INTERNATIONAL TAX REFORM: WHO GETS A SEAT AT THE TABLE?

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ABSTRACT

The international tax framework relies on early-twentieth-century principles and favors the interests of the Global North, which created it. It bases taxing rights on a corporation's physical presence and mostly allocates profits to the country of residence. Moreover, it has been slow to adapt to modern business practices. In the digital economy, companies shift profits with relative ease and often do not require a physical presence in the location of their consumers. International taxation needs reform, but leading proposals do not reflect meaningful input from the Global South and are unlikely to serve the needs of developing countries.

In 2021, the Organisation for Economic Co-operation and Development (OECD), known informally as the "World Tax Organization," introduced new rules for the cross-border taxation of multinational enterprises. The new rules intend to address the tax challenges of digitalization and profit-shifting, and they are likely the most significant change to international taxation in several decades. However, the OECD does not represent the interests of

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developing economies, and the proposed reform has not remedied the historic imbalance which disfavors the Global South.

This Article highlights the shortcomings of the OECD's multilateral efforts in the context of taxation and digitalization. It analyzes the political lawmaking of the OECD and presents the new rules as a compromise that fails to address inequities in cross-border taxation. The Article argues that the reform undermines tax sovereignty and that the current international tax regime overlooks the involvement of the world's developing countries. It asserts that attempts to promote inclusivity within the OECD have largely been expressive and that the international tax framework inherently disadvantages developing countries and their interests. The Article proposes steps to promote the equal-footed participation of developing countries in future international tax policy initiatives. First, it recommends expanding voting rights for non-members within the OECD. Second, it supports the creation of a new intergovernmental framework within the United Nations that is better positioned to revisit traditional international tax norms through a genuinely inclusive process.

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TABLE OF CONTENTS

Introduction......1010
I. A Two -Pillar Reform to International Tax Rules......1015
II. The Two-Pillar Approach as a Political Compromise......1024
III. Cooperation and Tax Sovereignty......1032
IV. Tax Competition and the "Race to the Bottom"......1039
V. The Role of Developing Countries in International Tax Policymaking......1043
VI. A Proposal for Promoting Equal-Footed Representation......1053
Conclusion......1063

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INTRODUCTION

Current international tax rules are largely designed to address the taxation of physical businesses in a brick-and-mortar economy. They originated in the 1920s based on agreements introduced by technical experts from the United States and Europe.[1] These agreements set forth the key principles of permanent establishment, residence, and source, which remain applicable today.[2] However, the international tax framework continues to favor the interests of the developed countries which created it. Furthermore, it has been slow to adapt to the modern tax challenges arising from the digital economy, and leading proposals have neglected input from developing countries.

To address these challenges, most multilateral efforts have targeted tax havens and profit-shifting tactics by digital technology giants.[3] Sheltering profits in low-tax jurisdictions is a common

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[1] Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L.J. 1021, 1073-74 (1997); Hugh J. Ault, *Some Reflections on the OECD and the Sources of International Tax Principles*, 70 TAX NOTES INT'L 1195, 1195 (2013); Reuven S. Avi-Yonah, *All of a Piece Throughout: The Four Ages of U.S. International Taxation*, 25 VA. TAX REV. 313, 316, 322 (2005).

[2] *See Double Taxation and Tax Evasion Report Presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion*, League of Nations Pub. Doc. II. Econ. and Fin. 1928. II. 49. (1928); *Report on Double Taxation submitted to the Financial Committee – Economic and Financial Commission Report by the Experts on Double Taxation*, League of Nations Doc. E.F.S.73 F.19 (1923); *see also* Michael J. Graetz, *The David R. Tillinghast Lecture Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 262-63, 272, 319 (2001); Graetz & O'Hear, *supra* note 1, at 1027-34, 1070-72.

[3] For example, in 2014, the European Commission opened an investigation into the operations of several of Apple's subsidiaries in Ireland. It found that Apple received illegal state aid from Ireland and failed to pay €13 billion in taxes between the years 2003 and 2014, issuing a recovery order to repay that amount with interest. In 2003, Apple paid an effective corporate income tax rate of 1% on its profits of Apple Operations Europe Ltd. and Apple Sales International Ltd. (its Irish subsidiaries), and only 0.005% in 2014. But in 2020, the European General Court annulled the European Commission's decision, finding that the commission did not meet the requisite legal standard to show that Apple received an economic advantage from the Irish tax authorities. Apple shielded and avoided taxation in both the United States and Ireland by using the "Double Irish" mechanism. It avoided the definitions of corporate residence in both the United States and Ireland, thereby achieving double non-taxation. *See* European Commission Press Release IP/14/663, State aid: Commission Investigates Transfer Pricing Arrangements on Corporate Taxation of Apple (Ireland) Starbucks (Netherlands) and Fiat Finance and Trade (Luxembourg) (June 11, 2014); European Commission, Commission Decision of 30.8.2016 on State Aid A.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple; European Commission Press Release

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practice among multinational enterprises (MNEs). For example, Alphabet (Google), Pfizer, Goldman Sachs, and Citigroup each have hundreds of offshore subsidiaries that hold billions of profits.[4] Tax haven regimes are abundant and include island countries and territories that do not impose corporate income taxes, such as the Cayman Islands, Bermuda, Anguilla, and the Bahamas.[5] In some cases, a company's operational presence in a tax haven can be nothing more than a mailbox.[6] Prominent European economies such as the Netherlands, Luxembourg, and Ireland are also frequently used to shelter profits from taxation.[7] These countries typically levy low corporate income tax rates, offer ample credits and deductions to corporations, and have broad bilateral treaty networks that are used as intermediaries to shift profits to tax havens.[8] The increase in digitalization and the growing mobility of capital allows MNEs to more easily shift profits to low-tax jurisdictions or avoid paying taxes altogether in the jurisdictions of their consumers.[9] Such arrangements are known as Base Erosion and Profit Shifting

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IP/16/2923, State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth up to €13 Billion (Aug. 30, 2016); General Court of the European Union Press Release No. 90/20, Judgment in Cases T-778/16, Ireland v Commission, and T-892/16, Apple Sales International and Apple Operations Europe v Commission (July 15, 2020).

4 RICHARD PHILLIPS, MATT GARDNER, ALEXANDRIA ROBINS & MICHELLE SURKA, OFFSHORE SHELL GAMES 2017: THE USE OF OFFSHORE TAX HAVENS BY FORTUNE 500 COMPANIES 1-3 (2017).

5 Thomas R. Tørsløv, Ludvig Wier & Gabriel Zucman, *The Missing Profits of Nations*, 90 REV. ECON. STUD. 1499, 1506-07 (2023).

6 *Id.* at 1; Sean Bray, *Corporate Tax Rates Around the World, 2021*, TAX FOUND. (Dec. 9, 2021), https://taxfoundation.org/corporate-tax-rates-by-country-2021/ [https://perma.cc/V832-T2FK]; Cristina Enache, *Corporate Tax Rates Around the World, 2022*, TAX FOUNDATION (Dec. 13, 2021), https://taxfoundation.org/publications/corporate-tax-rates-around-the-world/ [https://perma.cc/L7AE-8QMG].

7 Tørsløv et al., *supra* note 5, at 1506 (noting that Belgium, Ireland, Luxembourg, Netherlands, and Switzerland are the five OECD tax haven countries).

8 Allison Christians, *Friends With Tax Benefits: Apple's Cautionary Tale*, 78 TAX NOTES INT'L 1031, 1034 (2015); Louise Fjord Kjarsgaard & Peter Koerver Schmidt, *Allocation of the Right to Tax Income from Digital Intermediary Platforms: Challenges and Possibilities for Taxation in the Jurisdiction of the User*, 1 NORDIC J. COMPAR. L. 146, 151-52 (2018).

9 Reuven Avi-Yonah, Young Ran (Christine) Kim & Karen Sam, *A New Framework for Digital Taxation*, 63 HARV. J. INT'L L. 279, 280 (2022); Michael Graetz, *A Major Simplification of the OECD's Pillar 1 Proposal*, 101 TAX NOTES INT'L 199, 199 (2021); Itai Grinberg, *The New International Tax Diplomacy*, 104 GEO. L.J. 1137, 1155 (2016).

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(BEPS)[10] practices which result in low taxation or double non-taxation due to the exploitation of international tax rules. The OECD[11] estimates that BEPS practices generate losses of $100 to $240 billion in annual global revenues, representing 4 to 10% of annual global corporate income tax revenues.[12]

Digitalization poses unique challenges to cross-border taxation.[13] Many of the world's largest and most influential companies, including Amazon, Apple, Microsoft, Meta (Facebook), and Alphabet (Google),[14] are U.S.-based but operate extensively in the global digital economy.[15] Highly digitalized MNEs often do not have a physical, permanent establishment in the market jurisdiction

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[10] According to the OECD, BEPS relates to instances where the interaction of different tax rules creates double non-taxation or lower single taxation. It also results from arrangements that intend to achieve low or non-taxation. *See* OECD, *Action Plan on Base Erosion and Profit Shifting*, at 10 (2013), https://www.oecd.org/ctp/BEPSActionPlan.pdf [https://perma.cc/ZVX6-E5XV] [hereinafter *Action Plan on BEPS*].

[11] The Organisation for Economic Co-operation and Development (OECD) is an intergovernmental economic organization comprising thirty-eight members. The OECD was founded in 1961 to stimulate economic progress and world trade. For more information and a complete list of OECD members, see *About: Our Global Reach*, OECD, https://www.oecd.org/about/members-and-partners [https://perma.cc/U886-F9CC] (last visited Oct. 24, 2022) [hereinafter *OECD Global Reach*].

[12] *BEPS: International Collaboration To End Tax Avoidance*, OECD, https://www.oecd.org/tax/beps/ [https://perma.cc/UW5E-STJH] (last visited Oct. 24, 2022).

[13] Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT'L L. 353, 355-59 (2020); Young Ran (Christine) Kim, *Digital Services Tax: A Cross-Border Variation of the Consumption Tax Debate*, 72 ALA. L. REV. 131, 132-33 (2020); Karine Perset, *The Economic and Social Role of Internet Intermediaries* (OECD Digit. Econ. Papers No. 171, 2010); Monica Gianni, *OECD BEPS (In)Action 1: Factor Presence as a Solution to Tax Issues of the Digital Economy*, 72 TAX LAW. 255, 270-71 (2018); Wolfgang Schön, *Ten Questions About Why and How to Tax the Digitalized Economy* 21 (Max Planck Inst. for Tax L. & Pub. Fin. Working Paper No. 2017-11, 2017).

[14] These companies are regularly considered to be some of the world's largest companies, typically measured by market capitalization, profitability, and revenue metrics. *See, e.g.*, Andrea Murphy & Isabel Contreras, *The Global 2000*, FORBES (May 12, 2022), https://www.forbes.com/lists/global2000/?sh=3ded75f75ac0 [https://perma.cc/3C8N-RJG3]; *Top 100 Digital Companies*, FORBES (2019), https://www.forbes.com/top-digital-companies/list/#tab:rank [https://perma.cc/WXN9-5DQQ].

[15] Daniel Shaviro, *Digital Services Taxes and the Broader Shift from Determining the Source of Income to Taxing Location-Specific Rents* 2 (NYU L. & Econ. Research Paper No. 19-34, 2020); Lilian V. Faulhaber, *Taxing Tech: The Future of Digital Taxation*, 39 VA. TAX REV. 145, 147-48 (2019). Google, Amazon, Facebook, and Apple are often collectively referred to as "GAFA" or the "Four Horsemen."

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in which they have sales.[16] A permanent establishment has been traditionally required to give rise to taxing rights by the source (market) state.[17] Nevertheless, the economic activity of MNEs can be substantial even without a physical presence in the market. Thus, source states, which are often developing countries, are deprived of taxing rights because of their inability to tax MNEs on their profits.

Policymakers worldwide have begun to recognize the need to adapt international tax norms to the digital era. In 2021, the OECD proposed a two-pillar solution to address the tax challenges of digitalization and profit-shifting[18]—an agreement later endorsed by the G20.[19] Pillar One of the OECD's proposal creates a taxing right for market jurisdictions, including new profit allocation rules. Pillar Two introduces a 15% global minimum corporate income tax rate for foreign-earned income.[20] The two-pillar solution is likely to be the most significant reform to international tax rules in several decades.

International tax reform is necessary to address the challenges of digitalization and to ensure that companies pay a fair share of taxes on their global profits. But the OECD's framework has been both procedurally and substantively flawed. To establish a broader consensus on the new rules, the OECD worked with an Inclusive Framework on BEPS[21] which numbers over 135 countries, including

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[16] Ault, *supra* note 1.

[17] *See* OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, at art. 5 (Dec. 18, 2017) [hereinafter *OECD Model Tax Convention*].

[18] *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy,* OECD (2021), https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf [https://perma.cc/7WZF-VAP9] [hereinafter *Statement on a Two-Pillar Solution*].

[19] The G20 is an international forum comprising nineteen countries and the European Union and representing the world's major developed and emerging economies. Together, the G20 members represent 85% of the global GDP, 75% of international trade, and two-thirds of the world's population. *See About G20*, G20, https://www.oecd.org/g20/about [https://perma.cc/XAU7-763S] (last visited June 11, 2023); *Fourth G20 Finance Ministers and Central Bank Governors Meeting*, G20 (Oct. 13, 2021), http://www.g20.utoronto.ca/2021/211013-finance.html [https://perma.cc/XAU7-763S] [hereinafter *Fourth G20 Finance Ministers*]; *see also* G20, G20 ROME LEADERS' DECLARATION 11 (2021), http://www.g20.utoronto.ca/2021/G20ROMELEADERSDECLARATION.pdf [https://perma.cc/2T4D-Y6ZU].

[20] *Statement on a Two-Pillar Solution, supra* note 18.

[21] For a complete list of the Inclusive Framework on BEPS, see *Members of the OECD/G20 Inclusive Framework on BEPS*, OECD (Aug. 2021), https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf

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non-OECD members.[22] It was created to enable interested countries, including developing ones, to participate in an "equal footing in the development of standards on BEPS related issues, while reviewing and monitoring the implementation of the OECD/G20 BEPS Project."[23] However, non-OECD members have not been equal-footed participants in the OECD's policymaking and the "inclusivity" of the Inclusive Framework was largely expressive. The new rules undermine the principle of tax sovereignty by limiting autonomous discretion on tax policymaking and coercing non-members and low-tax jurisdictions into cooperation. They continue to reflect the interests of the world's developed economies and disregard the revenue needs of developing ones, offering a limited redistributive outcome.

This Article highlights the shortcomings of the OECD's multilateral efforts in the context of taxation and digitalization. It analyzes the OECD's role in shaping cross-border taxation and depicts the new rules as a political compromise that fails to address institutional inequities. The Article argues that the two-pillar reform violates tax sovereignty and neglects the contributions of developing countries. It proposes measures to promote the equal-footed participation of developing countries in future global tax initiatives, asserting that such equal-footed participation should commence with broader voting rights.

This Article begins by outlining the OECD's two-pillar approach to addressing the tax challenges of digitalization and profit-shifting. It examines the role of the OECD as the informal "World Tax Organization" and the barriers to implementing its planned reform. Thereafter, the Article identifies the political compromises between the United States and E.U. members which helped establish the new rules. It evaluates the challenges to tax sovereignty and competition arising from the reform and questions whether these outcomes are beneficial. The Article then explores the role of developing countries in the OECD's agenda, raising concerns about the organization's

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[https://perma.cc/NX4N-FJGN] [hereinafter *Members of the OECD/G20 Inclusive Framework on BEPS*]. As of December 2022, the Inclusive Framework consists of 142 countries.

[22] *Members of the OECD/G20 Inclusive Framework on BEPS*, OECD (June 9, 2023), https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf [https://perma.cc/AQ9F-5HS2].

[23] OECD, *OECD/G20 Inclusive Framework on BEPS*, at 1 (June 28, 2018), https://www.oecd.org/tax/beps/flyer-inclusive-framework-on-beps.pdf [https://perma.cc/8RGY-CUJ2] [hereinafter *Inclusive Framework on BEPS*].

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inclusivity. The Article offers two solutions to advance the participation of developing countries in international tax policymaking: First, it recommends expanding voting rights for non-members within the OECD. Second, it supports the creation of a new intergovernmental framework within the United Nations that is better positioned to revisit traditional international tax norms through a genuinely inclusive process.

I. A TWO -PILLAR REFORM TO INTERNATIONAL TAX RULES

The OECD was founded in 1961[24] by twenty members from North America and Europe[25] and presently consists of 38 members.[26] Its mission is to design economic and world trade policy, including international taxation.[27] The OECD has been informally regarded as the "World Tax Organization,"[28] given its uncontested influence in shaping international tax policy. And unlike the United Nations, the OECD is an exclusive organization with strict requirements for accession.[29] Legal scholars have referred to the OECD as a "rich man's club": developing countries are not

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[24] The OECD superseded the Organisation for European Economic Co-Operation, which was established in 1948. *See 75th Anniversary of the Creation of the OEEC*, OECD (2023), https://www.oecd.org/general/organisationforeuropeaneconomicco-operation.htm [https://perma.cc/A644-XK64].

[25] *List of OECD Member Countries - Ratification of the Convention on the OECD*, OECD, https://www.oecd.org/about/document/ratification-oecd-convention.htm [https://perma.cc/BXK8-N7HL] (last visited June 11, 2023).

[26] *Id.*

[27] *About*, OECD, https://www.oecd.org/about/ [https://perma.cc/7YYF-ZYRQ] (last visited June 11, 2023).

[28] Arthur J. Cockfield, *The Rise of the OECD as 'Informal World Tax Organization' Through National Responses to E-Commerce Tax Challenges*, 8 YALE J.L. & TECH. 136 (2006); Elliot Ash & Omri Marian, *The Making of International Tax Law: Empirical Evidence From Natural Language Processing* 8 (U.C. Irvine Sch. L., Legal Studies Research Paper No. 2019-02, 2019).

[29] The Framework for the Consideration of Prospective Members includes economic and public governance characteristics such as an open market economy, tax transparency and international cooperation, a stable and transparent financial system, and access to information. It also includes the ability to sustain the accession process and membership obligations, actively participating in the OECD and its committees, and having a regional or global role in the global economy. *See* OECD, Report of the Chair of the Working Group on the Future Size and Membership of the Organisation to Council: Framework for the Consideration of Prospective Members, at annex I (June 2017).

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OECD members, and the OECD does not represent their interests.[30] The OECD embodies the interests of its members—the "Global North," the world's industrialized, developed countries.[31] Nevertheless, the OECD's principles, resolutions, and commentary are adopted far beyond the scope of its members. Since its first version in 1963, the OECD Model Tax Convention has had a considerable impact on the formation, negotiation, application, and interpretation of income tax treaties.[32] OECD member-states have largely conformed to the OECD model when drafting bilateral income tax treaties for the avoidance of double taxation. The OECD has also influenced non-OECD members and international organizations which have frequently used the OECD model as a benchmark for income tax treaty negotiation and design.[33] Today, over 3,000 bilateral income tax treaties are in force worldwide, and most conform to the OECD model.[34]

In past years, governments have cooperated within the OECD on issues such as ending bank secrecy and combatting tax evasion by corporations and individuals.[35] The increasingly digitalized economy and growth of online platforms[36] have prompted governments to expand multilateral cooperation to also address the tax challenges of digitalization. Current international tax rules—namely, the permanent establishment principle[37]—provide that a foreign company can be taxed in the market jurisdiction only if it has

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30 Yariv Brauner, *Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument*, 25 FLA. TAX REV. 489, 490-91 (2022).

31 Okanga Okanga & Lyla Latif, *Effective Taxation in Africa: Confronting Systemic Vulnerability Through Inclusive Global Tax Governance*, 2 AFJIEL 101, 104-05 (2021).

32 *OECD Model Tax Convention*, *supra* note 17, at 12. The OECD Model Tax Convention directly descends from the 1928 League of Nations Model Treaty and largely preserves its key principles. *See* Graetz & O'Hear, *supra* note 1, at 1023, 1066.

33 *OECD Model Tax Convention*, *supra* note 17.

34 *Tax Treaties: Update to OECD Model Tax Convention Released*, OECD (Dec. 12, 2017), https://www.oecd.org/tax/treaties/tax-treaties-2017-update-to-oecd-model-tax-convention-released.htm [https://perma.cc/GBX8-AKW6].

35 *Statement on a Two-Pillar Solution*, *supra* note 18, at 12-13.

36 The platform economy typically refers to the economic activity facilitated by online platforms and digital intermediary services. *See* Giancarlo Frosio, *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 NW. U. L. REV. 19, 19-21 (2017); U.N. Conference on Trade & Development, *Digital Economy Report 2021: Cross-Border Data Flows and Development: For Whom the Data Flow*, at 2, U.N. Doc. UNCTAD/DER/2021 (2021) [hereinafter *Digital Economy Report 2021*].

37 *See OECD Model Tax Convention*, *supra* note 17, at 31-33.

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a physical presence there. A permanent establishment is generally a "fixed place of business" through which an enterprise wholly or partly carries out its operations. This includes a place of management, branch, office, factory, workshop, or place of extraction of natural resources.[38] A certain level of physical presence in the source jurisdiction is typically required to constitute a permanent establishment.[39] But the permanent establishment standard does not reflect the growing ability of companies to have a substantial economic engagement in the market without a physical presence. Furthermore, some countries only tax the domestic business income of their MNEs but not their foreign income, assuming that these profits will be taxed where they are earned. But much of that income remains untaxed.

MNEs often do not require a physical presence in the location of their consumers and can easily circumvent the permanent establishment standard to avoid taxation in market jurisdictions and in high-tax countries. A company's online consumer base can be in one jurisdiction while its servers, data centers, cloud computing, management, and intellectual property can be in another. Sometimes, these can be in many different jurisdictions. Meanwhile, the largest digital platforms are becoming increasingly powerful and control all stages of the global data value chain.[40] The heavy reliance on intangibles and mobility of profits enable digital technology giants to avoid source taxation with relative ease.[41] Their revenues are not necessarily reported in the countries in which they are earned, making it more difficult for market jurisdictions to tax them.[42]

In addition to avoiding source-country permanent establishments, MNEs frequently base their residency in jurisdictions that have low or no corporate income taxes. This includes the practice of "treaty shopping": exploiting favorable bilateral treaties to reduce or eliminate withholding tax in the source

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[38] *Id*. at 31.

[39] Assaf Harpaz, *Taxation of the Digital Economy: Adapting a Twentieth Century Tax System to a Twenty-First-Century Economy*, 46 YALE J. INT'L L. 57, 61 (2021).

[40] These stages include data collection through user-facing platform services; data transmissions through submarine cables and satellites; data storage in data centers; and data analysis, processing, and use. *See Digital Economy Report 2021*, *supra* note 36, at 2.

[41] Jinyan Li, *Protecting the Tax Base in the Digital Economy*, *in* UN HANDBOOK ON SELECTED ISSUES IN PROTECTING THE TAX BASE OF DEVELOPING COUNTRIES 407, 407-08 (Alexander Trepelkov, Harry Tonino & Dominika Halka eds., 2015).

[42] Harpaz, *supra* note 39, at 64.

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country.[43] As a result, the tax bases of non-tax haven countries are substantially diluted. According to a 2016 Europol report,[44] the total amount of global wealth held in offshore accounts is approximately $8 trillion, representing over 10% of global GDP.[45] The percentage of wealth held offshore is much higher for developing countries which are disproportionately affected by tax evasion.[46] Moreover, developing countries are typically source (market) jurisdictions in which parent MNEs are rarely incorporated and where the existence of a permanent establishment is habitually avoided through the use of BEPS.[47]

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[43] Ault, *supra* note 1, at 1198. As a result of treaty shopping, the OECD introduced Action 6 on "Preventing the Granting of Treaty Benefits in Inappropriate Circumstances" within its Base Erosion and Profit Shifting Project to address bilateral treaty abuse. *See generally* OECD, *Action 6 – 2015 Final Report, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, at 3 (2015) (explaining Action 6 of the OECD/G20 Base Erosion and Profit Shifting Project which identified treaty shopping as one of the most important sources of BEPS concerns).

[44] The European Union Agency for Law Enforcement Cooperation (Europol) is an E.U. law enforcement agency whose goal is to combat and prevent "all forms of serious international and organised crime, cybercrime and terrorism." *See About Europol: Helping Make Europe Safer*, EUROPOL, https://www.europol.europa.eu/about-europol [https://perma.cc/4LSC-5Q7R] (last visited June 11, 2023).

[45] Europol, *Shadow Money: The International Networks of Illicit Finance*, at 3 (2016), https://www.europol.europa.eu/cms/sites/default/files/documents/Shadow%20money%20%E2%80%93%20the%20international%20networks%20of%20illicit%20finance_PUBLIC_0.pdf [https://perma.cc/CLD3-J24T]. Several other studies show similar figures. *See* Annette Alstadsæter, Niels Johannesen & Gabriel Zucman, *Who Owns the Wealth in Tax Havens? Macro Evidence and Implications for Global Inequality* 1 (Nat'l Bureau of Econ, Rsch., Working Paper No. 23805, 2017); Lijun Li & Chris Wellisz, *Gimme Shelter*, FIN. & DEV. (IMF), Sept. 2019, at 46, https://www.imf.org/external/pubs/ft/fandd/2019/09/pdf/offshore-tax-havens-and-inequality-picture.pdf [https://perma.cc/5S5F-KR5X].

[46] Martin Hearson, *The Challenges for Developing Countries in International Tax Justice*, 54 J. DEV. STUD. 1932, 1933 (2017).

[47] *See* Ernesto Crivelli, Ruud De Mooij & Michael Keen, *Base Erosion, Profit Shifting and Developing Countries* 269 (IMF Working Paper No. WP/15/118, 2016); ADOLFO MARTÍN JIMÉNEZ, PREVENTING THE ARTIFICIAL AVOIDANCE OF PE STATUS 54 (2014).

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Thus, in 2021,[48] the OECD agreed on a two-pillar solution to address the tax challenges of digitalization and profit-shifting.[49] Pillar One establishes a new taxing right that applies on top of present international tax standards, such as the permanent establishment principle. It responds to digitalization by targeting (extremely) large companies that earn profits in market jurisdictions, without a physical presence requirement. Pillar One provides that a portion of MNEs' residual profits will be taxed by the source jurisdiction.[50] Its new taxing right, known as *Amount A*,[51] is limited to companies with global revenues exceeding €20 billion and profitability[52] exceeding 10% of their revenues.[53] The profits exceeding the 10% profitability threshold are deemed "non-routine" and would be allocated to various market jurisdictions based on a revenue allocation key.[54] An eligible market jurisdiction—with an established nexus—is one where an MNE derives at least €1 million in revenues from that jurisdiction, distinguishing smaller jurisdictions with GDPs lower than €40 billion (for which this nexus

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48 The OECD's agreement follows almost a decade of work on reforming international tax rules. In 2012, the G20 tasked the OECD with developing a BEPS Project Action Plan, approved in 2013. The BEPS work has included the drafting and adopting of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS. The 2018 Multilateral Instrument has already entered into force and covers approximately 100 jurisdictions. The BEPS work includes a mechanism of implementing country-by-country reporting, subject to which MNEs need to report relevant tax information about their global operations, on a country-by-country basis. The above measures concluded the process informally known as "BEPS 1.0." The proceeding BEPS process, known informally as "BEPS 2.0," emerged shortly thereafter. The goal of BEPS 2.0 has been, more explicitly, to address the tax challenges of digitalization and profit-shifting by MNEs. To achieve a broader consensus on BEPS, the OECD established the Inclusive Framework to include non-OECD members. *See Statement on a Two-Pillar Solution*, *supra* note 18; OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, July 1, 2018.

49 *See* OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, *supra* note 48.

50 *Statement on a Two-Pillar Solution, supra* note 18, at 2.

51 The analysis in this Article is limited to a discussion of Amount A, although there is more to Pillar One. Amount B standardizes the remuneration of related party distributors that perform baseline marketing and distribution activities in a way that is aligned with the arm's length principle. *See* OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint*, at 155 (2020) [hereinafter *Report on Pillar One Blueprint*].

52 The OECD considers profitability as profits before tax (PBT).

53 Contingent on successful implementation, the €20 billion threshold will be reduced to €10 billion after seven years.

54 *Statement on a Two-Pillar Solution, supra* note 18, at 2.

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threshold is reduced to €250,000).[55] For MNEs subject to Pillar One's new taxing right, 25% of the non-routine profits would then be allocated to market jurisdictions with nexuses to the company.[56] Under Pillar One, approximately $200 billion of taxing rights on profits will be redistributed from residence to source jurisdictions.[57]

The following example demonstrates an application of Pillar One's new taxing right (Amount A): assume that X Corp is an MNE headquartered and incorporated in Country A. X Corp is a highly profitable enterprise in the technology sector. It derives revenues from many jurisdictions, including those in which it has no physical presence. In the year 2022, X Corp reported global revenues of €30 billion and earned profits of €4 billion. Under prior law, absent a permanent establishment in the source (market) jurisdiction, the €4 billion of X Corp's profits could be allocated entirely to Country A. Under the OECD's new rules, X Corp would be subject to Pillar One's new taxing right. It exceeds both the revenue threshold (of €20 billion) and the profitability threshold (exceeding 10% of revenues). Under the new taxing right, various market jurisdictions that have a nexus would be eligible to tax X Corp's profits. Pillar One would deem €3 billion of X Corp's profits (representing 10% of its revenues) as "routine" and non-allocable. Then, 25% of the profits exceeding the 10% profitability threshold would be deemed "non-routine" and allocable to market jurisdictions. For X Corp, €1 billion is the residual amount exceeding 10% profitability, and 25% percent (€250 million) would be allocable to market jurisdictions. This €250 million would be reallocated to market jurisdictions that have a nexus to X Corp based on a revenue allocation key and in proportion to the revenues that X Corp derives from them.

Thus, Pillar One redistributes profits from residence jurisdictions where companies are incorporated to source (market) jurisdictions where companies have sales. Note, however, that Pillar One's profoundly high revenue (€20 billion) and profitability thresholds (10%) result in an extremely limited redistributive outcome. Companies must satisfy both thresholds to be subject to Pillar One. Even then, only 25% of their residual profits are

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[55] *Id.* at 1.

[56] *Id.* at 2.

[57] *Revenue Impact of International Tax Reform Better Than Expected*, OECD (Jan. 18, 2023), https://www.oecd.org/tax/revenue-impact-of-international-tax-reform-better-than-expected.htm [https://perma.cc/FV2T-N6Y2] [hereinafter *Revenue Impact*]. Whereas the OECD's revenue projections were provided in U.S. dollars, revenue thresholds were provided in Euros.

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reallocated to numerous market jurisdictions which would have the right to tax them. According to estimates, fewer than 100 MNEs would be subject to Pillar One given its limited scope.[58] These include U.S.-based Apple, Microsoft, and Alphabet (Google), and China-based Tencent (WeChat), and Alibaba.[59] Amazon could be excluded because it fails to satisfy the 10% profitability threshold.[60] Companies like eBay and Airbnb could also be excluded because their global revenues fall short of €20 billion.[61] Because of this limited redistribution, Pillar One is projected to increase annual global tax revenue gains by only $13 to $36 billion.[62]

Pillar Two of the OECD's proposal targets profit-shifting practices. It seeks to reduce tax competition and eliminate tax havens. Pillar Two consists of intertwining rules known as the "Global Anti-Base Erosion Rules" (GloBE),[63] which apply a 15% minimum corporate income tax on foreign earned income.[64] First, an Income Inclusion Rule applies a top-up tax on a parent company in

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[58] Depending on the study observed, the numbers generally fluctuate between sixty and eighty in-scope MNEs. *See* Michael Devereux & Martin Simmler, *Who Will Pay Amount A?*, ECONPOL POL'Y BRIEF, July 2021, at 1, 1; Martin A. Sullivan, *Which Companies Could Be Caught in the Pillar 1 Net?*, 173 TAX NOTES FED. 435, 435 (2021); Yariv Brauner, *Editorial: Agreement? What Agreement? The 8 October 2021, OECD Statement in Perspective*, 50 INTERTAX 2 (2022).

[59] Sullivan, *supra* note 58.

[60] Note, however, that in exceptional circumstances, the Pillar One new taxing right may apply to situations where a "Disclosed Segment" meets Pillar One's scope thresholds where the MNE does not overall. Thus, although Amazon.com, Inc. will likely not be subject to Pillar One's new taxing right, it is possible that one of its highly profitable subsidiaries—such as Amazon Web Services, Inc.—will be. *See* OECD, *Fact Sheet Amount A: Progress Report on Amount A of Pillar*, at 2, https://www.oecd.org/tax/beps/pillar-one-amount-a-fact-sheet.pdf [https://perma.cc/6PN2-DKTT]; Saleha Mohsin, William Horobin & Anna Edgerton, *Amazon to Be Covered by Global Tax Deal Despite Thin Margins*, BLOOMBERG TAX (June 7, 2021), https://news.bloombergtax.com/daily-tax-report-international/amazon-set-to-be-covered-by-global-tax-deal-despite-thin-margins [https://perma.cc/M7JL-82UL].

[61] *See eBay Inc. Reports Better Than Expected First Quarter 2022 Results*, EBAY (May 4, 2022), https://investors.ebayinc.com/investor-news/press-release-details/2022/eBay-Inc.-Reports-Better-Than-Expected-First-Quarter-2022-Results/default.aspx [https://perma.cc/5XNN-C8JY]; *Airbnb Q4 2022 and Full-Year Financial Results*, AIRBNB (Feb. 14, 2023), https://news.airbnb.com/airbnb-q4-2022-and-full-year-financial-results/#:~:text=Q4%20revenue%20of%20%241.9%20billion,Rates%20(%E2%80%9CADR%E2%80%9D).

[62] *Revenue Impact*, *supra* note 57.

[63] *Statement on a Two-Pillar Solution*, *supra* note 18, at 3.

[64] *Id.* at 4; *see also* OECD, *Tax Incentives and the Global Minimum Corporate Tax: Reconsidering Tax Incentives After the GloBE Rules* (Oct. 6, 2022).

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respect of its subsidiary, including a permanent establishment, if the subsidiary's effective corporate income tax rate is less than the minimum rate of 15%.[65] Second, an Undertaxed Payment Rule denies intra-group deductions. The Undertaxed Payment Rule would assign a top-up minimum tax of up to 15% on a parent company in a high-tax jurisdiction making an otherwise deductible payment to its low-taxed subsidiary.[66] Under Pillar Two, the 15% global minimum tax is expected to raise approximately $220 billion in new global tax revenues annually.[67] Thus, its overall revenue impact far exceeds Pillar One's. MNEs will pay higher taxes under Pillar Two, which primarily targets low-tax jurisdictions and tax havens. These higher taxes will mostly be paid to residence countries which are typically OECD members. The two-pillar approach does little to allocate the increased revenues to source countries that are non-OECD members.

The following example demonstrates an application of Pillar Two: assume that Y Corp is a parent company, headquartered and incorporated in a high-tax jurisdiction. Z Corp is a constituent entity (subsidiary) of Y Corp, incorporated in a low-tax jurisdiction. If Z Corp is not subject to a 15% effective corporate tax, the Income Inclusion Rule would require Y Corp (the parent) to account for Z Corp in its share of income by applying the GloBE top-up taxes levied by the parent's jurisdiction.[68] The Undertaxed Payment Rule is a stopgap to the Income Inclusion Rule, applying in the absence of the Income Inclusion Rule when Y Corp makes a deductible payment to constituent Z Corp. In this case, either the deduction will be denied to Y Corp or an adjustment will be made through source-based taxation such as a withholding tax.[69] Under the OECD's model rules, a source jurisdiction may elect to adopt a Qualified Domestic Minimum Top-up Tax (QDMTT). The QDMTT would be a domestic minimum top-up tax which must be implemented consistently with the GloBE rules.[70] The QDMTT is fully creditable

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65 *Statement on a Two-Pillar Solution*, *supra* note 18, at 5.

66 *Id.*

67 *Revenue Impact*, *supra* note 57.

68 OECD, *Tax Challenges Arising From Digitalisation – Report on Pillar Two Blueprint*, at 112 (2020) [hereinafter *Report on Pillar Two Blueprint*].

69 *Id.* at 123.

70 OECD, *Tax Challenges Arising From the Digitalisation of the Economy Global Anti-Base Erosion Model Rules (Pillar Two)*, at 61 (2021) [hereinafter *Global Anti-Base Erosion Model Rules*]; OECD, *Tax Challenges Arising From the Digitalisation of the*

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against the GloBE and provides the adopting jurisdiction with preference over the revenue from top-up taxes.[71]

The GloBE rules apply to MNEs with annual revenues equaling or exceeding €750 million in at least two of the four preceding fiscal years.[72] All OECD and E.U. members have agreed to the application of Pillar Two,[73] following much reservation from low-tax members such as Ireland and Hungary.[74] The OECD plans to implement the new rules through a multilateral convention and instrument which will enter into force in 2024.[75]

Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), at 98 (2023) [hereinafter *Administrative Guidance*].

71 *Administrative Guidance*, *supra* note 70, at 106.

72 OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two)* 14 (2022) [hereinafter *Commentary to the Global Anti-Base Erosion Model Rules*]. In addition to the GloBE, Pillar Two will create a Subject to Tax Rule (STTR). The STTR may override bilateral tax treaty benefits with respect to certain payments that are not subject to the minimum level of tax in the recipient jurisdiction. It will apply to payments such as royalties, interest, and brokerage between related parties. The STTR levies a withholding tax of 7.5% to 9%, and unlike the GloBE rules, it is applicable irrespective of the €750 million revenue threshold. *See Report on Pillar Two Blueprint*, *supra* note 68.

73 Council of the European Union Press Release, International Taxation: Council Reaches Agreement on a Minimum Level of Taxation for Largest Corporations (Dec. 12, 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/international-taxation-council-reaches-agreement-on-a-minimum-level-of-taxation-for-largest-corporations/ [https://perma.cc/PR2V-E6S8]; *Communication*, CM 5860/22 (Dec. 15, 2022), https://data.consilium.europa.eu/doc/document/CM-5860-2022-INIT/en/pdf [https://perma.cc/M2MD-96HM].

74 *See e.g.*, World Economic Forum, *Davos 2019: Rethinking Taxes: Creating a Fair and Balanced System*, YOUTUBE, at 2:50 (Feb. 10, 2019), https://www.youtube.com/watch?v=9NgjfwZPwng [https://perma.cc/P83G-REFX] (statement by Irish Minister for Finance Paschal Donohoe stating that Ireland will not support a global minimum tax); Will Morris, *Let's Use the 'Hungarian Hiatus' to Get Pillar Two Back on Track*, BLOOMBERG TAX (Jul. 28, 2022), https://news.bloombergtax.com/daily-tax-report-international/lets-use-the-hungarian-hiatus-to-get-pillar-two-back-on-track [https://perma.cc/B7FV-JU85] (last visited March 23, 2023); *Hungary Still Opposed To "Job Killing" Global Minimum Tax, Orban Says*, REUTERS (Dec. 2, 2022), https://www.reuters.com/markets/europe/hungary-still-opposed-job-killing-global-minimum-tax-orban-says-2022-12-02/ [https://perma.cc/MMP4-EE7P].

75 OECD, *Cover Note by the Inclusive Framework to the Progress Report on Amount A of Pillar One*, at 3 (Jul. 2022), https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-cover-note-to-the-progress-report-on-amount-a-of-pillar-one.pdf [https://perma.cc/C52M-RSN4].

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II. The Two-Pillar Approach as a Political Compromise

The OECD began the BEPS Project with the intention of introducing transformative changes to the international tax landscape that would respond to the challenges of digitalization and profit-shifting.[76] But by 2020, the OECD had begun to significantly narrow the scope of its envisioned reform, thereby limiting the benefits for developing countries. The OECD's blueprint for Pillar One provided that in-scope companies should be those that either engage in automated digital services or that are consumer-facing businesses.[77] During these negotiation stages, the OECD estimated that approximately 2,300 MNEs would be in-scope: meeting a €750 million revenue threshold.[78] This plan was nixed due to political constraints when the Trump administration halted negotiations over its unwillingness to accept Pillar One. The Trump administration strongly opposed measures that would increase taxes on U.S.-based MNEs.[79] Pillar One was viewed as harmful because it would shift tax revenues from the United States abroad. The United States even proposed that Pillar One be implemented on a voluntary basis—a framing not accepted by E.U. counterparts.[80]

Although the United States is not traditionally considered a tax haven, it may suffer the greatest losses from Pillar One's reallocation. On one hand, the United States would gain revenues from the new taxing right because it would have nexus as a market jurisdiction in which large MNEs conduct sales. This means that 25% of residual profits—the profits exceeding 10% of revenues—will be allocated to the United States to the extent that it is the market

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[76] *See Commentary to the Global Anti-Base Erosion Model Rules*, *supra* note 72, at 19.

[77] *Report on Pillar One Blueprint*, *supra* note 51, at 19-22.

[78] *Id.* at 63.

[79] *See* Letter from Steven T. Mnuchin, U.S. Sec'y of the Treasury, to Bruno Le Maire, Rishi Sunak, María Jesús Montero, and Roberto Gualtieri (Jun. 12, 2020), https://www.politico.eu/wp-content/uploads/2020/06/CLEAN-US-letter-DST-120620201.pdf [https://perma.cc/FC3Z-J3DA] (expressing that discussions on global tax reform have reached an impasse) [hereinafter Mnuchin Letter to Finance Ministers].

[80] Letter from Steven T. Mnuchin, U.S. Sec'y of the Treasury, to José Ángel Gurría, OECD Secretary-General (Dec. 3, 2019), https://aboutbtax.com/NgX [https://perma.cc/VEX8-C87U] [hereinafter Mnuchin Letter to OECD Secretary-General]. Mnuchin proposed applying Pillar One through a "safe-harbor" regime, under which companies can elect to opt-in or out of Pillar One.

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jurisdiction for these companies.[81] However, the United States is predominantly a residence jurisdiction for MNEs. It leads the list of companies that would be subject to Pillar One's reallocation, both by number and share of global profits.[82] Moreover, U.S.-based MNEs will likely claim credits for the taxes they pay abroad. Under U.S. law, companies can claim foreign tax credits, dollar for dollar, against U.S. corporate income tax liability for income taxes paid to foreign jurisdictions.[83] For Pillar One to be creditable, it would have to pass the income test of Treasury Regulation § 1.901-2(b)(4), meaning that it would need to have the "predominant character" of an income tax according to U.S. law.[84] If Pillar One would qualify, the U.S. Treasury will need to credit much higher amounts than it would ultimately earn from Pillar One.[85]

But in 2022, the Treasury adopted new regulations under § 1.901-2(b), setting forth an "attribution" requirement which provides that a foreign tax credit will be denied if the foreign income tax is paid for income not sourced within the United States.[86] The goal of the regulations is to prevent digital services taxes from being credited against U.S. income taxes.[87] It is still unclear how the Pillar One reallocation and GloBE rules will be affected, but it is possible that they will not be credited.[88] This would result in much greater tax

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[81] *Statement on a Two-Pillar Solution, supra* note 18, at 2.

[82] Lorraine Eden, *Taxing the Top 100: U.S. Estimates of Winners and Losers From Pillar One Amount A*, 50 TAX MGMT. INT'L J. 1, 9 (2021); *see also* Lorraine Eden, *Taxing The Top 100 – Part 1: Who's In, Who's Out?*, BLOOMBERG TAX (June 14, 2021, 3:01 AM), https://news.bloombergtax.com/daily-tax-report/taxing-the-top-100-part-1-whos-in-whos-out [https://perma.cc/7Y6D-WKMD]. Note, however, that the exact identities of in-scope companies and precise fiscal outcomes of Pillar One cannot be certain at this preliminary stage.

[83] SEAN LOWRY, CONG. RSCH. SERV., R45532, DIGITAL SERVICE TAXES (DSTS): POLICY AND ECONOMIC ANALYSIS 21 (2019).

[84] Treas. Reg. § 1.901-2(a)(ii).

[85] Robert Goulder, *The Price of Tax Reform: Pillar 1 Reduced to the Back of a Napkin*, FORBES (July 6, 2021), https://www.forbes.com/sites/taxnotes/2021/07/06/the-price-of-tax-reform-pillar-1-reduced-to-the-back-of-a-napkin/?sh=79398e7a686 [https://perma.cc/72U2-SKZR]. Note that if the United States does not credit Amount A, the result would be a much heavier tax burden (arguably double taxation) for companies subject to the new tax.

[86] Treas. Reg. § 1.901-2(b)(1), (5).

[87] Digital Services Taxes are typically flat-rate turnover taxes that target various types of digital services. *See* Kim, *supra* note 13, at 145.

[88] Jefferson VanderWolk, *U.S.-Based Multinationals Face a Double Tax Whammy*, BLOOMBERG TAX (Feb. 7, 2022), https://news.bloombergtax.com/tax-insights-and-

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burdens (arguably, double or multiple taxation) on U.S.-based MNEs. The United States' taxing rights are the greatest target of Pillar One and the United States may become Pillar One's largest net loser. Tax revenues would shift from the United States, in which the MNEs are incorporated and currently taxed, to market jurisdictions where MNEs have sales.[89] Increased tax burdens on U.S. companies could have broad implications, and it can be expected that companies will shift the added tax burdens to their consumers. This would not be unprecedented in the recent history of digital taxation. Amazon, for example, has increased seller fees in response to foreign digital services taxes enacted by France and the United Kingdom.[90] Additionally, increased corporate taxes have been commonly regarded as "indirect taxes" on workers and investors, often leading to lower wages and dividends, respectively.[91]

The U.S. opposition to Pillar One lightened during the Biden administration, which was willing to negotiate under the OECD framework.[92] An OECD compromise was reached after E.U. members proposed to act unilaterally through an E.U.-wide digital services tax[93] which would greatly damage U.S. interests. Thus, U.S. Secretary of the Treasury Janet Yellen supported the OECD process, referring to the two-pillar solution as "a once-in-a-generation

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commentary/u-s-based-multinationals-face-a-double-tax-whammy [https://perma.cc/WQ7R-3FMK].

89 Goulder, *supra* note 85.

90 In 2019, the Amazon Seller Central website announced that it must adjust the fee rates on Amazon.fr to reflect this additional cost following the 3% French digital services tax. *See* Stephanie Soong Johnson, *Amazon Hikes Seller Fees in Wake of French Digital Tax*, TAX NOTES TODAY INT'L (Aug. 2, 2019), https://www.taxnotes.com/featured-news/amazon-hikes-seller-fees-wake-french-digital-tax/2019/08/01/29sxb [https://perma.cc/Y3QK-HH5D]; *Upcoming Fee Changes in the UK Following Instruction of Digital Services Tax*, AMAZON SERVS. (Aug. 2020), https://sellercentral-europe.amazon.com/forums/t/upcoming-fee-changes-in-the-uk-following-introduction-of-digital-services-tax/322163 [https://perma.cc/4N32-UD43]. In addition, Amazon increased fee rates of 2% in 2020 due to the passing of the U.K. Digital Services Tax. *Id.*

91 David Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 TAX L. REV. 19, 36 n.72 (2011).

92 *See, e.g.*, Finance Committee Questions for the Record: Hearing on the Nomination of Dr. Janet Yellen, Responses by Dr. Yellen Before the S. Comm. On Finance, 117th Cong 8-9 (2021) (expressing that the Biden-Harris administration "will pursue a comprehensive multinational agreement to update global tax rules").

93 Leigh Thomas & Jan Strupczewski, *Europe Threatens Digital Taxes Without Global Deal, After U.S. Quits Talks*, REUTERS (June 18. 2020), https://www.reuters.com/article/uk-usa-trade-digital-france-idUKKBN23P0UQ [https://perma.cc/87VW-BZP4].

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accomplishment for economic diplomacy."[94] Such endorsement was not present during the Trump administration and may not reoccur if a Republican president is elected in the future. Moreover, such endorsement may not recur under a Republican-controlled Senate, which may resist the adoption of Pillar One's outputs.[95]

The Biden administration proposed a solution under which Pillar One would apply to no more than 100 in-scope MNEs meeting high revenue and profitability thresholds.[96] This compromise was ultimately accepted and represents the current structure of Pillar One, under which in-scope companies are those with global revenues exceeding €20 billion and profitability exceeding 10%.[97] The political agreement between the United States and E.U. members narrows the scope of the reform to target a subset of highly profitable MNEs. It was sufficient to appease European countries and pass the long-awaited reform without substantially hurting U.S. political interests. In testimony before the Senate Committee on Finance, Yellen stated that the United States would gain revenue as a taxing authority and lose revenue that would be reallocated to foreign countries. She further expressed that the total revenue impact of Pillar One is still uncertain yet would be "minimal."[98] If this forecast materializes, source countries will raise almost no new tax revenue from Pillar One's limited reallocation.

There are some other notable political attributes that stand out from the two-pillar compromise. For example, extractive industries (e.g., oil and mining) and regulated financial services (e.g., banking) have been excluded from the scope of Pillar One.[99] The OECD has largely justified these exclusions on the grounds that these sectors

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[94] Press Release, U.S. Department of the Treasury, Statement from Secretary of the Treasury Janet L. Yellen on the OECD Inclusive Framework Announcement (Oct. 8, 2021), https://home.treasury.gov/news/press-releases/jy0394 [https://perma.cc/58D3-FJ5V].

[95] Note, however, that the Pillar Two global minimum tax was supported by both the Trump and Biden administrations. Pillar Two will largely benefit the United States because it targets profit-shifting and tax havens.

[96] Isabelle Gottlieb & Laura Davison, *U.S. Floats Tax Compromise Targeting 100 International Firms*, BLOOMBERG TAX (Apr. 8, 2021, 1:06 PM), https://news.bloombergtax.com/daily-tax-report-international/u-s-offer-on-global-tax-deal-would-tie-levies-to-revenue [https://perma.cc/HY46-P6ZB].

[97] *Statement on a Two-Pillar Solution, supra* note 18, at 1.

[98] Secretary Janet Yellen Testimony Before the Senate Committee on Finance, Hearing on The President's Fiscal Year 2023 Budget (Jun. 7, 2022), at 1:11:40, https://www.finance.senate.gov/hearings/the-presidents-fiscal-year-2023-budget [https://perma.cc/D9MD-93Z7].

[99] *Statement on a Two-Pillar Solution, supra* note 18, at 1.

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operate outside the digital economy and are not consumer-facing.[100] The exclusion of extractives is reasonable, to an extent. Countries with an abundance of natural resources, such as oil and diamonds, have a legitimate claim to financial compensation for the extraction of their sub-soil assets.[101] Many of these extractive-rich countries are developing economies[102] and carving out these industries can serve a distributional justice cause. Payments by companies in the extractive sector are widely regarded as an integral part of their "social license to operate" in the host jurisdiction.[103] Without an exclusion for extractives, there would be a risk of regressive redistribution—from developing to developed countries—because developed countries are typically the location where sales occur. The Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development requested that the extractive industry be carved-out because the physical presence of a mine, for instance, "creates an irrefutable obligation to pay tax in the resource-owning country."[104] Tax Justice Network Africa[105] has conveyed that the extractive sector is the one most vulnerable to aggressive tax planning. Thus, the extractive industry carve-out is justifiable because it helps developing countries protect their rightful claims to

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[100] Dick Roche, *How the U.S. Got the Upper Hand in the OECD Tax Reform Proposals*, EURACTIV (Oct. 4, 2021), https://www.euractiv.com/section/global-europe/opinion/how-the-us-got-the-upper-hand-in-the-oecd-tax-reform-proposals/ [https://perma.cc/MC9P-HZKN].

[101] Thomas Lassourd & Thomas Scurfield, *Should the OECD's Proposal for a "Unified Approach" on Corporate Taxation Exclude Extractive Industries?*, NAT. RES. GOVERNANCE INST. (Nov. 28, 2019), https://resourcegovernance.org/blog/oecd-corporate-taxation-exclude-extractive-industries [https://perma.cc/S7SP-VU3T].

[102] *Extractive Industries: Overview*, WORLD BANK (Aug. 13, 2021), https://www.worldbank.org/en/topic/extractiveindustries/overview#1 [https://perma.cc/ED73-XFDZ].

[103] ROBERT G. BOUTILIER & IAN THOMSON, MODELLING AND MEASURING THE SOCIAL LICENSE TO OPERATE: FRUITS OF A DIALOGUE BETWEEN THEORY AND PRACTICE 2 (2011); ROBERT G. BOUTILIER, A MEASURE OF THE SOCIAL LICENSE TO OPERATE FOR INFRASTRUCTURE AND EXTRACTIVE PROJECTS (2017); Olivier Boiral, Iñaki Heras-Saizarbitoria & Marie-Christine Brotherton, *Sustainability Management and Social License to Operate in the Extractive Industry: The Cross-Cultural Gap with Indigenous Communities*, 31 SUSTAINABLE DEV. 125, 125-26, 129 (2023); LENIN H. BALZA, LINA M. DÍAZ, NICOLÁS GÓMEZ-PARRA & OSMEL MANZANO, THE UNWRITTEN LICENSE: THE SOCIAL LICENSE TO OPERATE IN LATIN AMERICA'S EXTRACTIVE SECTOR 1, 4 (2021).

[104] Alexandra Readhead, *Resource-Rich Countries and the Digital Tax Agenda*, INT'L CTR. FOR TAX & DEV. (Nov. 20, 2019), https://www.ictd.ac/blog/resource-rich-countries-digital-tax-agenda/ [https://perma.cc/28LK-42FX].

[105] TJNA is a pan-African research and advocacy organization. *See* TAX JUSTICE NETWORK AFRICA, https://taxjusticeafrica.net/ [https://perma.cc/B35X-ZGD3].

https://scholarship.law.upenn.edu/jil/vol44/iss4/4
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extractive assets.[106] This means, however, that some of the world's most profitable companies (primarily in the oil industry) are excluded from the new taxing right.

The exclusion of regulated financial services is more difficult to justify.[107] Financial services have greater digital, mobile, and consumer-facing components and do not share the brick-and-mortar business model of the extractive industry. More importantly, the financial sector exclusion does not benefit developing countries. Rather, it serves wealthy, developed economies in which these financial services are located. The exclusion of financial services was primarily achieved through successful political lobbying by the United Kingdom, which is Europe's largest financial center.[108] Former U.K. Chancellor of the Exchequer Rishi Sunak (currently Prime Minister) pushed to carve-out the financial industries to help protect London's largest banks and prevent the reallocation of their profits.[109] This lobbying also serves U.S. interests, given that the United States is a major banking headquarters. But it is unclear why regulated financial services differ from other industries to justify a principled Pillar One exclusion. This carve-out is largely a result of political lobbying as opposed to principled policymaking.

Like Pillar One, the Pillar Two corporate minimum tax rate was determined through political compromise. This is almost trivial

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[106] Letter from Robert Ssuuna, Tax Policy and Statistics Division, Tax Justice Network Africa, to OECD Public Consultation Document: Secretariat Proposal for a "Unified Approach" Under Pillar One (Nov. 8, 2019), https://www.dropbox.com/s/3pb98p1o3qnz3me/oecd-public-comments-secretariat-proposal-unified-approach-november-2019.zip?dl=0&file_subpath=%2FPublished+15+November+2019%2FTax+Justice+Network+Africa+(TJNA).pdf [https://perma.cc/69GT-9GDL].

[107] A May 2022 OECD public consultation document described that the "defining character of this sector is that it is subject to a unique form of regulation, in the form of capital adequacy requirements, that reflect the risks taken on and borne by the firm." The OECD provides six categories of Regulated Financial Institutions: Depositary Institution; Mortgage Institution; Investment Institution; Insurance Institution; Asset Manager; a Mixed Financial Institution; and a seventh service entity that exclusively provides services to the Regulated Financial Institution. *See* OECD, *Pillar One - Amount A: Regulated Financial Services Exclusion*, at 3-4 (2022).

[108] William James & Leigh Thomas, *UK Pushes for Financial Services To Be Exempt From G7 Global Tax Plan*, REUTERS (June 9, 2021), https://www.reuters.com/world/uk/uk-pushes-city-london-be-exempt-g7-global-tax-plan-ft-2021-06-09/ [https://perma.cc/8KJA-QV3K].

[109] Kate Holton, *UK Wins Financial Services Carve-Out from New Global Tax Rules - FT*, REUTERS (June 30, 2021), https://www.reuters.com/world/uk/uk-wins-financial-services-carve-out-new-global-tax-rules-ft-2021-06-30/ [https://perma.cc/AB2B-3J6Y].

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because, arguably, there is nothing normatively just about levying one corporate income tax rate over another. The decisions to impose a corporate income tax, determine its rate, and apply the tax on a global scale are typically political decisions. Under the OECD's framework, any minimum tax rate would likely be a political outcome.

Initially, the OECD negotiated a 12.5% minimum rate,[110] in line with some of the lowest corporate income tax rates in the European Union, such as those in Ireland and Lichtenstein. The Biden administration proposed a global minimum tax rate of 21%, similar to the U.S. federal corporate income tax rate.[111] Under the Tax Cuts and Jobs Act of 2017 (TCJA), [112] passed during the Trump administration, the United States decreased its federal corporate income tax rate from 35% to 21%.[113] The United States would benefit from a high global minimum tax rate because it is predominantly a residence country for MNEs. A global regime harmonized with the U.S. federal rate would be beneficial and administratively simple. It

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110 Stephanie Soong Johnston, *France Endorses OECD Pillar 1 Global Tax Overhaul Proposal*, TAX NOTES TODAY INT'L (Nov. 26, 2019), https://www.taxnotes.com/beps-expert/digitaleconomy/france-endorses-oecd-pillar-1-global-tax-overhaul-proposal/2019/11/27/2b5gn [https://perma.cc/J78A-72E6]; Gottlieb & Davison, *supra* note 96; David Lawder, *U.S. Treasury Floats Global Corporate Tax of At Least 15%*, REUTERS (May 20, 2021, 9:03 PM), https://www.reuters.com/business/finance/us-treasury-backs-off-21-global-minimum-corporate-tax-rate-wants-least-15-2021-05-20/#:~:text=WASHINGTON%2C%20May%2020%20(Reuters),minimum%20for%20U.S.%20multinational%20firms [https://perma.cc/B5ZK-Y4LF].

111 Gottlieb & Davison, *supra* note 96; Jeff Stein & Seung Min Kim, *Biden, Other G-20 World Leaders Formally Endorse Groundbreaking Global Corporate Minimum Tax*, WASH. POST (Oct. 30, 2021), https://www.washingtonpost.com/us-policy/2021/10/30/biden-g20-global-minimum-tax/ [https://perma.cc/X8K5-KTDV].

112 Tax Cuts and Jobs Act of 2017, Pub. L. 115–97, § 13001(b), 131 Stat. 2054.

113 Under the TCJA, the United States also adopted its own version of a global minimum tax by implementing the GILTI regime. The U.S. GILTI is a new annual tax on earnings exceeding 10% percent of controlled foreign corporations (CFCs), intended to prevent profit-shifting from the United States. The U.S. GILTI imposes the current domestic corporate tax rate on foreign asset earnings of CFCs, then provides a reduced minimum tax rate between 10.5% and 13.125%. In 2026, the maximum GILTI rate is scheduled to increase to 16.406%. *See* I.R.C. § 951A; David Kamin, David Gamage, Ari Glogower, Rebecca Kysar, Darien Shanske, Reuven AviYonah, Lily Batchelder, J. Clifton Fleming, Daniel Hemel, Mitchell Kane, David Miller, Daniel Shaviro & Manoj Viswanathan, *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439, 1490 (2018).

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would likely reduce corporate inversions[114] and the incentive for tax avoidance. But a high global minimum tax rate would hurt in-scope MNEs that would be subject to the added taxes. It would also harm investment hubs, such as Ireland, which would lose their competitive advantage. Under the Biden administration, the United States and E.U. member states achieved a political agreement to adopt a global minimum tax rate of 15%, rather than 12.5% or 21%.

Although the BEPS Project began with a principled approach to international tax reform, its outputs have been narrowed to mostly technical, political compromises. The outcomes of the two-pillar solution are still the most significant changes to international taxing rights in decades. However, they introduce no transformative change to cross-border tax norms compared to other "constitutive" moments in international tax history. Again, consider the pioneering international tax agreements of the 1920s. These agreements set forth distinctions between residence and source taxation and established the nondiscrimination, arm's length, and permanent establishment standards.[115] Arguably, over time, these tax principles have become universally followed out of a sense of international legal right or obligation,[116] rising to the level of customary international law.[117] The OECD's two-pillar reform introduces a limited reallocation of taxing rights on profits and a minimum corporate tax rate on offshore income. It does not offer new tax norms that would likely be adopted from a sense of international legal right or moral obligation. Thus, its outputs are significantly more fragile. The agreement represents a snapshot in time during which the interests of OECD members aligned to create new rules governing cross-border taxation. The political compromise works when countries are willing to make certain sacrifices to their

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[114] A corporate inversion is a restructuring mechanism where a U.S. parent company (usually) is replaced by a foreign parent company to reduce U.S. income tax liability.

[115] Graetz & O'Hear, *supra* note 1, at 1027-34, 1070-72.

[116] According to the Restatement Fourth of U.S. Foreign Relations Law, such law "results from a general and consistent practice of states followed out of a sense of international legal right or obligation." Though the OECD's impact is significant, its international tax outputs have not been implemented uniformly and from a sense of international legal obligation. *See* RESTATEMENT (FOURTH) OF U.S. FOREIGN RELATIONS LAW § 402 (AM. L. INST. 2018) (supporting that customary international law is universally followed out of a sense of international legal right or obligation).

[117] *See* Reuven S. Avi-Yonah, *International Tax Law as International Law*, 57 TAX L. REV. 483, 498 (2004) (discussing customary international tax rule not to tax nonresidents directly).

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economic interests while accepting the long-term benefits of multilateral cooperation. But the compromise may be violated when the OECD's outputs need to harden to a multilateral convention and domestic law adoption, or when some of the economic interests that established the agreements no longer align.

III. COOPERATION AND TAX SOVEREIGNTY

The OECD's political agreement is a tradeoff between the benefits of multilateral cooperation and restrictions on countries' tax sovereignty. When entering the multilateral framework, countries agreed to limit their tax sovereignty in the interest of cooperation and future benefits. But the concession of tax sovereignty became problematic when countries did not cooperate out of their free will and joined the Inclusive Framework despite significant burdens and limited benefits. The question of tax sovereignty mostly arises under Pillar Two which dictates how MNEs are taxed by creating a floor for taxing foreign earnings. The global minimum tax limits the ability to unilaterally determine and levy corporate income tax rates.[118] The mechanism is generally applied by the parent jurisdiction in respect of the subsidiary through the intertwining GloBE rules. Many countries, therefore, face a choice: either increase the corporate income tax rate (or adopt a QDMTT) or be subject to the top-up taxes of Pillar Two. In any case, the GloBE, as its acronym suggests, will effectively become globally applicable when OECD members adopt it.

The concept of tax sovereignty refers to a country's autonomous right to levy (or not to levy) taxes, and to determine applicable rates.[119] Scholars commonly cite tax sovereignty as intrinsic to a

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[118] Note, however, that Pillar Two is also not the first coordinated attempt to establish multinational minimum tax rates. The European Union, for example, requires minimum excise duties on alcohol, tobacco, and energy. *See Excise Duty on Alcohol*, EUR. COMM'N, https://ec.europa.eu/taxation_customs/taxation-1/excise-duties/excise-duty-alcohol_en [https://perma.cc/Y33G-3YEY] (last accessed June 11, 2023). The European Union also sets forth a standard minimum rate for Value Added Tax (VAT), which can be no less than 15% (though special reduced rates can be no less than 5%). *See VAT Rules and Rates*, YOUR EUR. (July 7, 2022), https://europa.eu/youreurope/business/taxation/vat/vat-rules-rates/index_en.htm [https://perma.cc/X929-XA55].

[119] H. David Rosenbloom, *Sovereignty and the Regulation of International Business in the Tax Area*, 20 CAN.-U.S. L.J. 267, 267 (1994); Tsilly Dagan, Vogel Lecture, Unbundled Tax Sovereignty: Refining the Challenges 3 (2021) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4067679); David Quentin,

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country's broader national sovereignty, analogous to the claim of sovereignty over national resources within one's boundaries.[120] The underpinnings of tax sovereignty can be traced to Hobbesian philosophies which establish the right of the sovereign to raise money.[121] It is also associated with broader fiscal sovereignty and is grounded on the claim that countries have the right to tax income produced within their borders.[122] Taxation is a predominant contributor to government revenue and countries need to levy taxes to sustain themselves and provide public goods.[123] Because taxes are so essential to sovereignty, some have even argued that tax sovereignty deserves broader legal protection than other areas of the law.[124] Thus, countries should, and largely do, have the liberty to pursue their own public policy goals through tax legislation.

Critics of tax sovereignty claim that it has been both misused and overused,[125] perceiving it as thinly theorized and vague.[126] Yariv Brauner, for example, has commented that "sovereignty is often used in international tax discourse as a hand grenade to shut down difficult discussion. It is very common to hear arguments about the 'tax sovereignty' of countries when they do not wish to adhere to

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What Is Tax Sovereignty For?, SMART (May 11, 2017), https://www.smart.uio.no/news/what-is-tax-sovereignty-for.html [https://perma.cc/35Q6-ZS99].

[120] Allison Christians, *Sovereignty, Taxation and Social Contract*, 18 MINN. J. INT'L L. 99, 104 (2009); Angel Gurría, *Taxation and Competition Policy*, OECD (Feb. 11, 2014), https://www.oecd.org/competition/taxation-and-competition-policy.htm [https://perma.cc/9EXC-N5UZ]; Angel Gurría, *Joint Action for Efficient and Fair Taxation*, OECD (Jul. 20, 2013), https://www.oecd.org/about/secretary-general/joint-action-efficient-fair-taxation.htm [https://perma.cc/46J6-B2T8].

[121] THOMAS HOBBES, LEVIATHAN Ch. XVIII: Of the Rights of Soveraignes by Institution (Lerner Publishing Group, 2018) (referring to the "Power of raising Money"); *see also* Deborah Bräutigam, *Building Leviathan: Revenue, State Capacity and Governance*, 33 IDS BULL. 10, 18 (2002).

[122] Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOK. J. INT'L L. 1357, 1396 (2001).

[123] Christians, *supra* note 120, at 104-05. Note that Christians is largely critical of the tax sovereignty concept.

[124] Rajiv Biwas, *Introduction: Globalisation, Tax Competition and Economic Development*, *in* INTERNATIONAL TAX COMPETITION: GLOBALISATION AND FISCAL SOVEREIGNTY 1, 1 (Rajiv Biwas ed., 2002) (providing that "fiscal sovereignty is a right which has been carefully guarded by sovereign states and protected in international law over hundreds of years").

[125] Luis Calderon Gomez, *Transcending "Tax" Sovereignty and Tax Standardization: Three Questions*, 45 YALE J. INT'L L. 191, 205 (2020).

[126] *Id*. at 204; Yariv Brauner, *An Essay on BEPS, Sovereignty, and Taxation*, *in* TAX SOVEREIGNTY IN THE BEPS ERA 73, 75 (Sergio Andre Rocha & Allison Christians eds., 2017).

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international norms or obligations that they deem disadvantageous." [127] Like other forms of sovereignty, tax sovereignty is not absolute, and its boundaries can be likened to the principles of public international law.[128] Countries need to account for the global consequences of their tax policies. They are restricted by political economy considerations and do not enjoy unfettered control over tax policy decisions.[129]

Although bound by multilateral conventions and bilateral treaties, countries have historically retained substantial sovereignty over their tax policies. Lacking absolute control over taxing rights does not invalidate the legitimate interest of maintaining significant control over them.[130] Accordingly, tax policy and income tax rates vary considerably around the world, including within the OECD.[131]

When countries choose to cooperate in international taxation, they relinquish some of that sovereignty in the interest of multilateralism and the benefits of cooperation.[132] But should countries necessarily be expected to multilaterally cooperate? The issue of tax sovereignty has frequently arisen in the OECD's process. The organization has emphasized that BEPS practices weaken tax sovereignty because BEPS dilutes tax bases and therefore countries should cooperate within the OECD.[133] Former Director of the Centre for Tax Policy and Administration at the OECD, Pascal Saint-Amans, has stated that "if we want to protect the sovereignty of countries . . . [w]e need to have this cooperation, which is a limitation of the sovereignty."[134] Saint Amans' comments illustrate a paradox:

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[127] Brauner, *supra* note 126.

[128] The term "international law" was likely coined by English legal philosopher Jeremy Bentham. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 6 (J.H. Burns eds., 1789).

[129] Diane Ring, *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation*, 9 FLA. TAX REV. 555, 559 (2009); Brauner, *supra* note 126, at 74-75.

[130] Ring, *supra* note 129, at 559-60.

[131] Ruth Mason, *A Theory of Tax Discrimination* 11 (Jean Monet Working Paper No. 09/06, 2008).

[132] Allison Christians, *BEPS and the Power to Tax*, *in* TAX SOVEREIGNTY IN THE BEPS ERA 4 (Sergio Andre Rocha & Allison Christians eds., 2017).

[133] *Action Plan on BEPS*, *supra* note 10, at 9-10; OECD, *Policy Brief: Taxing Multinational Enterprises* (2015), https://www.oecd.org/ctp/policy-brief-beps-2015.pdf [https://perma.cc/GNJ5-E23V].

[134] Stephanie Soong Johnston, *New Country May Join Global Tax Reform Deal, Saint-Amans Says*, TAX NOTES TODAY INT'L (Oct. 27, 2021), https://www.taxnotes.com/tax-notes-today-international/politics-taxation/new-

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limiting tax sovereignty is necessary to creating sovereignty. In a 2017 book, Allison Christians wrote that "to regain effective autonomy in tax policymaking, governments will have to end their deep-seated resistance to multilateralism on grounds of sovereign entitlement. This will require lawmakers to muster the political will to accept that a multilateral tax regime is necessary."[135] The OECD's new rules strengthen sovereignty when the cooperation limits negative externalities and restores taxing autonomy to the rightful sovereign. But these outcomes are not apparent for all countries. Non-OECD members and low-tax OECD members faced political pressures to cooperate despite a lack of benefits to them.

Deciding to cooperate within the OECD's multilateral framework certainly does not violate tax sovereignty. Countries can concede their taxing autonomy, prioritizing the harmonization and standardization of their international tax rules, in favor of long-term benefits or when there is no benefit.[136] In fact, such decisions are a manifestation of tax sovereignty. But the legitimacy of the new rules relies on state consent[137] and infringement of tax sovereignty can exist to the extent that cooperation is coerced. In a 2022 article, Shu-Yi Oei provided data showing that countries joined the Inclusive Framework due to both normative and coercive pathways, despite disputable benefits.[138] Oei's study also unveiled the importance of parallel E.U. tax haven listing processes[139] which were correlated

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country-may-join-global-tax-reform-deal-saint-amans-says/2021/10/27/7cjw0?highlight=sovereignty [https://perma.cc/4XHT-4RCF].

135 Christians, *supra* note 132.

136 Gomez *supra* note 125, at 191-93; Mindy Herzfeld, *The Landmark OECD Deal in Historical Perspective*, TAX NOTES TODAY INT'L (Nov. 8, 2021), https://www.taxnotes.com/tax-notes-today-international/international-taxation/landmark-oecd-deal-historical-perspective/2021/11/08/7ckl9?highlight=sovereignty [https://perma.cc/QR9D-9GPU].

137 In a 2020 article, Luis Calderon Gomez commented that "state consent is the main legitimizing value of international law. Sources of international law-whether they be treaties or customary international law-critically hinge on State consent. Any cooperative framework or push towards standardization, then, would depend on informed and uncoerced consent from States." Gomez, *supra* note 125, at 205-06.

138 Shu-Yi Oei, *World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership*, 47 YALE J. INT'L L. 199, 203 (2022).

139 In 2017, the European Union adopted the working "EU list of non-cooperative tax jurisdictions." The list is updated twice a year. *See EU List of Non-Cooperative Jurisdictions for Tax Purposes*, EUR. COUNCIL,

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with increased tendencies by developing countries to join the Inclusive Framework.[140] This raises questions on whether Inclusive Framework members are genuinely committed to implementing its outputs. A decision to maintain more control over tax policies by refraining from the OECD's multilateral framework should fall within the sovereign entitlement.[141] But the political consequences of non-cooperation would be severe. For developing countries, non-cooperation or unilateral action could mean blacklisting and sanctioning both by the OECD and the European Union.[142]

In addition, many investment hubs initially refused to join the OECD's agreement because of the negative economic impacts it would entail. Investment hubs would lose tax revenues from both Pillars. This includes countries with 0% corporate income tax rates such as Barbados and Saint Vincent and the Grenadines, and low-tax E.U. members Ireland and Hungary.[143] Ireland, for example, strongly opposed Pillar Two which would hurt its economic interests. Paschal Donohoe, Ireland's then-Minister for Finance, stated that Ireland would lose about €2 billion a year in corporate income tax revenues, equal to approximately one-fifth of its total corporate income tax revenues.[144] The GloBE rules would impose a 15% corporate minimum tax rate on foreign MNEs' income in Ireland—greater than its 12.5% current rate. For several years, Ireland refrained from joining Pillar Two, but ultimately acquiesced[145] after pressure from the U.S. Treasury.[146] The

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https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/ [https://perma.cc/75PC-MF2X] (last visited June 11, 2023).

140 Oei, *supra* note 138, at 237.

141 Ring, *supra* note 129, at 559-60.

142 *Id*.

143 Leigh Thomas, *130 Countries Back Global Minimum Corporate Tax of 15%*, REUTERS (July 1, 2021), https://www.reuters.com/business/countries-backs-global-minimum-corporate-tax-least-15-2021-07-01/ [https://perma.cc/Y2JE-67YK].

144 Eoin Burke-Kennedy, *Donohoe Warns of €2bn Corporation Tax Loss to State*, IRISH TIMES (Jan. 9, 2020), https://www.irishtimes.com/business/economy/donohoe-warns-of-2bn-corporation-tax-loss-to-state-1.4135085 [https://perma.cc/8N4A-ACLY].

145 Press Release, Government of Ireland, Ireland Joins OECD International Tax Agreement (Oct. 7, 2021), https://www.gov.ie/en/press-release/59812-ireland-joins-oecd-international-tax-agreement/# [https://perma.cc/8KJA-QV3K].

146 Naomi Jagoda, *Ireland, Loved by Biden, Is Obstacle to Tax Deal*, HILL (June 8, 2021), https://thehill.com/policy/finance/557249-ireland-loved-by-biden-is-obstacle-to-tax-deal [https://perma.cc/ZA5H-WWF2]; Padraic Halpin & Conor Humphries, *Ireland Agrees to Global Tax Deal, Sacrificing Prized Low Rate*, REUTERS

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concession mostly reflected a fear of exclusion and diplomatic retaliation rather than a voluntary agreement to the corporate minimum rate.

Hungary also refused to adopt Pillar Two's 15% global minimum corporate minimum tax rate and opted to maintain its 9% rate—one of the lowest in Europe. In response, the Biden administration punitively terminated its 1979 tax treaty with Hungary, citing lack of reciprocal benefits and little return for U.S. investment in Hungary.[147] Hungary was then forced to withdraw its opposition to Pillar Two, the last E.U. country to do so.[148]

If all OECD countries adopt the GloBE rules, which they have now agreed to do, the rules will apply to source jurisdictions irrespective of their consent. Thus, any electiveness is mostly artificial.[149] The consent of source countries is not required—the 15% minimum tax will apply to low-tax jurisdictions even if they do not cooperate or agree to the mechanism. Thus, Pillar Two becomes essentially globally applicable. Low-tax jurisdictions have the incentive to adopt the 15% GloBE rate or a QDMTT, otherwise, they would be subsidizing higher-tax jurisdictions that would levy the 15% rate. Pillar Two can function as an indirect subsidy, transferred from low-to-high-tax jurisdictions.[150] Recall the example of foreign tax credits, under which U.S. companies can claim credits—dollar for dollar—against U.S. corporate income tax liability for income

(Oct. 7, 2021), https://www.reuters.com/business/ireland-backs-global-tax-deal-gives-up-prized-125-rate-2021-10-07/ [https://perma.cc/8RBS-SXK3].

[147] Jeff Stein, *U.S. to Terminate Treaty with Hungary Over Resistance to Global Tax*, WASH. POST (July 9, 2022) https://www.washingtonpost.com/us-policy/2022/07/09/hungary-treaty-yellen-tax/ [https://perma.cc/MLW3-V669]; David Lawder & Anita Komuves, *U.S. Treasury to End 1979 Treaty with Global Minimum Tax Holdout Hungary*, REUTERS (July 9, 2022), https://www.reuters.com/world/europe/us-treasury-end-1979-treaty-with-global-minimum-tax-holdout-hungary-2022-07-08/ [https://perma.cc/TQA3-BWMC].

[148] *Communication*, *supra* note 73; Siqalane Taho, *EU Agrees Pillar Two Global Minimum Tax Rate*, INT'L TAX REV. (Dec. 13, 2022), https://www.internationaltaxreview.com/article/2b0daxfffslhsf7xe9n9c/eu-agrees-pillar-two-global-minimum-tax-rate [https://perma.cc/9N6Z-J9PC].

[149] Whereas Pillar One will require a multilateral convention, Pillar Two will be applied through a "common approach." *Global Anti-Base Erosion Model Rules*, *supra* note 70, at 2.

[150] *See* Robert Gould, *Flip the Script: Do We Need a Global Maximum Tax?*, TAX NOTES TODAY INT'L (Oct. 19, 2021), https://www.taxnotes.com/tax-notes-today-international/corporate-taxation/flip-script-do-we-need-global-maximum-tax/2021/10/19/7bc21?highlight=sovereignty#7bc21-0000012 [https://perma.cc/L57H-KEB4].

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taxes paid to foreign jurisdictions.[151] The goal of the foreign tax credit is to alleviate double taxation. When the United States (or any other country) provides a foreign tax credit for income taxes paid to other tax administrations, it effectively supports the tax collection by the foreign government. Even though no transfer payment is made, the forgiveness of the amount from the taxpayer results in sponsoring the foreign government's treasury.[152]

Similarly, an indirect subsidy occurs under Pillar Two if a country continues to levy a corporate income tax rate that is less than 15%—of say, 12.5%. The low-tax jurisdiction must respect the top-up tax applied by the high-tax jurisdiction, but it does not economically benefit from the additional 2.5% of the top-up tax collected. Rather, the top-up tax is monetarily tantamount to the low-tax jurisdiction levying and collecting a 15% corporate income tax but sharing 2.5% of its receipts with the higher-tax jurisdiction. Thus, the GloBE works as an indirect subsidy paid by low-tax jurisdictions which do not implement it. The higher the difference between the corporate income tax rates of the two jurisdictions, the greater the subsidy.[153] And unlike the foreign tax credit, this subsidy would do nothing to relieve double taxation. Hence, many tax havens and low-tax countries ultimately preferred joining the Inclusive Framework commitment. This requires raising their corporate income tax rates or adopting a QDMTT to comply with the GloBE, but it allows them to hold on to their tax receipts, rather than keeping their low rates while subsidizing other countries. Nevertheless, a tax increase would be required to avoid the indirect subsidy.

For tax havens and low-tax jurisdictions, Pillar Two represents a seismic shift in taxing structure. Low or no corporate income tax rates widely enable BEPS and dilute the tax bases of other countries.[154] But they also represent a decision on how to tax and collect revenue. Over the past decades, tax havens have received substantial foreign investment and benefited from economic growth.[155] This includes an increase in construction projects and

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151 Treas. Reg. § 1.901-2(b)(4); *see infra* Part IV.

152 Gould, *supra* note 150.

153 *Id.*

154 Adam H. Rosenzweig, *Why Are There Tax Havens*, 52 WM. & MARY L. REV. 923, 928 (2010).

155 Timothy V. Addison, *Shooting Blanks: The War on Tax Havens*, 16 IND. J. GLOB. LEGAL STUD. 703, 711 (2009).

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higher employment levels due to the added investment.[156] By foregoing corporate income taxation, tax havens usually supplement revenues through corporate registration and annual renewal fees, and higher import duties.[157] Other low-tax jurisdictions often levy different types of taxes, such as consumption taxes, in lieu of high corporate income taxes and the foregone revenue. For example, Hungary imposes the highest value-added tax in the European Union, at 27%,[158] and Ireland levies a rate of 23% which is higher than the E.U. average.[159] These rates reflect legitimate fiscal decisions that countries make within their taxing sovereignty. As a result of Pillar Two, low-tax countries will need to re-evaluate their tax structure and make new decisions on how they collect revenue and provide public goods for their residents.

IV. TAX COMPETITION AND THE "RACE TO THE BOTTOM"

An analysis of tax sovereignty is necessary to understand its influence on the closely related issue of tax competition.[160] By instituting a global minimum tax, Pillar Two looks to limit tax competition and halt the global race to the bottom in corporate income taxation. Tax competition is generally viewed as the interactive tax setting by independent governments in a noncooperative, strategic manner.[161] It is the reactionary practice of designing favorable tax regimes in response to other countries' policies to attract or prevent the outflow of investment.[162] Tax competition intends to create incentives by encouraging new investments.[163] It can take a variety of forms: decreasing tax rates, redefining the tax base, creating preferential tax regimes for

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156 Milka Casanegra de Jantscher, IMF, *Tax Havens Explained* 31-33 (1997).

157 *Id.*

158 *VAT Rates Applied in the Member States of the European Union* (Jan. 1, 2020), https://taxation-customs.ec.europa.eu/system/files/2021-06/vat_rates_en.pdf [https://perma.cc/CZ7P-M2AV].

159 *Id.*

160 Ring, *supra* note 129, at 557-60.

161 PETER DIETSCH, CATCHING CAPITAL: THE ETHICS OF TAX COMPETITION 36 (2015).

162 Wei Cui, *New Puzzles in International Tax Agreements*, 75 TAX L. REV. 201, 234 (2021).

163 OECD, *Harmful Tax Competition: An Emerging Global Issue* 16-17 (1998) [hereinafter *Harmful Tax Competition*].

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foreigners, and establishing favorable regulatory measures.[164] Still, there is no consensus on the prevalence of global tax competition.[165] This is primarily due to empirical and theoretical uncertainty of the extent to which governments determine their corporate income tax rates in relation to others.[166] Note, however, that corporate income tax rates have gradually and consistently decreased in every region of the world since 1980.[167] Arguably, the United States has participated in global tax competition by decreasing its corporate income tax rate from 35% to 21% under the TCJA in 2017[168] to compete with the average E.U. rate of just over 21%.[169]

Former OECD Secretary-General Angel Gurría has asserted that countries are under "enormous pressure to provide competitive regulatory and tax environments to promote growth and prosperity."[170] The OECD has considered tax havens responsible for "harmful" forms of tax competition.[171] Much of the academic literature on tax competition follows the 1998 OECD publication *Harmful Tax Competition: An Emerging Global Issue*.[172] The report provided that tax competition becomes harmful when one country begins to redirect capital and financial flows from other countries by aggressively bidding (or "poaching") tax bases of others.[173] Such tax competitiveness is harmful because it does not represent different judgments about the justified rate of taxes to be levied in a particular country. Rather, it aspires to attract investment originated elsewhere

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164 DIETSCH, *supra* note 161, at 36.

165 Miriam Ronzoni, *The Global Order: A Case of Background Injustice? A Practice-Dependent Account*, 37 PHIL. & PUB. AFFS. 229, 250 (2009).

166 Cui, *supra* note 162.

167 In 1980, the average corporate income tax rate around the world was 40.11%, or 46.22% when weighted by GDP. By 2021, those figures were 23.54%, and 25.44%, respectively. Bray, *supra* note 6.

168 Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, § 13001(b)(3), 131 Stat. 2054.

169 Bray, *supra* note 6167.

170 Angel Gurria, *Taxation and Competition Policy*, OECD (Feb. 11, 2014), https://www.oecd.org/competition/taxation-and-competition-policy.htm [https://perma.cc/VV79-T4QV].

171 Ring, *supra* note 129, at 562.

172 *Harmful Tax Competition*, *supra* note 163.

173 The report also provides key factors to identify "harmful" tax havens. These include countries that have no or nominal taxation, lack of effective exchange of information laws, lack of transparency, and no substantial economic activities in the jurisdiction (the transactions are purely tax-driven). *See id.* at 23.

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DOI: https://doi.org/10.58112/jil.44-4.4

and encourages the avoidance of taxes that ought to be paid in other countries.[174]

Tax competition can distort investment flows, discourage compliance, cause undesired shifts in tax burdens, undermine the integrity of the tax system, and increase administrative and compliance costs.[175] While there is no reason that two countries should have identical levels and structures of taxation, tax havens can become "free riders" of public goods created by non-tax haven countries.[176] Thus, the harmonization of corporate income tax rates aims to limit the practice of global tax competition.

Scholars have often tied tax competition to violations of tax sovereignty,[177] viewing the two as intrinsically related.[178] In the era of globalization, governments face pressure to lower tax rates to attract corporate investment and skilled labor, resulting in the race to the bottom in corporate income taxation.[179] Tax competition drives tax avoidance and BEPS practices.[180] It increases internal inequalities and deprives countries of the power to exercise social justice causes.[181]

However, tax competition may not always be detrimental. Competition for resident MNEs can make governments more efficient and responsive to the needs of their citizens.[182] Arguably, the standardization of tax rates due to competition cannot reasonably be expected to bring global tax rates to zero in a true race to the bottom.[183] For such an outcome, the services of governments and industries would need to be replicable, which they are not.[184] Furthermore, it is possible to distinguish between different forms of tax competition, as not all types are equally harmful. For example, "virtual tax competition" is regarded as harmful competition for accounting profits (portfolio capital) which often leads to BEPS. It is

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174 *Id*. at 16.

175 *Id*.

176 *Id*. at 15.

177 Ronzoni, *supra* note 165, at 249-50; Ring, *supra* note 129, at 562.

178 Yariv Brauner, *The Other Side of BEPS*, *in* TAX SOVEREIGNTY IN THE BEPS ERA 179, 199 (Sergio Andre Rocha & Allison Christians eds., 2017).

179 Ronzoni, *supra* note 165, at 249-50.

180 Brauner, *supra* note 178, at 199.

181 Ronzoni, *supra* note 165, at 250.

182 *See* Julie Roin, *Competition and Evasion: Another Perspective on International Tax Competition*, 89 GEO. L.J. 543, 544-45 (2001).

183 *Id*. at 555.

184 *Id*.

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characterized by artificial profit-shifting, lack of transparency or effective exchange of information laws, and no substantial business activity in the taxing (or non-taxing) authority.[185] Meanwhile, "real tax competition" refers to more legitimate policies intended to attract foreign direct investment.[186] Some countries reduce corporate income tax rates and create favorable credits and deductions to incentivize actual business investment. Such practices are legitimate and should not be penalized. Actual tax competition is less harmful to sovereignty if it is not associated with BEPS.

The distinction between "harmful" and "unharmful" tax competition can be ambiguous when examining the merits of a preferential regime.[187] Higher tax rates habitually drive capital into other countries, which benefits lower-tax countries by broadening their tax base and increasing their revenues.[188] But countries do not necessarily benefit from tax coordination.[189] This is particularly the case when counties have asymmetric economic prowess and the benefits of harmonization are limited for the less-affluent country.[190] There is nothing morally positive about a given corporate income tax rate, and it is unclear why adopting a global minimum corporate income tax rate is universally just.[191] If countries agree to end tax competition contrary to their preferences, multilateral cooperation still appears to be coerced[192] and raises legitimacy concerns. There is no sufficient evidence to show that the world is better off when the actual, legitimate competition for foreign direct investment is terminated.[193] Even if a global agreement increases universal welfare, it does not represent genuine multilateral cooperation when countries are pressured to join the commitment to their detriment.[194]

The political pressures to join the OECD's commitment are certainly not unique to international taxation as countries act

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[185] *Harmful Tax Competition*, *supra* note 163, at 23.

[186] Laurens van Apeldoorn, *BEPS, Tax Sovereignty and Global Justice*, 21 CRITICAL REV. INT'L SOC. POL. PHIL. 478, 483 (2018); DIETSCH, *supra* note 161, at 87.

[187] DIETSCH, *supra* note 161, at 321.

[188] Michael Keen & Kai A. Konrad, *The Theory of International Tax Competition and Coordination*, *in* 5 HANDBOOK OF PUBLIC ECONOMICS 257, 287 (Alan J. Auerbach, Raj Chetty, Martin Feldstein & Emmanuel Saez eds., 2013).

[189] *Id.* at 287-94.

[190] *Id.* at 287-88.

[191] *See* Cui, *supra* note 162, at 234-35.

[192] *Id.* at 234.

[193] *Id.* at 235-36.

[194] *Id.*

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stringently in all fields of diplomacy. Governments are routinely faced with diplomatic pressures and sometimes that pressure can also be legitimate. Multilateral cooperation is advantageous when countries are bettered by collectively adopting minimum tax rates, even though they are not bettered by doing so unilaterally.[195] But legitimacy concerns arise when limitations on tax sovereignty and competition are imposed. All countries are entitled to protect their taxing sovereignty. But less-affluent developing countries are more vulnerable to encroachments on tax sovereignty and do not have a seat at the OECD's table to help them secure their political interests.

V. THE ROLE OF DEVELOPING COUNTRIES IN INTERNATIONAL TAX POLICYMAKING

The legitimacy of the proposed reform is further questioned when the OECD—representing the world's developed economies—establishes global rules that developing countries are expected to adopt and which can be enforced against them without their meaningful representation or involvement. All countries are affected by profit-shifting practices, with most suffering negative externalities and net revenue losses.[196] But the world's developing countries are faced with unique tax challenges arising from digitalization and BEPS. At the same time, they are unable to influence the OECD's tax policymaking agenda.

First, note that there is no established convention for the designation of "developed" and "developing" countries. In common practice, however, Japan in Asia, Canada and the United States in North America, Australia and New Zealand in Oceania, and Europe are considered the world's "developed" regions or areas.[197] In international trade statistics, the Southern African Customs Union is considered a developed region, Israel is a developed country, and countries comprising former Yugoslavia are deemed developing countries. In contrast, the countries of Eastern Europe and the former Soviet Union are typically not included

[195] *Id*. at 223.

[196] Alexander Klemm & Li Liu, *The Impact of Profit Shifting on Economic Activity and Tax Competition* 4 (IMF Working Paper No. 19/287, 2019).

[197] U.N. Secretary-General, *Supplementary Information to Progress Towards the Sustainable Development Goals*, at 138, U.N. Doc. E/2022/55 (2022).

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under either developed or developing regions.[198] The United Nations has an evolving list of Least Developed Countries, reviewed every three years by the Committee for Development Policy. As of 2023, the forty-six-country list is comprised of thirty-three African members, nine Asian members, one Caribbean member (Haiti), and three Pacific members.[199] The World Bank employs a more technical determination, which is based on countries' Gross National Income[200] as the benchmark.[201] Despite some definitional ambiguities, most of the developed-developing distinctions are consistent with the academic literature identifying the "Global North" and "Global South."[202]

Although developing countries have experienced substantial technological advancement,[203] that advancement lags significantly behind developed countries. For example, the data-driven digital

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198 *See Glossary of Statistical Terms, Developed, Developing Countries*, OECD, https://stats.oecd.org/glossary/detail.asp?ID=6326 [https://perma.cc/RJV2-5X7H] (last visited June 11, 2023).

199 *UN List of Least Developed Countries*, UNCTAD (Oct. 2022), https://unctad.org/topic/least-developed-countries/list [https://perma.cc/6A22-RVZH].

200 The OECD defines Gross National Income (GNI) as "gross domestic product, plus net receipts from abroad of compensation of employees, property income and net taxes less subsidies on production." *See Gross National Income*, OECD DATA, https://data.oecd.org/natincome/gross-national-income.htm [https://perma.cc/WGE4-LJ5H] (last visited June 11, 2023).

201 According to the World Bank, for the 2023 fiscal year, low-income economies are defined as those with Gross National Income (GNI) per capita of $1,085 or less in 2021; lower middle-income economies are those with a GNI per capita between $1,086 and $4,255; upper middle-income economies are those with a GNI per capita between $4,256 and $13,205; high-income economies are those with a GNI per capita of $13,205 or more. For the full classification of each country, see *Data: World Bank Country and Lending Groups*, WORLD BANK, https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups [https://perma.cc/T9VW-RA4E] (last visited March 3, 2023).

202 *See* Arie M. Kacowicz, *Globalization, Poverty, and the North-South Divide*, 9 INT'L STUD. REV. 565, 565 (2007); Lemuel Ekedegwa Odeh, *A Comparative Analysis of Global North and Global South Economies*, 12 J. SUSTAINABLE DEV. IN AFR. 338, 338-39 (2010); Giovanni Arrighi, *Global Capitalism and the Persistence of the North-South Divide*, 65 SCI. & SOC'Y 469, 469 (2001); Andrew Hurrell & Sandeep Sengupta, *Emerging Powers, North–South Relations and Global Climate Politics*, 88 INT'L AFFS. 463, 463 (2012).

203 *See* African Tax Administration Forum, *The Place of Africa in the Shift Towards Global Tax Governance: Can the Taxation of the Digitalised Economy be an Opportunity for More Inclusiveness*, at 24 (2019), https://events.ataftax.org/index.php?page=documents&func=view&document_id=35&token=f0afb2fae5583cba30ef1c192aa88561&thankyou [https://perma.cc/N5PE-RN3J].

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DOI: https://doi.org/10.58112/jil.44-4.4

economy has expanded amid vast disparities between developed and developing countries. The average internet speed is eight times higher in developed countries,[204] and according to the United Nations, 23% of the population in lesser-developing countries still has no access to a mobile broadband network.[205] Developing countries also have lower levels of smartphone adoption, with sub-Saharan Africa having the lowest rates in the world.[206]

Developing countries commonly experience tax challenges that are not as prevalent for developed countries. They typically have limited financial resources and rely heavily on tax revenues from MNEs, with an emphasis on the extractive industry.[207] They have significantly lower national per-capita incomes[208] and frequently struggle to convert GDP into government revenue,[209] converting a much lower percentage (on average, 20%) than developed countries (on average, 40%).[210] This problem is magnified when developing countries are limited in their ability to collect income or consumption taxes from the overwhelmingly poor majority of their population. Such levies are unpopular, administratively costly to collect, and further exacerbate social disparities.[211] Meanwhile, developing countries often struggle to tax wealthy elites who have the ability to pay.

Developing countries have a heightened interest in responding to BEPS practices because they are disproportionately affected by tax avoidance and profit-shifting.[212] Over a quarter of all private wealth owned by households in Latin America is held offshore. In the Middle East and Africa, that figure jumps to one-third of the overall wealth.[213] In several countries, including Russia, Venezuela, Saudi Arabia, Argentina, and the United Arab Emirates, offshore

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[204] *Digital Economy Report 2021*, *supra* note 36, at 2.

[205] *Id.*

[206] *Id.* at 10.

[207] Johnny West, *A Fair Deal in Extractives: The Company Profit-Related Contract*, *in* GLOBAL TAX FAIRNESS 298, 308 (Thomas Pogge and Krishen Mehta eds., 2016); Itai Grinberg, *Building Institutions for a Globalized World: Automatic Information Exchange*, *in* GLOBAL TAX FAIRNESS 14, 14-15 (Thomas Pogge & Krishen Mehta eds., 2016).

[208] Hearson, *supra* note 46.

[209] *Id.*

[210] Thomas Pogge & Krishen Mehta, *Introduction: The Moral Significance of Tax-Motivated Illicit Financial Outflows*, *in* GLOBAL TAX FAIRNESS 1, 3 (Thomas Pogge & Krishen Mehta eds., 2016).

[211] *Id.* at 3-4.

[212] *See* Hearson, *supra* note 46.

[213] Grinberg, *supra* note 207, at 15.

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wealth exceeds 60% of GDP.[214] Most of this offshore wealth is controlled by the elite class, and it is primarily held in tax havens.[215] Yet the benefits of the OECD's reform for developing countries, and the influence of developing countries in its policymaking, have been widely disputed. An effective two-pillar reform can limit profit-shifting to tax havens, but developing countries will receive little of that benefit. Higher taxes on MNEs do not mean a different global distribution of tax revenues, and such distribution is difficult to achieve without political power in the international tax arena. Developing countries do not have voting rights within the OECD and the OECD does not inherently represent their interests. Scholars have commented that developing countries were never meaningfully involved in the OECD's policy drafting and negotiation stages. Rather, developing countries were merely needed for broad diplomatic endorsement.[216]

The OECD and G20, which consist mostly of developed countries and prominent economies, have historically been the organizations through which countries have negotiated and designed new international tax rules. The G20 was created in 1999 by the G7,[217] following a push by the United States to incorporate more countries in economic discussions.[218] The rise of the G20 as an economic policy leader has not materially changed tax policymaking norms. Rather, it led to branding the OECD's outputs as globally agreed tax standards due to the G20's support and endorsement of its work.[219] Meanwhile, the G7 has been critiqued for overlooking the efforts of the G-24.[220] The G20 largely endorses

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[214] Alstadsæter et al., *supra* note 45, at 12-13; Li & Wellisz, *supra* note 45, at 46-47.

[215] Grinberg, *supra* note 207, at 15.

[216] Allison Christians, *Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20*, 5 NW. J. L. & SOC. POL'Y 19, 36 (2010); Brauner, *supra* note 30, at 519-26; Mason, *supra* note 13, at 382-83.

[217] The Group of Seven is an intragovernmental political forum consisting of seven members: The United Kingdom, United States, Canada, Japan, Germany, France, Italy, and the European Union. *See What is the G7?*, GOV.UK, https://www.gov.uk/government/news/what-is-the-g7 [https://perma.cc/YF7H-W48A].

[218] Leonardo Martinez-Diaz, *The G20 After Eight Years: How Effective a Vehicle for Developing-Country Influence?* 7-8 (Brookings Glob. Econ. & Dev., Working Paper No. 12, 2007).

[219] Christians, *supra* note 216, at 20.

[220] *About: Mandate*, G-24, https://www.g24.org/mandate/ [https://perma.cc

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and popularizes G7 positions while remaining mostly silent or neutral to the G-24's agenda.[221] For example, in 2019, the G-24 proposed addressing the tax challenges of digitalization by attributing business profits to a permanent establishment based on a significant economic presence.[222] However, the OECD and G20 have largely ignored this proposal.[223]

In 2016, the OECD established the Inclusive Framework on BEPS which includes approximately 135 members, incorporating about 70% of non-OECD and non-G20[224] countries from all geographic regions.[225] According to the OECD, the Inclusive Framework was created to ensure that interested countries, including developing ones, can equally participate in designing BEPS standards while monitoring the implementation of the OECD's outputs.[226] The OECD asserted that as BEPS associates, Inclusive Framework members "will work on an equal footing with the OECD and G20 members on the remaining standard-setting under the BEPS Project."[227] The Inclusive Framework purports to provide developing countries with a forum for inclusive and equal-footed participation. Yet there is no formal explanation of what such equal footing and inclusivity mean[228] and how these expectations should

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/PC33-KSRS] (last visited June 11, 2023). The G-24 is an intergovernmental group of developing countries that coordinates positions on monetary and development issues.

[221] Martinez-Diaz, *supra* note 218, at 17.

[222] G-24, *G-24 Working Group on Tax Policy and International Tax Cooperation: Proposal for Addressing Tax Challenges Arising from Digitalisation*, at 8 (Jan. 17, 2019).

[223] Allison Christians, *OECD Secretariat's Unified Approach: How to Get Things on a Truly Equal Footing*, ICTD (NOV. 5, 2019), https://www.ictd.ac/blog/oecd-secretariat-unified-approach-equal-footing/ [https://perma.cc/AHK8-LVG5].

[224] The Group of Twenty is an intergovernmental organization comprising nineteen countries and the European Union. The G20 works on issues related to the global economy. Its members represent more than 80% of global GDP and 75% of international trade. *See About the G20*, G20, https://www.g20.org/en/about-g20/#overview [https://perma.cc/9WRW-53DS] (last visited June 11, 2023).

[225] *About: What Is BEPS?*, OECD, https://www.oecd.org/tax/beps/about [https://perma.cc/7ZRR-XG7V] (last visited June 11, 2023) [hereinafter *What Is BEPS?*].

[226] *Inclusive Framework on BEPS*, *supra* note 23.

[227] *All Interested Countries and Jurisdictions to Be Invited to Join Global Efforts Led by the OECD and G20 to Close International Tax Loopholes*, OECD (Feb. 23, 2016), https://www.oecd.org/ctp/all-interested-countries-and-jurisdictions-to-be-invited-to-join-global-efforts-led-by-the-oecd-and-g20-to-close-international-tax-loopholes.htm [https://perma.cc/H67G-W3CZ].

[228] Allison Christians & Laurens van Apeldoorn, *The OECD Inclusive Framework*, 72 BULL. FOR INT'L TAX'N, 226, 228 (2018).

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materialize. It is difficult to assess how the OECD defines inclusivity because of the unavailability of information on the objectives and negotiations leading up to the creation of the Inclusive Framework. The OECD has not specified a clear role for the Inclusive Framework, nor has it identified any measure for inclusivity.[229] The organization's opaque structure and overall lack of transparency complicate the analysis of how members engage in its processes.[230]

The Inclusive Framework's activity began with the adoption of four BEPS minimum standards to which Inclusive Framework members must conform. The minimum standards are related to combatting harmful tax practices, preventing the granting of treaty benefits in inappropriate circumstances, providing guidance on country-by-country reporting, and making dispute resolution mechanisms more effective. [231] The implementation of these standards is then subject to monitoring and peer review processes. But developing countries have questioned the benefits that these measures provide to them. In many of the Inclusive Framework's regional meetings, members voiced that joining the Inclusive Framework is challenging and requires adequate capacity. Representatives frequently highlighted their budget and administrative constraints.[232] They have raised repeated concerns about the technical expertise required to implement and enforce the OECD's outputs and questioned whether the OECD's work truly reflects their needs.[233] For example, in a 2016 regional meeting for Latin America and the Caribbean, representatives expressed "concerns for the high level of complexity and resources needed to implement the BEPS measures, especially for countries with tax

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[229] Brauner, *supra* note 30, at 496.

[230] *See* Christians & van Apeldoorn, *supra* note 228, at 13 (exploring the need for exclusivity in authenticating a global tax policy mandate and the challenges associated with it).

[231] *See BEPS: About*, OECD, https://www.oecd.org/tax/beps/about/ [https://perma.cc/9W28-55E6] (last visited June 11, 2023).

[232] *See, e.g.*, OECD, *2nd Regional Meeting of the Inclusive Framework on BEPS for Eastern European and Central Asia Countries, Co-Chair's Statement*, at 2 (Apr. 7, 2017), https://www.oecd.org/tax/beps/tblisi-co-chairs-statement-april-2017.pdf [https://perma.cc/FJT7-VSLN]; OECD, *3rd Regional Meeting of the Inclusive Framework on BEPS for Eastern European and Central Asia Countries: Co-Chairs' Statement*, at 1 (Oct. 20, 2017), https://www.oecd.org/tax/beps/co-chairs-summary-eastern-europe-central-asia-beps-regional-meeting-2017.pdf [https://perma.cc/7396-FBAE].

[233] Irma Johanna Mosquera Valderrama, *Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative*, 72 BULL. FOR INT'L TAX'N 160, 164 (2018).

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DOI: https://doi.org/10.58112/jil.44-4.4

administrations struggling with low capacity."[234] Many developing countries fundamentally struggle with tax collection and enforcement and are disadvantaged by the allocation of taxing rights between source and residence.[235] Issues of distributional justice and the effects of developed countries' tax systems on developing countries have not been sufficiently addressed by the BEPS Project.[236] And even to the extent that developing countries' interests align with the OECD's initiatives, they lack the administrative resources to effectively implement them.[237]

Efforts to establish international tax governance through the Inclusive Framework are foiled by challenges that prevent developing countries from participating on an equal footing.[238] Many developing countries still have inadequate resources and the necessary expertise to implement the OECD's international tax agenda. Some prioritize demanding issues such as climate change, political security, and deep social inequalities[239] that prevent them from fully investing in tax policymaking on a global scale.[240] The limited resources of developing countries combined with the OECD's fast-moving agenda place them in inferior positions compared to their developed counterparts.[241] When developing countries do not participate on equal footing, the standards designed by a small number of wealthier countries obtain the status of international norms.[242] Because many developing countries

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[234] OECD, *Regional Meeting of the Inclusive Framework on BEPS for Latin American & the Caribbean: Co-Chair's Summary*, at 2 (Sep. 23, 2016), https://www.oecd.org/tax/beps/beps-regional-meeting-co-chairs-summary-lac-september-2016-montevideo.pdf [https://perma.cc/4WLU-66NA].

[235] Valderrama, *supra* note 233; ADINDA WISSE, MYRTHE BEKKERS, JOHANNA KREBS & THIJMEN REINALDA, REPORT ON THE BEPS INCLUSIVE FRAMEWORK OF THE OECD 12 (2021).

[236] Martin Hearson, *Developing Countries' Role in International Tax Cooperation* 5-8 (G-24 Working Paper, 2017); Oei, *supra* note 138, at 210-11.

[237] Oei, *supra* note 138, at 210.

[238] African Tax Administration Forum, *supra* note 203, at 2. In addition to ATAF, other regional organizations have worked with the OECD in the area of international taxation. This includes The Centre de rencontre des administrations fiscales (CREDAF), and the Centro Interamericano de Administraciones Tributarias (CIAT). *See, e.g.*, *OECD and CREDAF Renew Partnership to Strengthen Tax Co-Operation*, OECD (May 3, 2021), https://www.oecd.org/tax/oecd-and-credaf-renew-partnership-to-strengthen-tax-co-operation.htm [https://perma.cc/PL8V-ESPF].

[239] African Tax Administration Forum, *supra* note 203, at 9.

[240] *Id*.

[241] Brauner, *supra* note 30, at 526.

[242] Christians & van Apeldoorn, *supra* note 228, at 14-15.

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cannot effectively summon a leadership role in the tax policymaking process, they become subject to whatever international tax rules are determined while receiving some technical assistance and guidance to implementing them.[243]

The narrow functions of the Inclusive Framework have raised questions on whether it is genuinely inclusive. Developing countries have been included in the diplomatic endorsement stage of the OECD's agenda, rather than in the critical areas of negotiation and idea development.[244] The policy design and political negotiation stages are largely confined to OECD members— particularly the United States and E.U. members.[245] The participation of non-OECD members has largely been restricted to a consultative role.[246] The African Tax Administration Forum (ATAF)[247] has famously likened the international tax framework to "a dinner table where the menu was set and prepared by OECD countries with the ensuing dishes being available for eating *as is* to all countries, including developing countries, irrespective of their tastes and preferences."[248] Non-OECD members have assisted in the broad adoption and implementation of the OECD's outputs. But it is the OECD that determines which policy to adopt and to implement.[249] Developing countries are typically at the early stages of their policy development, especially when designing digital strategies for their economies. The operating pace and logistics of the OECD—headquartered in Paris—are often beyond the capacity and budgetary constraints of developing countries.[250] Annual Inclusive Framework meetings are held in Paris, with a mid-annual meeting

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[243] African Tax Administration Forum, *supra* note 203, at 13.

[244] Christians, *supra* note 216, at 36.

[245] *See* Mnuchin Letter to Finance Ministers, *supra* note 79; Mnuchin Letter to OECD Secretary-General, *supra* note 80.

[246] Irma Johanna Mosquera Valderrama, *Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism*, 7 WORLD TAX J. 16 (2015).

[247] The African Tax Administration Forum is an intergovernmental organization for cooperation between African tax authorities. *See About: Overview*, AFR. TAX ADMIN. F., https://www.ataftax.org/overview [https://perma.cc/DE2W-85PB] (last visited June 11, 2023) (explaining the vision, mandate, objectives, and history of the ATAF).

[248] African Tax Administration Forum, *supra* note 203, at 6 (emphasis added).

[249] Rasmus C. Christensen, Martin Hearson & Tovony Randriamanalina, *At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations* 65 (ICTD Working Paper No. 115, 2020).

[250] MARTIN HEARSON, ICTD, CORPORATE TAX NEGOTIATIONS AT THE OECD: WHAT'S AT STAKE FOR DEVELOPING COUNTRIES IN 2020? 4 (2020).

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in another Inclusive Framework country.[251] Developing countries typically have fewer and lesser-trained tax specialists and are not able to send as many delegates to meetings at the OECD. If equal footing requires meetings within OECD working parties, disparities in available resources between developed and developing countries present a core inequity.[252]

Developing countries are further marginalized by the broader, unfavorable international tax framework. The history of multilateral cooperation on international taxation has not produced benefits for developing countries.[253] The common perspective is that cooperation in the form of tax conventions produces mutual gains for all parties.[254] Treaties intend to relieve double taxation and facilitate an efficient allocation of goods and capital between signatories. But in treaties between developed and developing countries, outcomes can be less desirable. Tsilly Dagan has written that bilateral and multilateral treaties for the relief of double taxation do not benefit developing countries.[255] Bilateral treaties often reproduce the same outcome that could be achieved unilaterally: each country administers its domestic taxes, and the residence country issues a foreign tax credit to avoid double taxation. Dagan argues that bilateral tax treaties result in a regressive distribution of taxing rights from the developing (source) country to the benefit of the developed (residence) country.[256]

The institutional allocation of the global tax base tends to favor developed countries at the expense of developing ones.[257] Such is the case under the OECD Model Tax Convention, which most bilateral tax treaties follow. In most situations, the developed country is the residence jurisdiction and capital exporter, while the developing county is the source country and capital importer. Under the OECD model, the allocation of taxing rights to source countries is narrowly construed. The preferential allocation of taxing rights towards residence countries, even after the two-pillar reform, subordinates

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[251] Brauner, *supra* note 30, at 520; *Inclusive Framework on BEPS*, *supra* note 23, at 2.

[252] Christians & van Apeldoorn, *supra* note 228, at 14.

[253] *Id.*

[254] Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939, 939 (2000).

[255] *Id.*

[256] *Id.* at 943.

[257] *Id.* at 947-48.

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the world's developing (typically source, capital importing) countries.[258]

According to the European Parliament, the broad global network of tax treaties prevents developing countries from taxing profits earned in their jurisdictions.[259] This outcome is also attributed to other causes, including increased capital, use of tax havens, corruption, and non-transparent public administrations.[260] Developing countries are further harmed when parent MNEs establish subsidiaries in tax havens. These entities then contract with a developing country subsidiary to reduce the taxable profits in the high-tax developing country, artificially increasing the untaxed book profits in the tax haven.[261] This practice creates a regressive distribution of tax revenues, where developing countries—already in a worse-off position—are depleted. On average, treaties between developing countries and E.U. members result in the greatest limitations on developing countries' taxing rights compared to bilateral treaties with other developing countries or even other OECD members.[262]

Harmonization of international tax law can be useful if it maximizes universal economic welfare gains. But increasing total welfare does not necessarily equate to promoting distributional justice. An equitable international tax framework should be concerned with how benefits are distributed between countries and who shares the tax pie.[263] A larger tax pie is not necessarily more appealing for developing countries. Worldwide standardization does not mean that a greater tax pie is equitably divided or that it achieves any form of distributional justice.[264]

Although the two-pillar reform has been presented as a global transformation of tax laws, not much has changed. Its scope is extremely narrow and prioritizes the needs of OECD members over

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[258] *Id.*

[259] Resolution of 8 July 2015 on Tax Avoidance and Tax Evasion as Challenges for Governance, Social Protection and Development in Developing Countries, EUR. PARL. DOC. P8_TA (2015) 0265.

[260] *Id.*

[261] Pogge & Mehta, *supra* note 210, at 4.

[262] MARTIN HEARSON, THE EUROPEAN UNION'S TAX TREATIES WITH DEVELOPING COUNTRIES: LEADING BY EXAMPLE? 3 (2018). The report examined a sample of 172 treaties in force between E.U. members and developing countries, part of a sample of 519 bilateral tax treaties signed by developing counties, at the time.

[263] *See* Gomez, *supra* note 125, at 212.

[264] *Id.* at 192-93.

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developing countries.[265] The reallocation mechanism of Pillar One, which is supposed to benefit source countries, has been largely diminished.[266] Pillar Two is likely the greatest change to international rules and provides OECD members with the largest benefit. If effective, Pillar Two will significantly limit profit-shifting practices. But its benefit to developing countries is questionable if developing countries are scarcely allocated taxing rights on profits. Meanwhile, some tax havens have been and are still developing countries. It may be possible that the case for eliminating a tax haven is weaker when that tax haven is a developing country.[267] For developing countries, certain tax practices might be tolerated as a legitimate means for countries to pull themselves and their residents out of poverty.[268]

VI. A PROPOSAL FOR PROMOTING EQUAL-FOOTED REPRESENTATION

Developing countries have not been meaningfully involved in the OECD's tax policy agenda. In the context of BEPS, the OECD paid lip service to inclusivity by establishing the Inclusive Framework. But the Inclusive Framework has been anything but inclusive. Developing countries have no power to influence policymaking and negotiation which mostly transpire between the United States and E.U. members.[269] Joining the Inclusive Framework was not always an act of free will, and the OECD's outputs provide limited benefits to developing countries. The two-pillar solution has been hailed as a "ground-breaking tax deal for the digital age,"[270] struck by the "international community."[271] But the agreement is hardly ground-breaking[272] and does not represent the equal views or interests of non-OECD members.

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[265] Brauner, *supra* note 58, at 2.

[266] *Id.*

[267] DIETSCH, *supra* note 161, at 103, 202.

[268] *Id.* at 60.

[269] Valderrama, *supra* note 246, at 4.

[270] *International Community Strikes a Ground-Breaking Tax Deal for the Digital Age*, OECD (Oct. 8, 2021), https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm.

[271] *Id.*

[272] Brauner, *supra* note 58, at 1.

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Both the process and outputs of the OECD's efforts suffer from legitimacy concerns.[273] The OECD's restricted membership hurts its legitimacy when it advances norms that will be adopted far beyond its membership. Such legitimacy is further questioned when the outcomes do not produce benefits for all participants. Developing countries ought to have a commanding role in the policy negotiations on the matters that greatly affect them. If non-OECD members are expected to adopt multilateral instruments in their domestic jurisdictions, they should have a say in designing them.[274] Greater representation will improve legitimacy and produce better global results. It will also reinforce developing countries' duties as representatives of their citizens when negotiating in a multilateral capacity.

This Article proposes two ways to promote equal-footed participation in international tax policymaking: first, expanding non-member voting rights within the OECD, and second, establishing a new intergovernmental process within the United Nations on international taxation that is better positioned to revisit traditional international tax norms.

Ensuring participation through voting rights is a key step that will help remedy inequities and achieve better substantive outcomes. The OECD has several means to expand voting for non-members, including through its existing category of associate membership. The OECD may invite other countries as "partners" to participate in any one of its committees or other bodies.[275] Partners may be invited in different capacities, including as "invitees" on a non-confidential, one-meeting basis, as "participants" to all of a committee's non-confidential meetings, or as "associates" who participate in a committee with the same rights and obligations as OECD members but cannot attend discussions on the accession of new OECD members.[276] The OECD Council has designated Brazil, China, India, Indonesia, and South Africa as its key partners.[277]

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[273] For more on legitimacy in international tax lawmaking, see Valderrama, *supra* note 246, at 4-5.

[274] *Id.* at 5-6.

[275] *Global Relations: Partnerships in OECD Bodies*, OECD, https://www.oecd.org/global-relations/partnershipsinoecdbodies/ [https://perma.cc/BB97-E2NT] (last visited June 11, 2023).

[276] OECD, *Rules of Procedure of the Organisation*, at 52 (Oct. 2013) [hereinafter *Rules of Procedure*].

[277] *Global Relations: Key Partners*, OECD, https://www.oecd.org/global-relations/keypartners/#d.en.194387 [https://perma.cc/S5LA-CCMX] (last visited June 11, 2023).

https://scholarship.law.upenn.edu/jil/vol44/iss4/4
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Inclusive Framework members are considered "associates" of the BEPS Project. As associates, they are expected to contribute actively to the project through policy, dialogue, and exchange of information, and to align themselves with its outcomes.[278] The associate affiliation, which is on an invitation basis, should be extended without prejudice to more countries and to all the international tax activities performed under the Committee on Fiscal Affairs. Currently, the Rules of Procedure of the OECD limit an associate invitation to the inviting body and its subsidiaries or joint bodies.[279] A broadly construed associate structure should permit non-members to participate in more of the OECD's activities. Furthermore, the current framing vaguely allows associates the ability to participate in the full range of the specified body's work. An ideal framing would explicitly grant voting rights to associates, even if these would still be limited compared to full members. Instituting broader associate membership with voting rights will provide non-members a meaningful role within the OECD without having the same level of influence as full members. It will also allow the OECD to accommodate a larger number of non-member participants, without significantly increasing its complexity or full membership.

Some scholars have suggested a system of two-tiered membership to facilitate better representation in the OECD.[280] Under this structure, the first tier would include all OECD members who would have authority over significant policy changes such as amendments to the OECD Model Tax Convention. Non-members would occupy the second tier: they would be invited to discuss policy changes, but only the first tier could vote.[281] Such a structure, however, does little to improve the subordinated status of non-members who are and would remain *second tier* with no ability to vote.[282]

Ideally, equal representation should manifest through full membership and equal voting rights.[283] Equal voting rights will

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[278] *Committee on Fiscal Affairs, Participation Plan*, OECD, https://www.oecd.org/global-relations/partnershipsinoecdbodies/PP-CFA-PUBLIC-ENG.pdf [https://perma.cc/7KCT-QMK6].

[279] *Rules of Procedure*, *supra* note 276, at 52.

[280] *See, e.g.*, Cockfield, *supra* note 28, at 184.

[281] *Id.*

[282] *Id.* at 186.

[283] Although this Article addresses tax policymaking, expanded voting rights within the OECD could be relevant to non-tax matters as well.

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allow non-members, including developing countries, to have a greater influence on the tax policies that greatly affect them. The OECD is currently comprised of thirty-eight members. Non-members have different ways to participate, but largely cannot vote. They are unable to shape the direction of the organization or set forth policy agendas. As the informal "World Tax Organization," the OECD's outputs are broadly adopted, but most countries do not participate or vote on its work. If global decisions are made at the OECD level and those decisions impact other countries, more countries should be involved in them. Expanded voting rights will help resolve the power imbalances that exist within the OECD and which are created by it. It will permit non-members to advance the interests of their residents and influence decisions on global matters.[284] Equal voting rights can address legitimacy concerns and promote better outcomes that reflect the interests of all stakeholders.

Full membership should be granted to a larger number of developing countries, allowing them to fully participate in all aspects of the organization's work. The OECD has already made significant progress in diversifying its structure and membership. Beginning in the late 1990s, the OECD included the contributions of non-OECD members to the OECD Model Income Tax Convention revisions, recognizing that its influence "had extended far beyond OECD member countries."[285] More recently, the OECD's thirty-seventh and thirty-eighth members have been Colombia and Costa Rica, respectively.[286] In January 2022, the OECD Council began accession discussions with six candidate countries for OECD membership: Brazil, Argentina, Bulgaria, Croatia, Peru, and Romania.[287] This approach represents a notable shift from the OECD's twenty founding members (in 1961), who were exclusively European and North American countries.[288]

Equal voting rights within the OECD is an important first step towards a more equitable international tax order. But increased representation alone is unlikely to yield structural changes within the organization. Such changes would need to include increased transparency (working parties usually do not convene publicly),

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[284] Christians & van Apeldoorn, *supra* note 228, at 4.

[285] *OECD Model Tax Convention*, *supra* note 17, at 10; Cockfield, *supra* note 28, at 184.

[286] *OECD Global Reach*, *supra* note 11.

[287] *Id.*

[288] *Id.*

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diversification of the OECD Secretariat,[289] and a clear vision to incorporate the ideas and interests of the Global South. The OECD is still, inherently, a "rich man's club" representing the needs of developed economies. Broadly expanding full membership would be highly uncharacteristic and contrary to the organization's history.[290] Moreover, some countries may not wish to become full voting members if it means changing their tax policies to satisfy OECD mandates which still do not align with their national interests as developing countries. For example, Mexico initially refused to enter into bilateral tax treaties with developed countries until it did so with Canada in 1992. It ultimately became an OECD member in 1994.[291]

The OECD cannot claim legitimacy for producing universal outputs while decision-making and membership remain exclusive.[292] Thus, voting rights would be a first and vital step toward equal-footed representation. But for developing countries, equal footing within the OECD is likely limited to greater representation. Structural changes will be much harder to achieve. As an organization founded by developed economies for developed economies, the direction of the OECD will always be defined by full members, and primarily by the world's superpowers.[293] These include the key principles laying the foundation for the OECD Model Tax Convention. The OECD is unlikely to revisit the allocation of taxing rights that are inherently distorted in favor of developed countries. Concluding many years of negotiation, the two-pillar solution created a limited redistributive mechanism applied on top of existing rules. In the context of distributive justice, that is likely as much as the OECD can accomplish.

Thus, this Article recommends that the United Nations lead international tax policymaking through a new intergovernmental framework. The United Nations has traditionally been a more inclusive forum for developing countries in international taxation.[294] This includes drafting the Model Double Taxation Convention between Developed and Developing Countries (2021), first

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[289] WISSE ET AL., *supra* note 235.

[290] Christians & van Apeldoorn, *supra* note 228, at 6.

[291] Cockfield, *supra* note 28, at 184.

[292] Christians & van Apeldoorn, *supra* note 228, at 3.

[293] Brauner, *supra* note 30, at 2-3.

[294] Christians, *supra* note 216, at 30.

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published in 1980.[295] The U.N. model largely resembles the OECD's but assigns more weight to the source principle and allocates greater taxing rights to developing countries. For example, in response to increasing global digitalization, a new Article 12B was added to the U.N. model, addressing the taxation of automated digital services.[296] Article 12B preserves the domestic taxing rights for countries in which payments for digital services are made, including through a source-country withholding tax.[297] Retention of source country taxing rights has long been regarded as an issue of unique importance to developing economies which are traditionally source countries.[298] However, the United Nations has historically lacked the institutional support and resources necessary for effective international tax policy design.[299] The OECD has enjoyed greater resources and the backing of the world's developed economies. The OECD's impact in designing global tax policy has been nearly uncontested.[300] Bilateral treaties between developed and developing countries mostly conform with the OECD Model Tax Convention rather than the more favorable U.N. model.[301]

In December 2022, the U.N. General Assembly adopted a resolution on "Promotion of inclusive and effective international tax cooperation at the United Nations" (U.N. Resolution").[302] The resolution, introduced by the fifty-four-member African Group of Countries[303]—representing all African countries—provides that the United Nations will begin intergovernmental discussions on ways to strengthen the inclusiveness and effectiveness of international tax cooperation, including the possibility of developing an international tax cooperation framework through a U.N. process.[304] The U.N.

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[295] U.N. DEP'T OF ECON. & SOC. AFFAIRS, MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES 2021, at 6, U.N. Doc. ST/ESA/378 (2021).

[296] *Id*. art. 12B.

[297] *Id*.

[298] *Id*. at intro. ¶ 3.

[299] Christians, *supra* note 216, at 30-31.

[300] Cockfield, *supra* note 28, at 136.

[301] HEARSON, *supra* note 262, at 3.

[302] G.A. Res. 77/244, at 1 (Dec. 30, 2022).

[303] *The African Group*, AFR. UNION, https://www.africanunion-un.org/africangroup [https://perma.cc/N5SH-YPBL] (last visited June 11, 2023).

[304] G.A. Res. 77/244, at 3 (Dec. 30, 2022).

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Resolution, later endorsed by the G-24,[305] requests that the U.N. Secretary-General prepare a report outlining steps for an intergovernmental committee to strengthen the inclusiveness of global tax cooperation.[306] This possible U.N. initiative conveys developing countries' response to the lack of equity and representation in the OECD's tax policymaking. African representatives have frequently voiced their displeasure with the OECD's non-inclusive process,[307] expressing the need for an intergovernmental framework that would produce better outcomes.[308]

The United Nations inherently differs from the OECD: it has 193 member states, a much broader mandate, and operates on a one-country, one-vote basis.[309] Developing countries are voting members of the United Nations. They can influence the direction of the organization including its tax standards, unlike the OECD. Thus, it is better positioned to consider broader international tax principles that could benefit the distinct needs of developing countries. The introduction of the U.N. Resolution by the fifty-four-member African Group of Countries demonstrates this distinction.

A U.N.-led initiative on international taxation can accomplish more than enabling participation by voting. A more inclusive procedure will help produce improved substantive outputs. The United Nations should address the tax issues that developing countries prioritize. In its report on the twenty-fifth session, the U.N. Committee of Experts on International Cooperation in Tax Matters

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[305] *Communique: Intergovernmental Group of Twenty-Four on International Monetary Affairs and Development*, IMF (Apr. 18, 2013), https://www.imf.org/en/News/Articles/2015/09/28/04/51/cm041813.

[306] G.A. Res. 77/244, at 3 (Dec. 30, 2022).

[307] *See, e.g.*, H.E. Thabo Mbeki, *Africa: Call For Action!*, ALLAFRICA (Nov. 21, 2022), https://allafrica.com/stories/202211210437.html, [https://perma.cc/YK4A-VYYJ]; *see also* Ruth Olurounbi, Isabel Gottlieb & William Horobin, *Nigeria Snubs Global Tax Deal in Sign It Won't Work for All*, BLOOMBERG (Jan. 19, 2023), https://www.bloomberg.com/news/articles/2023-01-19/nigeria-snubs-global-tax-deal-in-sign-it-won-t-work-for-all [https://perma.cc/5UAQ-W87W].

[308] *See, e.g.*, Press Release, GATJ, Governments Approve Proposal for International Tax Cooperation at United Nations (Nov. 23, 2022), https://globaltaxjustice.org/news/press-release-governments-approve-proposal-for-international-tax-cooperation-at-united-nations/ [https://perma.cc/2T8D-T8L6]; *see also* Alex Cobham, *Open Letter to G20: OECD Failure to Deliver on G20 Mandates*, TAX JUST. NETWORK (Nov. 15, 2022), https://taxjustice.net/2022/11/15/open-letter-to-g20-oecd-failure-to-deliver-on-g20-mandates/ [https://perma.cc/NG3H-MRXT].

[309] U.N. Charter art. 18, ¶ 1.

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(U.N. Committee of Experts) conveyed that some of these issues include capacity building, environmental taxation, and taxation of the extractive industries.[310]

The United Nations is in a better position to tackle normative questions of international taxation and introduce a principled reform. The OECD's two-pillar solution sets forth some significant changes, but most are technical and greatly limited in scope. With a broader mandate and fewer legitimacy concerns, the United Nations should address the foundational challenges that cross-border taxation faces in the twenty-first century. On the digital front, a U.N. framework should question how users add value in the digital economy and how that value should be taxed. The digital business models of the twenty-first century rely heavily on user-generated data and capital mobility.[311] International tax norms reflecting the practices of a brick-and-mortar economy are outdated and have not been considerably revamped by the OECD. It may be time to rethink the traditional permanent establishment, source, and residence principles in light of the digital transformation. Such a task must be accompanied by addressing the core inequities that govern the international tax order. The international tax framework has contributed to the subordination of the Global South to the Global North. Furthermore, developing countries have not benefited from bilateral tax treaties with developed countries or from multilateral cooperation. A U.N. framework must confront these institutional concerns.

However, an intergovernmental process within the United Nations may encounter limitations. Despite having voting rights, developing countries are far from equal-footed participants under the United Nations' domain. The United Nations is dominated by the world's developed superpowers who shape its policy and agenda. Scholars have often scrutinized the United Nations' reinforcement of the Global South's subordination.[312] The United

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310 Committee of Experts on International Cooperation in Tax Matters Report on the 25th Session, U.N. Doc. E/2023/45-E/C.18/2022/5 (2022).

311 Mason, *supra* note 13, at 3-7; Perset, *supra* note 13, at 7.

312 *See, e.g.*, E. Tendayi Achiume, *Putting Racial Equality Onto the Human Rights Agenda*, 15 SUR INT'L J. HUM. RTS. 141, 143 (2018); E. Tendayi Achiume & Devon Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 UCLA L. REV. 1462, 1490 (2021); Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803 (2022). For an analysis of predominantly Black convictions in the ICC and critique of the U.N. Security Council, see Rachel López, *Black Guilt, White Guilt at the International Criminal Court*, *in* RACE AND NATIONAL SECURITY (Matiangai Sirleaf ed., forthcoming 2023).

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Nations' institutions are marred by inequities that continue to shape the global order.[313] Thus, it may be unreasonable to expect the United Nations to effectively cure distortions that are ingrained in the international tax framework.

In addition, it is unlikely that the United Nations can wholly replace the OECD as the "World Tax Organization," even if it embarks on a new international tax cooperation framework. The U.N. Committee of Experts lacks the support of the OECD's expert committees[314] and will require far greater resources to pursue an intergovernmental project. Such resources will need to focus on capacity building and technical expertise. Otherwise, developing countries may suffer similar setbacks in the U.N. framework as they have in the OECD. Moreover, the OECD remains the leading global tax actor and it is more plausible that both intergovernmental organizations will concurrently shape cross-border tax policy. Several developed countries, including the United States, have opposed the U.N. Resolution on account that intergovernmental discussions at the United Nations will be inconsistent with the OECD's two-pillar approach.[315] The United Nations acknowledges the role of the OECD in the area of international taxation[316] and subsequently passed a resolution reaffirming its agenda of cooperation with the OECD.[317] The U.N. Resolution does not repeal or replace the work of the Inclusive Framework nor the OECD's forthcoming multilateral convention. OECD members have been resistant to the prospect of a possible U.N. initiative, expressing that such an effort would be duplicative, creating inefficiencies and fragmentation.[318]

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313 *See* DIANA PANKE, UNEQUAL ACTORS IN EQUALISING INSTITUTIONS: NEGOTIATIONS IN THE UNITED NATIONS GENERAL ASSEMBLY 3-5, 13-33 (2013); Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1, 15, 41 (2019).

314 Valderrama, *supra* note 246, at 24.

315 Rose Marks, U.S. Advisor to the Second Committee, Explanation of Position on a Second Committee Resolution on the Promotion of Inclusive and Effective International Tax Cooperation (Nov. 23, 2022), https://usun.usmission.gov/explanation-of-position-on-a-second-committee-resolution-on-the-promotion-of-inclusive-and-effective-international-tax-cooperation/ [https://perma.cc/4Z55-73KS].

316 *Id.* ¶ 3.

317 G.A. Res 77/21 (Nov. 15, 2022).

318 Press Release, United Nations, Inclusive International Tax Systems Crucial in Strengthening Developing Countries' Fiscal Policies, Green Transition, Speakers Tell Economic and Social Council (Mar. 31, 2023), https://press.un.org/en/2023/ecosoc7116.doc.htm [https://perma.cc/EL2N-CBRJ].

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Despite some of these drawbacks, the United Nations is still better positioned to represent the interests and distinct revenue needs of developing countries. Concerns about duplicative processes will not materialize if the United Nations and OECD initiatives serve different missions. The OECD BEPS Project mostly targeted profit-shifting practices and tax havens without changing traditional tax norms. A U.N. initiative should introduce a broader, principled reform that reconsiders the 1920s standards while including developing countries in its decision-making. There is no intergovernmental organization that provides developing countries with equal-footed participation in the tax field. In fact, a limited number of intergovernmental organizations engage in some form of international tax policy. These include the G20, International Monetary Fund, and the World Bank. The G20 mostly relies on the OECD, and the latter two largely provide technical assistance on tax-related matters to achieve their central goals.

Most importantly, a U.N. intergovernmental framework has the broad endorsement of developing countries, which consider the United Nations the appropriate platform for future cooperation to strengthen the inclusiveness of the international tax framework.[319] At the 2023 session of the U.N. Economic and Social Council (ECOSOC), representatives from developing countries highlighted the importance of a new U.N. intergovernmental framework. For example, in her keynote speech, Minister for Finance, Budget and National Planning of Nigeria, Zainab S. Ahmed, stated:

> We must address the lack of inclusiveness and equal footing in the development of taxation frameworks both in terms of weight attributable to input from developing countries and in terms of their capacities to make certain rules . . . Currently, developing countries are being punished by unilateral declarations and blacklisted by forums and bodies in which they have no voice . . . The United Nations has the convening power to lead an inclusive tax cooperation process.[320]

Minister Ahmed's position was echoed by representatives at the ECOSOC meeting. Experts repeatedly expressed that traditional

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[319] G.A. Res. 77/244, ¶ 2 (Dec. 30, 2022).

[320] *2023 ECOSOC Special Meeting on International Cooperation in Tax Matters*, at 52:50, U.N. (Mar. 31, 2023), https://media.un.org/en/asset/k1o/k1owan9rse [https://perma.cc/4583-484Q].

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international rules are outdated,[321] mostly pointing to the permanent establishment principle and the disproportionate allocation of taxing rights to the residence jurisdiction over source. The international community should answer this call and begin a new international tax framework that demonstrates a commitment to equal-footed participation and governance.

CONCLUSION

This Article examined the OECD's proposed rules to address the tax challenges of digitalization and profit-shifting. It argued that the two-pillar solution resulted from a political compromise that undermines tax sovereignty and overlooks the role of developing countries. Reducing profit-shifting is an important duty. MNEs should be required to pay their fair share of taxes and report profits where they are earned. However, the OECD BEPS Project largely ignored broader institutional issues in the international tax framework. Taxes on MNEs will increase—mostly under Pillar Two—yet traditional tax norms, including profit allocation principles, have not been meaningfully reconsidered.

The OECD inherently represents the interests of the world's developed economies and has historically disregarded the interests of developing ones. While the OECD dominates global tax policy, it continuously neglects the effects of its agenda on non-members who are excluded from the essential stages of policy design and diplomatic negotiation. Thus, this Article proposed ways to promote inclusivity in international tax policymaking. It recommended expanding voting rights for non-members within the OECD. Furthermore, it supported a newly created intergovernmental process within the United Nations that should focus on revisiting the traditional norms and promoting the distinct interests of developing countries.

We live in an era of remarkable digital advancement concurrent with economic uncertainty and political polarization. The global tax order remains governed by a post-colonial contract and resolving the deeply rooted equity issues underlying international taxation is a tall order. The first step to better tax policymaking is ensuring equal-footed representation of all stakeholders. That first step should be to expand the voting rights for non-members within the

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[321] *See, e.g.*, *id.* at 42:40 (statement by Rasmi Das).

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OECD. A more significant step would be coordinating international tax policy in the United Nations rather than the OECD. An intergovernmental process led the by United Nations should address normative questions that are central to twenty-first-century business models. It will need to examine how users add value in the digital economy, and how that value should be taxed. To genuinely confront the inequities of the international tax order, it may be time to reevaluate the traditional permanent establishment principle and the preference of residence over source.

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