, at §5.
[105] *Recourse 1*, *supra* note 103, at ¶ 212 (stating: "Any taxpayer that seeks to obtain a tax

WTO-AB, in the first recourse action taken by the EC, found against the U.S. and concluded that the ETI Act must be brought into compliance with the previous findings in regards to the timing/phase-out provisions for FSC-based tax exemptions of the Act and in regards to the "fair market value" rule triggering certain tax exemption eligibilities.[106] The U.S. faced yet another obligation to alter its domestic tax law to bring it into compliance with the decision of the WTO-AB.

The US responded to the first recourse determination of the WTO-AB by continuing the FSC tax scheme in a different form with the passage of the American Jobs Creation Act of 2004 (the "Jobs Act"). Section 101 of the Jobs Act, titled "Repeal of Exclusion for Extraterritorial Income", explicitly repealed the ETI Act.[107] However, the U.S. did not comply with the first recourse action taken by the EC; the Jobs Act included phase-out periods for the previously –allegedly- abolished ETI-clothed FSC tax exemption provisions.[108] In the EC's second recourse action, the WTO-DSB panel highlighted these extended transition provisions and even pointed out that other aspects of the ETI Act were not repealed resulting in a continuation of some of the original FSC provisions constituting prohibited tax-based export subsidies.[109]

The U.S. argued that the transition phases were a necessity for the orderly implementation of the new provisions (to prevent retroactive impacts); particularly, the transition provision in the Jobs Act regarding existing contracts.[110] The WTO-DSB found this unacceptable and concluded that the U.S. must immediately

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exemption under the ETI measure must ensure that, in the manufacture of qualifying property, it does not "use" imported input products, whose value comprises more than 50 percent of the fair market value of the end-product . . . The fair market value rule, therefore, influences the manufacturer's choice between like imported and domestic input products if it wishes to obtain the tax exemption under the ETI measure").

[106] *Id*. at ¶¶ 256-57.

[107] American Jobs Creation Act of 2004, H.R. 4520, 108th Cong. §101(a) (2004) (enacted).

[108] *Id*. at §101(d).

[109] World Trade Organization, *United States - Tax Treatment for 'Foreign Sales Corporations' - Second recourse to Article 21.5 of the DSU by the European Communities - Report of the Panel* at ¶¶ 2.13-17, WT/DS/108/RW2, Sept. 30, 2005 *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/108RW2-00.doc (the WTO-DSB specifically referred to §101 of the Jobs Act stating: "Section 101 of the Jobs Act does not repeal section 5(c)(1) of the ETI Act, indefinitely grandfathering FSC subsidies in respect of certain transactions. Nothing in the legislative language of the Jobs Act modifies, explicitly or implicitly, the transition rules for the FSC subsidies") [hereinafter *Recourse2P*].

[110] *Id*. at ¶ 7.10; *see also* H.R. 4520 §101(f) (exempted binding contracts "between the taxpayer and a person who is not a related person" and "which is in effect on September 17, 2003, and at all times thereafter" from the amendments to the ETI Act by the Jobs Act).

withdraw all prohibited export subsidies, such as the grandfathering provisions of the FSC exemptions.[111]

On appeal, the WTO-AB affirmed the findings of the second recourse panel, stating that Section 101 of the Jobs Act provided for a continuation of the FSC tax exemptions and thus extended the life of the prohibited tax-based export subsidies.[112] The final U.S. response in the *US-FSC* dispute was the passage of the "Tax Increase Prevention and Reconciliation Act of 2005" ("TIPRA").[113] A provision in TIPRA repealed the essentially unlimited extension of FSC exemptions for existing contracts; however, the other disputed phase-out provisions were not repealed.[114] Several days prior to the passage of the bill, probably as a result of the likelihood of its passage, EU Trade Commissioner Peter Mandelson announced the suspension of retaliatory trade sanctions against the U.S. totaling approximately US$2.4 billion in additional duties on U.S. exports scheduled to take effect the day before TIPRA was signed into law.[115] After a long and drawn out dispute (almost a decade) the differences over one set of tax-based export subsidies were tentatively settled; yet, the main conflict, between domestic income tax measures and multilateral agreements, such as those found in the WTO was not. Only several months after the conclusion of *US-FSC*, the U.S. unveiled the 2006 US Model for bilateral tax treaties which contained a WTO override provision on certain income tax issues of national treatment.[116]

The conflict over tax-based subsidies in trade underscores the complexity and lack of collective political will to effectively address the matter. Several decades passed before the WTO-DSB (and its precursor, the GATT panel) put to rest certain provisions in the U.S. tax code regarding prohibited tax-based subsidies; yet, there is no guarantee that the U.S. legislature will not implement similar WTO-conflicting tax code provisions in the future. The languishing debates on prohibited tax-based subsidies, including on the acceptance of a universal definition for 'prohibited

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[111] Recourse 2P, *supra* note 109, at ¶ 8.1.
[112] World Trade Organization, *United States - Tax Treatment for Foreign Sales Corporations - Second Recourse to Article 21.5 of the DSU by the European Communities - AB-2005-9 - Report of the Appellate Body*, WT/DS/108/AB/RW2 at ¶ 100, Feb. 13, 2006 *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/108ABRW2.doc.
[113] Tax Increase Prevention and Reconciliation Act of 2005, H.R. 4297, 109th Cong. (2006) (enacted).
[114] *Id.* at §513(b)("Section 101 of the American Jobs Creation Act of 2004 is amended by striking subsection (f)").
[115] US State Dept., The United States Mission to the European Union, *U.S. Foreign Sales Corporations: EU Suspends Countermeasures and Will Repeal Them When the U.S. Ends Illegal Subsidies*, May 16, 2006 *available at* http://useu.usmission.gov/Dossiers/FSC/May1606_EC_Press_Release.asp.
[116] *See supra* Section IV.

subsidy' as applied to trade in services, threaten to generate an atmosphere of future non-compliance; thus, the strength of the WTO as an international regulatory body will be undermined. Similarly, from an international trade and tax coordination perspective, the inability of many developed countries to prevent their own usage of enticing, yet prohibited, tax subsidies, erodes the strength of authority they may have in forcing developing countries (which comprise more than 2/3 of the WTO membership)[117] to bring their tax and trade competition policies into compliance.

VI. POLICY RECOMMENDATIONS

The difficulties that former and current 'tax haven' island countries face in trade and tax compliance calls for a solution that is cognizant of the unique factors facing these economies.

A. Incorporating Human Rights

Economic, social, and cultural rights ("ESCR"), regarded by many to be positive rights, include the various rights of interest to countries whose trade and tax policies are in conflict with organizations such as the OECD. Early attempts at modern international recognition of ESCR can be found in agreements such as The Universal Declaration of Human Rights (the "UDHR"), adopted by the UNGA in 1948.[118] Later came the International Bill of Human Rights (the "IBHR"), which split the recognition of universal human rights by separating out civil/political rights from ESCR by creating two separate international conventions.[119] The International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") formed the basis of the IBHR.[120]

Various regional bodies throughout the world adopted their own regional agreements on ESCR, such as: The European Social Charter ("EUC"), the American Declaration on the Rights and Duties of Man ("AD"), the American Convention on Human Rights ("AC"), and the African Charter on Human and People's Rights ("ACHPR"). Despite problems regarding justiciability of ESCR, regional court systems have upheld complaints for ESCR violations further establishing the validity of claims regarding economic self-determination and the right to development. Thus, interfacing ESCR with developmental policy goals within the WTO system by implementation of things such as the DOHA Development Agenda[121] and waiver for

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[117] World Trade Organization, *Trade and Development*, http://www.wto.org/english/tratop_e/devel_e/devel_e.htm (last visited Dec. 10, 2014).
[118] Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence*, *in* IDLO Voices of Development Jurists Paper Series, Vol. 2 No. 2, 2005, at 17. [hereinafter *WTO & Human Rights*].
[119] *Id.*
[120] *Id.*
[121] World Trade Organization, Ministerial Declaration of 14 November 2001,

preferential tariff treatment for LDCs leads to convergence that can and should be expanded and carried over into multilateral tax policy.[122]

A degree of interfacing between WTO rules and human rights existed since the inception of the WTO. Inflexible policy positions are losing favor to integration of human rights and sustainable development concerns with trade and tax policy issues. Despite its on-going struggles, the WTO Dispute Settlement Mechanism remains, as some have put, "the shining light" of the WTO and represents the best system available for addressing these multilateral problems.[123] The DOHA negotiation difficulties should not overshadow the past successes and future potential of the WTO to resolve global trade disputes.[124] The way forward promotes sustainable development through the expansion of existing measures to make developing countries more competitive through carefully considered and implemented, but enhanced trade and tax preferences. Such measures should occur not just within the WTO system, but in every multilateral system through coordinated measures with active participation by developed country leaders, such as the U.S. and the OECD.

B. Participatory Realignment: Inclusivity Over Exclusivity

The conflict between multilateral initiatives and regional top-down policy pressures should be reconciled through true inclusivity. International tax policy coordination and cohesiveness requires true multilateralism, not policy pressures stemming from a select group of countries oriented in one particular region of the world. Unfortunately, unilateral preferences centered on developed country domestic revenue generation appear to take priority over promoting development and true international tax cooperation. This poses a threat to the further evolution of international trade cooperation as the WTO addresses tax and trade coordination.

The U.S. seemingly refuses to reconcile trade and tax integration within the WTO trade system and displays little interest in allowing developing countries to establish their own tax policies. The U.S.' opposition towards tax sparing provisions in bilateral tax treaties combined with their WTO 'opt-out' clause found in the 2006 U.S. Tax Treaty Model solidify American preference for a unilaterally imposed tax

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WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

[122] World Trade Organization, *Preferential Tariff Treatment for Least-Developed Countries*, WT/L/304 (June 17, 1999).

[123] Scott Flaherty, *Flagging Trade Talks May Hurt WTO Dispute System: Ex-Judge*, Oct. 2, 2013, Law 360 http://www.law360.com/articles/472293/flagging-trade-talks-may-hurt-wto-dispute-system-ex-judge.

[124] *Id.*

policy. However, in order for the U.S. and other developed countries to fully obtain their tax policy goals they must learn to better cooperate with developing countries.

Imbalanced tax information exchange agreements ("TIEAs"), even if 'agreed upon' by a developing country, will have little effectiveness if there is no political will behind enforcement of the agreement within the developing country. The aforementioned tale of Vanuatu's tax battle illustrates the somewhat hollow victory of obtaining TIEAs with Vanuatu.[125] Vanuatu fought very hard for their right to determine their own development policies, including their tax and financial laws, and relented only after being bullied into submission by the OECD. Given the immense struggle Vanuatu put up against the OECD, it is doubtful that agreements reached between the OECD and Vanuatu will be as effective as if the matter was handled by the OECD in a more cooperative and conciliatory manner.

Many SIDS countries face the following hypocrisy: the OECD and its leading members pushed many SIDS countries to develop offshore financing "as a means of diversifying their mostly one-product economies, and maintaining democracy and civil order in their societies" and now they find themselves under attack by the OECD for following their advice.[126] An offshore specialist stated in *Tax Notes International*: "the most important tax haven in the world is an island . . . the name of the island is Manhattan . . . the second most important . . . is a city called London in the United Kingdom."[127] In 2006 the OECD released a report admitting certain aspects of the U.S. and U.K. tax systems negatively parallel the OECD's alleged tax havens.[128] The black-listed SIDS' arguments focus on a level-playing field to promote economic growth and development through foreign investment, one that could not exist with the OECD's apparent double standards for member and non-member countries.[129]

Every year the World Bank releases a set of data on business and investment climates in countries around the world. One area of assessment rates tax systems used by a country and how those tax systems impact businesses. Studies have shown that countries with greater economic freedom are more appealing to foreign investors.[130] Taxation can support a population through government expenditure of collected revenues on social welfare or antagonize a population by limiting financial opportunities.

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[125] *See supra* Section II.
[126] Sanders, *supra* note 78, at 330.
[127] Chris Edwards and Daniel Mitchell, GLOBAL TAX REVOLUTION: THE RISE OF TAX COMPETITION AND THE BATTLE TO DEFEND IT 163, (Cato Institute 2008) *citing* Marshall Langer, *Harmful Tax Competition: Who Are the Real Tax Havens?*, TAX NOTES INTERNATIONAL, Dec. 18, 2000.
[128] *Id*. at 164.
[129] Edwards and Mitchell, *supra* note 127, at 164.
[130] *Id*. at 29.

The "Paying Taxes" portion of the study, conducted with assistance from PricewaterhouseCoopers ("PwC"), assesses the administrative burdens imposed by a country's tax system along with the total cost imposed (and impact on profits) on businesses.[131] Of the top fifteen countries ranked in the 2010 report, three are SIDS countries.[132] Despite the OECD's clamor, the number one ranked tax system in the world belonged to an LDC-SIDS country- the Maldives.[133] The Maldives, a SIDS low-tax jurisdiction, also ranked 1st place in 2009's "Paying Taxes" section of the World Bank Doing Business Report.[134] However, 'anti-developing country tax haven' nations dropped in ranking. Currently, the United States' tax system is ranked 64th in the world, a slight improvement from 69th in the 2013 rankings.[135] That means the following SIDS countries had tax systems more favorable to conducting business and thus ranked higher than the U.S. (in ascending order): Trinidad and Tobago, Solomon Islands, the Bahamas, St. Lucia, Seychelles, Comoros, Suriname, Vanuatu, Timor-Leste, Mauritius, Kiribati and the Maldives (ranked 1st worldwide until 2013).

Since the 2010 Doing Business Report, which covered a global financial crisis peak data period of June 2008 to May 2009, some SIDS "Paying Taxes" rankings in the 2011-2014 Doing Business Reports dropped drastically. The SIDS nation of the Maldives, ranked #1 in terms of Paying Taxes until 2013, displayed a sudden jump in tax rates from 9.3% to 30.7%, and a drop to #57 in ranking.[136] The Maldives continues to fall in tax system ranking, currently standing at #134 (dropping from #115 in the previous year's report).[137] What happened to cause such a drastic change in the World Bank's ranking of the Maldives tax system? In 2013, the Maldives, previously branded as a 'tax haven' in the OECD's initial report listing uncooperative 'Tax Havens' in 2000, implemented the "Business Profits Tax Act"

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[131] World Bank Group, *Paying Taxes 2010: The Global Picture* 8, (2010) *available at* http://www.doingbusiness.org/documents/FullReport/2010/Paying-Taxes-2010.pdf [hereinafter Taxes 2010] (For a link to the private sector PwC version of the report, *accord* PricewaterhouseCoopers, *Paying Taxes 2010: The Global Picture*, *available at* http://www.pwc.com/gx/en/paying-taxes/assets/paying-taxes-2010.pdf).
[132] World Bank Group, Doing Business 2010: Economy Rankings, http://www.doingbusiness.org/economyrankings/?direction=Asc&sort=8.
[133] *Id*.
[134] World Bank Group, *Doing Business in the Maldives*, http://www.doingbusiness.org/ExploreEconomies/?economyid=120#PayingTaxes.
[135] World Bank Group, *Doing Business 2014: Economy Rankings*, http://www.doingbusiness.org/economyrankings/?direction=Asc&sort=8.
[136] World Bank Group. Doing Business 2013, *Country Tables – Maldives* http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB13-Chapters/Country-tables.pdf
[137] World Bank Group, Doing Business, Economy Rankings http://www.doingbusiness.org/rankings (last visited Dec. 10, 2014).

which imposes a maximum of a 15% tax on business profits exceeding a certain amount.[138] According to the 2013 Paying Taxes assessment of the Maldives new "Business Profits Tax Act" by PwC and the World Bank, the new Business Profits Tax Act in the Maldives imposes a burden of approximately 100 hours of accounting work (denoted as "prepare, file and pay"[139]) on companies.[140]

So long as there is a low-tax jurisdiction outside of a tax information sharing agreement (presumptively with the OECD countries), developed countries with higher tax rates will experience tax competition. Extreme tax competition is minimized by foreign investors factoring in the higher risks associated with many of the developing country tax havens targeted by the OECD.[141] Some of these risk factors, such as financial instability (i.e. potential for bank failure), political and environmental instability of the recipient developing country, act as disincentives for developed country investors.[142] Thus, it does not appear coincidental that the OECD targets the vulnerable developing economies, when larger more advanced tax havens exist among its membership, such as Hong Kong. The OECD successfully managed to divert attention away from the large financial centers operating as tax havens amongst its membership and in other areas of the developed world. Further, American anti-tax haven measures could very well serve as thinly cloaked tax-based trade protectionism.

So how is it that OECD membership may engage in protectionism by taking away the largest form of competitive advantage, FDI-attractive low tax rates, a small island nation, developing or otherwise, may have (i.e. Vanuatu[143] or Ireland[144])? The

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[138] Government of the Maldives, *Unofficial Translation of Business Profit Tax Act*, Law no. 5/2011 as enacted Jan. 18, 2011, *available at* http://saarc-sec.org/uploads/document/Maldives%20-%20Business%20Profit%20Tax%20Act_20130108120856.pdf.
[139] World Bank Group, *Paying Taxes Methodology* [2013 Report], http://www.doingbusiness.org/methodology/paying-taxes (last visited Oct. 2, 2013).
[140] World Bank Group, *Paying Taxes in Maldives* [2013 Report], http://www.doingbusiness.org/data/exploreeconomies/maldives/paying-taxes (last visited Oct. 2, 2013).
[141] Jenny E. Ligthart, *The Economics of Taxing Cross-Border Savings Income: An Application to the EU Savings Tax* 239-66, at 239-40 *in* Colin Read and Greg N. Gregoriou eds., INTERNATIONAL TAXATION HANDBOOK: POLICY, PRACTICE, STANDARDS, AND REGULATION, (CIMA Publishing, Netherlands 2007).
[142] *Id*. at 249.
[143] *See generally* Vanuatu Paradise, *Destination Vanuatu South Pacific: Why invest in Vanuatu?*, http://www.vanuatuparadise.com/en/investments/why-invest-in-vanuatu (An example of a website boasting the tax incentives offered by Vanuatu: "There is no income tax in Vanuatu, no withholding tax, no capital gains tax, no death duties and no exchange controls. Money is easily transferred in all major currencies.") (last visited Nov. 1, 2014).
[144] Jamie Smyth, *Ireland Will Deploy Ministers to Counter 'Tax Haven' Claims*, THE FINANCIAL TIMES, May 27, 2013, *available at*, http://www.ft.com/intl/cms/s/0/70c74edc-c6ec-

secondary industry in many of these island nations is tourism, which relies heavily upon FDI in-flows to support the local tourism industry and thus the local economy.[145] Reports which focus solely on negative outcomes result in the furthering of irrational sweeping policy proposals to undermine tax incentive systems with which developed countries disagree.[146]

This is not to dismiss the dangers to developing economies of localized tax evasion, but rather, to narrow the focus to the core causes of capital flight from developing economies and address the competitive advantages of providing tax incentives to attract FDI. World Bank estimates show that illicit flows of cash from developing economies as a result of tax evasion amount to approximately US$300-US$480 billion yearly.[147] While it may be difficult at times to differentiate between tax incentives as vehicles of corruption versus vehicles of development, this does not mean the benefits to developing countries should be dismissed as inherently detrimental to both the host and external countries.[148] An excellent example of competitive tax incentives promoting rapid development is that of Hong Kong, at risk of being deemed an offensive 'tax haven'. Many corporations chose to invest in Hong Kong because of a favorable tax incentive system highlighted by a low corporate tax.[149] It is no coincidence that Hong Kong placed 2nd overall (out of 185 countries) and 4th in the "Paying Taxes" subcategory of the World Bank's 2013 "Ease of Doing Business" rankings.[150] Meanwhile, in the same 2013 rankings, the

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11e2-8a36-00144feab7de.html#axzz2gbQI5FJy (The Irish government faced a great deal of criticism from the U.S. government over recent inflammatory reports regarding Ireland as a tax home for several technology firms due to its lower imposed tax burdens, specifically its lower corporate tax rate which it has used to attract FDI); *see also* Feargal O'Rourke, *Whatever Way You Look at it, Ireland is not a Tax Haven*, THE IRISH TIMES, Sept. 14, 2013, *available at* http://www.irishtimes.com/business/economy/whatever-way-you-look-at-it-ireland-is-not-a-tax-haven-1.1527182 (In spite of U.S. accusations to the contrary, from the rest of the OECD's viewpoint, Ireland is not a tax haven: "Ángel Gurría, head of the OECD, came out this week and emphatically said Ireland was not a tax haven, quoting the key criteria the OECD applies to national tax systems. That's not enough for some people [referring to the U.S.], who might prefer their own definitions.").

[145] United Nations Conference on Trade and Development, UNCTAD CURRENT STUDIES ON FDI AND DEVELOPMENT NO. 6, FDI AND TOURISM: THE DEVELOPMENT DIMENSION 7-23 (2008), DIAE/IA/2008/6.

[146] For one example, *see* Carolyn O'Hara, Public Broadcasting Service, Online News Hour with Jim Lehrer, *Tax Havens Hamper Development in Poor Countries*, Apr. 19, 2009, *available at* http://www.pbs.org/newshour/updates/business/jan-june09/taxhavens_04-15.html.

[147] *Id.*

[148] *Id.*

[149] Hong Liang, *Tax Havens Not Sole Attraction*, CHINA DAILY, Apr. 14, 2009, *available at* http://www.chinadaily.com.cn/bizchina/2009-04/14/content_7675075.htm.

[150] World Bank, *Doing Business 2013: Economy Profile – Hong Kong* (2013), at 2 and 69,

United States placed 69th in "Paying Taxes".[151] Since the launch of the joint World Bank and PwC analysis of tax system burdens on business in 2006, the U.S.' "total tax rate (% of profit)" measurement in the Doing Business reports fluctuated around 46%.[152] The World Bank and PwC at the end of the "Paying Taxes 2013" report provide interesting indirect commentary on the U.S. and other burdensome tax systems:

> Economies around the world have made paying taxes faster and easier for businesses—such as by consolidating filings, reducing the frequency of payments or offering electronic filing and payment. Many have lowered tax rates. Changes have brought concrete results. Some economies simplifying tax payment and reducing rates have seen tax revenue rise.[153]

This statement harkens back to debates among economists and fiscal policy makers over the fragile balance involved with determining proper tax rates. If a country is too greedy in its fiscal endeavors it will not only see a direct impact via loss of investment attractiveness, but also potentially lose out on additional tax revenue as the report indicates.

Thus, tax incentive structures can have a significant effect on development through FDI channels. As one commentator notes: "it has become evident that tax havens are major players in the global financial markets: over half of all international bank lending and **approximately one-third of foreign direct investment is routed via tax havens** [emphasis added]."[154] Finding the appropriate balance between increased fiscal transparency and competitive tax incentive structures needed to attract FDI is key to staving off the negative externalities of such structures on developing countries while maximizing their benefits as vehicles to promote development.

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available at http://www.doingbusiness.org/reports/global-reports/~/media/giawb/doing%20business/documents/profiles/country/HKG.pdf.

[151] World Bank, *Doing Business 2013: Economy Profile – United States* (2013), at 71, *available at* http://www.doingbusiness.org/reports/global-reports/~/media/giawb/doing%20business/documents/profiles/country/USA.pdf.

[152] *Id*. at 72.

[153] *Id*. at 75.

[154] John Christensen, Real Instituto Elcano, *Africa's Bane: Tax Havens, Capital Flight and the Corruption Interface* 5 (Jan. 8, 2009) *available at* http://www.realinstitutoelcano.org/wps/wcm/connect/a3e13c004f018b94b9e8fd3170baead1/WP1-2009_Christensen_Africa_Bane_TaxHavens_CapitalFlight_Corruption.pdf?MOD=AJPERES&CACHEID=*a3e13c004f018b94b9e8fd3170baead1* (Christensen's working paper focuses on the dark side of how aspects of tax incentive structures can and unfortunately are often perverted to deprive developing countries of much needed income. However, he also acknowledges the beneficial impact of 'tax havens' as a delivery system for foreign direct investment).

Certain developing and transitional countries with competitive tax incentive structures have blazed their own paths to deal with the negative externalities of 'tax haven' incentive structures.[155] Cooperative multiparty dialogues may be appropriate to determine if the negative externalities from certain tax incentives are truly harming the developing country's economy. It is important to note the emphasis on "the developing country's economy" as the economy being harmed, since the focus has historically been unilaterally focused on the developed country's economy.

Alternatively, it may be advantageous for developing countries engaged in certain tax incentive structures to join together and establish their own framework of rules. This forum could act as a developing country dialogue on information sharing to combat fiscal evasion. For example, India recently undertook unilateral efforts to reign-in renegade tax haven investments requiring Indian subsidiaries "to have business operations in those countries to be eligible to make investments in India" and "scrutinis[ing] books of overseas subsidiaries that have been set up with a very low capital base as they are mostly used for round-tripping, or reinvestment of capital as foreign investment."[156] As a newly industrialized developing world leader, India can open dialogues with its fellow developing countries on implementation of similar measures adapted appropriately to the target developing country economy. It appears that the U.S. and the rest of the developed world could also learn something from the BIC countries (e.g. India),[157] as the BIC economies are recovering from the financial crisis at significantly faster rates.[158]

Overall, the discussion and suggestions form a cautionary tale of handling the inherently more complex issue of tax havens tax competition/cooperation, and tax-based trade incentive systems which tend to be superficially viewed by competing interests as either an absolute bane or boon on revenues and development.[159] The current division between the U.S., an international tax policy

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[155] Rajat Guha, *Investing from Tax Havens to Get Tough*, THE ECONOMIC TIMES, Apr. 6, 2009, *available at* http://economictimes.indiatimes.com/News/Economy/Investing-from-tax-havens-to-get-tough/articleshow/4364992.cms.

[156] *Id*.

[157] BIC Countries refers to Brazil, India and China who collectively represent the unofficial leaders of the developing world.

[158] David Wessel, *Why are China, India and Brazil Rebounding Faster Than the US?*, THE WALL STREET JOURNAL, Oct. 11, 2010, *available at* http://blogs.wsj.com/economics/2010/10/11/why-are-china-india-and-brazil-rebounding-faster-than-the-us/.

[159] As U.S. Michigan (a state with an industry heavily interested in protecting itself from foreign competitors) Senator Carl Levin puts it: "Tax havens are engaged in economic warfare against the United States. . .[a]nd the honest, hardworking American taxpayer is losing." *See* O'Hara, *supra* note 146.

hegemon, and the rest of the OECD membership on international tax coordination efforts and treatment/defining 'tax havens' bodes ill for long term prospects of an OECD solo proctor of tax competition policy within and without trade. While the U.S. prepares its full launch of its Foreign Account Tax Compliance Act, it remains to be determined how this will unilaterally alter the international tax cooperation and competition landscape. Already there are reports from ex-Americans who are attempting to avoid the burden of FATCA compliance by revoking their American citizenship.[160] The administrative burdens of tax measures such as FATCA partially explain why the U.S. ranks so poorly in the "Paying Taxes" portion of the World Bank/PwC Doing Business Report. This calls into question the viability of American tax unilateralism/bilateralism and OECD tax regionalism versus a truly cooperative multilateral tax competition and coordination effort.

C. The WTO as a Potential Proper Forum

The WTO is uniquely positioned to address the trade and tax concerns of both the powerful developed country membership of the OECD and disadvantaged developing countries. The primary commentators on the international trade-tax relationship share varied opinions on who should regulate and/or coordinate international tax competition that impacts trade. Despite the inevitable disagreements in the scholarship, there is definitive growth in mutual understanding among these trade-tax scholars that something must be done to address the problems with multilateral trade and tax coordination. One of the earliest scholars, Professor Robert Green, initially took the position that the WTO should not be involved in direct tax disputes and that such matters should be left to bilateral tax treaties.[161] Later, Green shifted his position, stating that the WTO should be somewhat involved in addressing income tax issues.[162]

Professors Avi-Yonah and Slemrod, discussed the unique situation of tax havens in relation to the WTO as a potentially proper forum for addressing harmful tax competition.[163] In a their co-authored work they suggested mainly using the WTO as a vehicle to obtain a multilateral tax treaty.[164] Prior to their joint work, Avi-Yonah individually suggested that the OECD is not the correct forum to address harmful tax competition for three reasons: 1) membership in the OECD is limited 2)

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[160] Tom Geoghegan, *Why Are Americans Giving Up Their Citizenship?*, BBC NEWS MAGAZINE, Sept. 26, 2013, *available at http://www.bbc.co.uk/news/magazine-24135021*.
[161] Robert Green, *Antilegaltistic Approaches to Resolving Disputes Between Governments: A Comparison of International Tax and Trade Regimes*, 23 YALE J. INT'L L. 79 (1998).
[162] Robert Green, *The Interaction of Tax and Non-Tax Treaties*, 50 CANADIAN TAX J. 107 (2002).
[163] *See* Avi-Yonah and Slemrod, *How Should Trade Agreements Deal With Income Tax Issues*, 55 Tax L. Rev. 533 (2002); *see also* Avi-Yonah, *Treating Tax Issues Through Trade Regimes*, 26 BROOK J. INT'L L. 1683 (2001).
[164] Avi-Yonah and Slemrod at 553.

the OECD's unilateral (organizationally) imposition of tax criteria on many developing countries created a grave lack of trust and 3) the limited size of the OECD also limits the extent of their effective reach.[165]

Subsequently, Professor Brauner concluded that the WTO is too institutionally weak to effectively handle international tax issues, discounting Professor McDaniel's approach that the WTO should handle subsidy-based direct tax issues.[166] More specifically, Brauner highlighted the OECD as the best current option given the development of the organization's expertise in international tax (pointing to developments in the field of transfer pricing brought about by the OECD guidelines).[167] However, Brauner stated that there needs to be a true multilateral world tax organization to truly address the concerns regarding international tax and trade coordination.[168] Related to this last point, the OECD decided to bundle the trade tax subsidy concerns within the overarching problems of international tax policy and development issues, this time taking careful steps to include developing countries.

Recently, the OECD launched an informal working group on international tax and development to address concerns of developing countries. Although this measure won over some support in the developing world, there still remains much skepticism. SIDS countries, like Jamaica, acknowledged that some of their tax practices in the past may have been problematic; however, they also note the frustration felt by many developing countries with similar tax incentive structures for the OECD's complete lack of sensitivity to SIDS' unique circumstances and lack of respect for their sovereignty and rights to economic self-determination and development.[169] In July 2013, the government of Jamaica hosted the Caribbean regional meeting of SIDS nations in preparation for the 2014 Conference on Small Island Developing States held in Samoa.[170] Unsurprisingly, the outcome document emphasized the need to attract FDI and the macroeconomic concerns of operating

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[165] Avi-Yonah at 1692.
[166] *See* Yariv Brauner, *International Trade and Tax Agreements May Be Coordinated, But Not Reconciled*, 25 VA. TAX REV. 251 (2005).
[167] *Id*.
[168] *Id*.
[169] Jamaican Government, *Presentation for 2nd Meeting of the Informal Task Forces on Tax and*
Development, Apr. 2011, at 4-5, *available at* http://www.oecd.org/ctp/47651940.pdf [hereinafter "Jamaica Commentary"].
[170] United Nations, *Report Of The Caribbean Regional Preparatory Meeting For The Third International Conference On Small Island Developing States*, Aug. 12, 2013, LC/CAR/L, *available at* http://www.sids2014.org/content/documents/252prepreport.pdf.

with severely limited fiscal policy opportunities.[171] The OECD's lack of accommodation generates concern due to the previous actions of the organization that demonized SIDS in the 1990s. Despite these marginally positive efforts by the OECD, the WTO membership show much greater acknowledgement of the concerns of LDCs and particularly SIDS nations.

In the summer of 2012, two LDC SIDS countries, Samoa and Vanuatu (former OECD Tax Haven outcasts) were admitted into the WTO with concessions for their unique circumstances. The WTO's work on addressing LDC concerns began in 2002 with the creation of the "WTO Work Programme for the Least Developed Countries", around the same time the OECD was pressing hard on LDC SIDS to comply with their tax competition policy demands or face OECD-imposed international condemnation.[172] The long and difficult efforts of the WTO Committee on LDCs culminated in July 2012 with revised accession guidelines for LDCs that place heavy emphasis on the unique circumstances and adversity faced by these counties.[173]

An area of the new guidelines potentially relevant to tax competition states: "In particular, **Members shall** [emphasis added] take into account the serious difficulty of acceding LDCs in undertaking commitments, in view of their special economic situation and their individual development, **financial** [emphasis added] and trade needs."[174] This paragraph was specifically within the context of GATS and could be interpreted to include the financial services offered by various LDC SIDS. Importantly, this paragraph addresses the OECD's_continued failure to truly acknowledge unique economic and financial circumstances and develop policy accordingly.

Another paragraph goes on further to add: "Acceding LDCs **shall** [emphasis added] not be expected to offer full national treatment, nor are they expected to undertake additional commitments under Article XVIII of the GATS on regulatory issues which may go beyond their institutional, regulatory, and administrative capacities."[175] This paragraph effectively forecloses developed countries from trying to extract additional commitments outside of those the LDC country is obligated to in its accession package. Lastly, the new LDC accession guidelines reaffirm the WTO's commitment to providing LDCs with Special and Differential Treatment as

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[171] *Id*. at 4, ¶ 24.
[172] World Trade Organization, *WTO Work Programme for the Least Developed Countries (LDCs) Adopted By The Sub-Committee On Least-Developed Countries*, WT/COMTD/LDC/11, Feb. 13, 2002, *available at* http://www.un.org/special-rep/ohrlls/ohrlls/wto%20programme%20for%20LDC.pdf.
[173] World Trade Organization, *Accession Of Least-Developed Countries*, WT/L/508/Add.1, July 30, 2012, *available at* http://www.ustr.gov/sites/default/files/WTL508A10.pdf.
[174] *Id*. at para. 8(a).
[175] *Id*. at para. 8(b).

needed and allows discussion of "additional transition periods/arrangements beyond the ones foreseen under specific WTO Agreements", stating that such requests will be viewed favorably on a case-by-case basis.[176]

The inclusion of former OECD branded 'tax haven' LDC SIDS within the WTO is a significant step in facilitating the WTO as a forum for progress in international tax matters. This is particularly important since many LDC SIDS already have negative tax history with the OECD due to the OECD's continued failure to recognize the special needs of SIDS countries.[177] All of these factors illustrate that the OECD cannot effectively handle international tax coordination without greater multilateral involvement due to lack of balance and, thus, the WTO may very well be the best alternative.

VII. CONCLUSION

The complex status of the trade-tax subsidy and tax haven conflict presents an onerous task for international policy makers, but provides an excellent opportunity to push for renewed focus on trade-tax policy in a true multilateral forum such as the WTO (as opposed to the OECD). The Eighth Millennium Development Goal itself calls for multilateral cooperation, a call that the developed country institutions, such as the OECD, can no longer ignore as the world continues towards global financial and economic reform. While pursuing this reform, the importance of involving the developing world, particularly developing world leaders such as the BIC countries and uniquely positioned country groups, such as the SIDS nations, remains key to preventing a lapse into an inefficient and unbalanced multilateral trade and international tax system.

Alternative approaches must be considered and the old superficial 'multilateral' approach (i.e. OECD's problematic attempts at externally controlling SIDS and other countries' tax policies) must be more thoroughly evaluated to avoid rash, developmentally dangerous and human rights-violating decisions. The focus on top-down regional international tax reform proposals represents how far removed from the development realities the OECD membership (operating at all strata of international activity) have become. The discussion of SIDS developing countries branded as tax havens provides an example of the need to look deeper into an inherently more complex problem.

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[176] *Id*. at paras. 18 and 19.
[177] *See generally* Jamaica Commentary, *supra* note 169.

Despite its own set of problems and institutional failures in certain areas, the WTO, now counting several SIDS countries currently or formerly branded as 'tax havens' among its membership, presents a better alternative to address certain international tax and tax-in-trade competition and coordination concerns. Tax bilateralism, particularly through bilateral or regional TIEAs, provide a possible secondary option, but are often fraught with disproportionate bargaining power that subjects the poorer nations to arm-twisting negotiations. The failures by the OECD in fairly handling SIDS and other developing country tax matters, coupled with the atmosphere of mistrust surrounding OECD tax initiatives after the 'Harmful Tax Competition' debacle, weakens OECD long-term viability to coordinate these tax competition issues with developing countries without involving multilateral organizations such as the WTO. The global trade and tax world is changing; it is time for the caustic approaches to control tax competition guised as 'cooperation' to change with it.