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OECD Two-Pillar GloBE Rules: Is It Time to Abandon Hope for International Cooperation on a Global Minimum Corporate Income Tax?

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OECD TWO-PILLAR GLOBE RULES: IS IT TIME TO ABANDON HOPE FOR INTERNATIONAL COOPERATION ON A GLOBAL MINIMUM CORPORATE INCOME TAX?

TABLE OF CONTENTS

INTRODUCTION

The twenty-first century has ushered in two changes that have had a profound effect on the global economy: increased globalization and the ubiquity of technology. Companies like Microsoft, Amazon, and Facebook, whose profits are largely derived from digital products, have become some of the largest in the world.[1] Increased digitization, another major change, has made it so large multinational enterprises (MNEs) are now able to easily do business in almost every country in the world.[2] The rise of the digital economy has also presented significant challenges to global tax law.[3]

Traditional principles of international income taxation, laid out in income tax treaties, generally only allow a country to subject a foreign business to its corporate income tax if that business has a physical establishment in that country, and even then, the taxation is limited to the profits that are directly attributable to that physical establishment.[4] Under these principles, if a MNE does business in a country but does not have any physical connection there, the MNE is able to completely avoid paying income tax in that country.[5] These rules made sense when the majority of sales were done in a physical store that the customer had to travel to, but the digital economy challenges the assumption that these rules were made on; customers no longer need to be physically present to make a purchase, and all that is required is an internet connection.[6] The need for reform in the global tax system has been highlighted by the shocking findings of investigative journalists, who have brought to light the extent of the some of the measures MNEs took to minimize their tax burden.[7]

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[1] *See* Aran Ali, *AWS: Powering the Internet and Amazon's Profits*, VENTURE CAPITALIST, (July 10, 2022), https://www.visualcapitalist.com/aws-powering-the-internet-and-amazons-profits/; *see also* Kamil Franek, *How Does Microsoft Make Money: Business Model Explained*, KAMIL FRANEK, (May 30, 2022), https://www.kamilfranek.com/how-microsoft-makes-money-business-model-explained/. These articles both contain analysis of all of the revenue streams for Amazon and Microsoft. Included in them is analysis specifically about the revenues from Amazon Web Services, and Microsoft Azure. Those are the products that will be most important for this Comment.

[2] U.N. Conference on Trade and Development, *Digital Economy Report 2019 Value Creation and Capture: Implications for Developing Countries*, at xvii, U.N. Doc. UNCTAD/DER/2019 (Sept. 4, 2019).

[3] 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, 62 (2021).

[4] *See generally* Monica Gianni, *OECD BEPS (In)Action 1: Factor Presence as a Solution to Tax Issues of the Digital Economy*, 72 TAX L. 255, 259 (2018).

[5] *Id.*

[6] *See id*.

[7] *See generally Offshore Trove Exposes Trump-Russia Links and Piggy Banks of the Wealthiest 1 Percent*, INTN'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (ICIJ), (Nov. 5, 2017),

The G20 Organization for Economic Co-operation and Development (OECD) has emerged as a global authority (albeit a non-binding one) on addressing the changes necessary to adjust global taxation principles to account for the digital economy.[8] The core problem is that there is no single global taxation scheme. Instead, there are a series of intersecting sets of tax regulations rooted in domestic law.[9] This has created an incentive for MNEs to engage in tactics that take advantage of gaps in different tax systems to reduce their taxable income in jurisdictions with high corporate tax rates, and transfer their profits to jurisdictions with lower corporate tax rates, collectively referred to as Base Erosion and Profit Sharing (BEPS).[10] The net effect of many BEPS efforts is that some of the largest and most profitable companies in the world pay little to no corporate income tax.[11] BEPS deprives countries with higher corporate tax rates of their tax income, but it also negatively affects domestic corporations in those countries, who ultimately pay a higher tax rate than their larger competitors because they are not large enough to shift their profits to favorable jurisdictions.[12]

This comment will analyze the OECD's Two-Pillar proposal for addressing the challenges posed by the digitalization of the modern economy and compare the most current domestic policy of several key member states. Section I will evaluate the core measure of the OECD's policy proposal, and how, if implemented, they might make the international taxation landscape much simpler for both member states and MNEs. Section II will evaluate the latest changes in the U.S. in light of the Biden administration's renewed commitment to implementing Pillar Two. Section III will compare the new U.S. tax regime with differing approaches of countries that impose digital services taxes (DSTs) like France. Section IV will evaluate the objections to the OECD's proposal from developing economies like Nigeria. Section V will provide a series of examples to illustrate how the OECD rules will work in practice. Finally, Section VI will posit that competing interests on the world stage render global

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https://www.icij.org/investigations/paradise-papers/paradise-papers-exposes-donald-trump-russia-links-and-piggy-banks-of-the-wealthiest-1-percent/.

8 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, 143 (2006).

9 *See generally* Ruth Mason, *The Transformation of International Tax*, 114 A.J.I.L. 353 (2020).

10 OECD, *OECD/G20 Inclusive Framework on BEPS*, (June, 28, 2018) [hereinafter *OECD Inclusive Framework*], https://www.oecd.org/tax/beps/flyer-inclusive-framework-on-beps.pdf.

11 *Id.*

12 *See* OECD, *Action Plan on Base Erosion and Profit Shifting*, at 10, (2014) [hereinafter *OECD Action Plan*], https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en#page1.

implementation of the OECD Inclusive Framework as currently drafted unrealistic, and, ironically, a more inclusive approach is necessary to achieve a system that is workable for both individual nations and MNEs.

I. THE OECD SOLUTION

The G20 and OECD have worked to come up with solutions for BEPS, starting in 2013 with their "Action Plan on Base Erosion and Profit Shifting."[13] The action plan laid out fifteen points that the OECD identified as contributing to the tax challenges posed by the digital economy.[14] In the following years, the OECD and member states worked together to translate the action plan into a more concrete set of rules that could be implemented to combat BEPS, culminating in 2016 with their "Inclusive Framework on BEPS."[15] This Inclusive Framework lays out a set of model rules and asks member states to make changes to both their domestic and foreign policy that bring their taxation regime in line with the proposed rules.[16] By 2021, over 135 nations, collectively representing over ninety-five percent of the global GDP, had joined the Inclusive Framework.[17]

A. Pillar One

Pillar One of the OECD's proposal is not itself a tax measure, but rather an agreement to change domestic tax rules regarding how income is allocated.[18] One of the primary characteristics of the MNEs that the OECD seeks to target is their scale, as only large enterprises can take advantage of gaps in international tax systems through payments between subsidiaries in multiple countries.[19] Essentially, under Pillar One, profits from digital services would be allocated for tax purposes based on where the product was sold, regardless of the physical location of the MNE that sold them.[20] For example, under current rules, if an American MNE with a subsidiary in Ireland sells digital services in Finland, the

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[13] *Id.* at 13.
[14] *Id.* at 14–24.
[15] *OECD Inclusive Framework*, *supra* note 10.
[16] *Id.*
[17] OECD, *Tax Challenges Arising from the Digitalization of the Economy – Global Anti-Base Erosion Model Rules (Pillar 2)*, at 3, (Dec. 14, 2021), [hereinafter *OECD Model Rules*], https://www.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-report-on-pillar-two-blueprint_abb4c3d1-en.
[18] Lilian Faulhaber, *Comments at Brookings Institution Webinar*, (Apr. 15, 2022), https://www.brookings.edu/wp-content/uploads/2022/03/ES_20220415_Global_Tax_transcript-1.pdf.
[19] *OECD Inclusive Framework*, *supra* note 10.
[20] Faulhaber, *supra* note 18.

profits would be subject to corporate income tax in Ireland, but likely not in Finland.[21] Pillar One would change that system, and distribute the tax base, the total income that is taxable in a certain country, so that all profits from the company derived from Finnish customers would be subject to tax in Finland, even if the money was going to a subsidiary of the MNE based in California.[22] Pillar One seeks to simplify the systems of international taxation by largely disregarding the splits between MNEs and their various subsidiaries, instead focusing on the profit purely from the perspective of the Ultimate Parent Entity (UPE). The second crucial (and slightly more controversial) part of Pillar One calls for members to amend domestic policy to eliminate any "Digital Service Taxes" (DSTs).[23] DSTs are taxes that are imposed on MNEs and are based on their digital activity within a particular jurisdiction.[24]

The United States' participation in Pillar One is key to its success as most of the MNEs that the Inclusive Framework will affect are American companies, but the response of then Secretary of the Treasury Steven Mnuchin was lukewarm at best.[25] In a letter to the Secretary-General of the OECD José Ángel Gurriá, Secretary Mnuchin proposed that the United States implement Pillar One as a safe harbor regime, a series of optional rules that American MNEs would have to opt into to be effective.[26] Secretary-General Gurriá's response did not outright deny Secretary Mnuchin's request, but several member states subsequently expressed their staunch opposition to allowing Pillar One to be a safe harbor regime.[27] While a safe-harbor regime would certainly have been

21 *See* OECD, *Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One – Two-Pillar Solution to the Tax Challenges of the Digitalisation of the Economy*, (Oct. 6, 2022) [hereinafter *OECD Progress Report*], https://www.oecd.org/tax/beps/progress-report-on-the-administration-and-tax-certaint-aspects-of-amount-a-of-pillar-one-two-pillar-solution-to-the-tax-challenges-of-the-digitalisation-of-the-economy.htm.

22 Faulhaber, *supra* note 18.

23 *Id.* For a deeper explanation of DSTs and their impact on the two-pillar solution, see the discussion of the French approach that follows.

24 Gordon Gray & Jennifer Huddleston, *Digital Services Taxes: A Primer*, AM. ACTION F., (Mar. 25, 2021), https://www.americanactionforum.org/insight/digital-services-taxes-a-primer/; *see generally*, Amie Ahanchian et. al, *Digital Services Tax: Why the World is Watching*, BLOOMBERG TAX, (Jan. 6, 2021), https://news.bloombergtax.com/daily-tax-report/digital-services-tax-why-the-world-is-watching.

25 Letter from U.S. Sec'y for the Treasury Steven Mnuchin to OECD Sec'y-Gen. José Ángel Gurriá (Dec. 3, 2019), https://s.wsj.net/public/resources/documents/TreasuryLetter OECD%20SecretaryGeneral12319.pdf.

26 *Id*.

27 Letter from OECD Sec'y-Gen. José Ángel Gurriá to U.S. Sec'y for the Treasury Steven Mnuchin (Dec. 4, 2019), Letter-from-OECD-Secretary-General-Angel-Gurria-for-the-attention-of-The-Honorable-Steven-T-Mnuchin-Secretary-of-the-Treasury-United-States.pdf. The most vocal critic of the U.S. proposed safe-harbor regime was French Finance Minister Bruno Le Maire, who rejected the proposal outright as a non-starter. *See*

more friendly to U.S. companies, it would defeat the point of Pillar One entirely, essentially allowing MNEs to only be subject to the new tax rules if it were beneficial to them.

The differences in opinion regarding the safe harbor regime for Pillar One led Secretary Mnuchin to suspend discussion of implementation of that aspect of the Inclusive Framework.[28] One particular sticking point was a development in the OECD Pillar One proposal regarding segmentation. Under this change, some businesses would provide both digital services subject to Pillar One and non-digital services that would not.[29] After the change in leadership in the United States in 2020, the Biden administration has renewed the U.S. commitment to bringing domestic policy closer to the Inclusive Framework and new Secretary of the Treasury Janet Yellen has indicated that she is no longer pursuing a safe-harbor regime for Pillar One.[30] Despite some calls from within the United States to expand the scope of Pillar One so that it would apply to more MNEs based outside the country, Secretary Yellen has not advocated for this change in the implementation, and the current U.S. policy is to go forward with Pillar One, even though American companies will face the brunt of its effect.[31] The outsized effect on U.S. companies has created differences of opinion regarding implementation of Pillar One, but outside of the United States that provision is far less controversial, and the discussion instead revolves around Pillar Two.[32]

US Suggests Safe Harbour Regime for OECD Pillar One Proposal, TAX J. (Dec. 11, 2019), https://www.taxjournal.com/articles/us-suggests-safe-harbour-regime-for-oecd-pillar-one-proposal.

[28] Letter from U.S. Sec'y of the Treasury Steven Mnuchin to French Minister of Fin. Bruno Le Maire, Spanish Minister of Fin. María Jesús Montero, Italian Minister of Fin. Roberto Gualtieri and British Chancellor of Exchequer Rishi Sunak (June 12, 2020), https://www.allisonchristians.com/blog/mnuchin-letter-digital-tax.

[29] Tax Notes Talk, *The U.S. Influence on the OECD's Global Tax Reform Plan*, FORBES, at 06:13 (May 14, 2021), https://www.forbes.com/sites/taxnotes/2021/05/18/the-us-influence-on-the-oecds-global-tax-reform-plan/?sh=75a1f65b4bcd. This point was particularly cumbersome for U.S. companies like Disney, who derive income from both digital and non-digital services worldwide, and under the proposed rule, would face the task of determining how much of their income came from services that are covered by the GloBE rules as a precursor to determining whether any top-up tax rules applied to them. *Id.* Instead of simplifying the tax regime, MNEs in Disney's position saw the proposed rules as adding another unwanted layer of complexity. *Id.*

[30] Julie Martin, *US Drops Demand that 'Pillar One' Global Tax Compromise be a Safe Harbor*, MNE TAX, (Feb. 26, 2021), https://mnetax.com/us-drops-demand-that-pillar-one-global-tax-compromise-be-a-safe-harbor-42765.

[31] Daniel Bunn, *Treasury's Latest Pillar 1 Proposal: A Strategy to Split the Riches or Give Away the Store?*, TAX FOUND. (Apr. 14, 2021), https://taxfoundation.org/treasury-pillar-1-proposal/.

[32] *See* Douglas Holtz-Eakin, *Pillar 1, Pillar 2, and U.S. History*, AM. ACTION F. (May 9, 2022), https://www.americanactionforum.org/daily-dish/pillar-1-pillar-2-and-u-s-history/. Mr. Holtz-Eakin's snarky, vaguely hyperbolic (although not unfair) criticism of Pillar One especially highlights the inherent departure adoption of the measure within the U.S. would be from principles of taxation deeply rooted in the Constitution.

The final important element of Pillar One is its scope, which the OECD has initially defined as MNEs with global turnover above €20 billion, with profitability above ten percent.[33] This amount could be expanded at a later date if the implementation of the rules goes smoothly.[34]

B. Pillar Two

Arguably the most significant part of the OECD Inclusive Framework, Pillar Two seeks to implement a global minimum corporate income tax rate.[35] Pillar Two is split between a set of two domestic rules and a treaty-based rule that combine to set the minimum acceptable corporate tax rate at fifteen percent.[36] The two domestic rules (collectively and hereafter referred to as the "Global Anti-Base Erosion (GloBE) Rules") are an Income Inclusion Rule (IIR), and an Undertaxed Payment Rule (UTPR). The IIR allows a parent entity to be taxed on the income of a constituent entity that might be subject to a lower tax rate.[37] The rule functions as a top-up tax; if a parent entity is located in a jurisdiction that applies a tax rate that is lower than the agreed upon minimum, or they allow for deductions that mean that the parent entity's effective tax rate falls below the minimum, then the IIR will apply.[38] The top-up percentage will be equal to the difference between the agreed upon minimum rate and the effective rate paid.[39] This top-up tax will be subject to various modifications and deductions to account for factors like payroll, tangible assets, and the extent that subsidiary entities of a parent pay taxes at an effective rate that exceeds the agreed upon minimum.[40] These carve-outs and exceptions address the potential for a parent

Id. His assertion that "the left supports a global minimum tax because it is the theoretical solution to problems that have not yet arisen in the real world" seemingly ignores the challenges to international taxation posed by the digital economy that are the very impetus for the creation of the OECD Inclusive Framework. *Id.*

33 OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy* 1, 1 (Oct. 8, 2021), [hereinafter *OECD Two Pillar Solution*], 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.

34 *See id*.

35 Alex Bergman, *The OECD Two-Pillar Solution: Pillar Two Highlights and a Discussion of US and EU Reaction*, TRUE PARTNERS CONSULTING (May 2022), https://www.tpctax.com/insights/the-oecd-two-pillar-solution-pillar-two-highlights-and-a-discussion-of-us-and-eu-reaction/.

36 Vikas Vasal et al., *Understanding the Global Implications of Pillar Two Model Rules*, GRANT THORNTON (Jan. 26, 2022), https://www.grantthornton.global/en/insights/articles/understanding-the-global-implications-of-pillar-two-model-rules/.

37 *See* OECD, *The Pillar Two Rules in a Nutshell*, (July 2023) [hereinafter *The Pillar Two Rules in a Nutshell*], https://www.oecd.org/tax/beps/pillar-two-model-rules-in-a-nutshell.pdf.

38 *OECD Two Pillar Solution*, *supra* note 33.

39 *Id.*

40 *Id*.

entity to be subject to over-taxation under the new rules, while ensuring that they cannot use BEPS tactics to erode their tax base.[41] Finally, there is an exclusion for constituent filing entities that are too small; the current threshold is defined as those that make less than €10 million per year.[42]

The second rule is the UTPR, which would deny deductions or require adjustments to the extent that the income of a lower taxed constituent entity is not subject to tax under an IIR.[43] The UTPR is a secondary rule because it can only be calculated and administered after the IIR.[44] The amount of UTPR tax that is owed is equal to the sum of the top-up taxes that would have been assessed against each of the parent entity's constituents in lower taxing jurisdictions.[45] To avoid the problem of double taxation, the UTPR is subsequently reduced to zero for each entity that pays an IIR in their country of residence.[46] Effectively, this means that a country can assess extra taxes against resident MNEs to account for lower tax rates that might be paid by their constituent entities, even if those entities reside in a different country.[47]

The treaty-based rule is called the Subject to Tax Rule (STTR) and it would allow source jurisdictions to withhold tax on certain types of related party payments (for example interest or royalties) when these payments are not subject to a minimum tax rate.[48] The STTR is intended to be narrow in scope and apply to only a small range of related party payments.[49] The rule only covers payments made between related entities that are residents of two or more different states.[50] The test for whether entities are sufficiently related is whether one entity has

41 *See The Pillar Two Rules in a Nutshell*, *supra* note 37.

42 *OECD Two Pillar Solution*, *supra* note 33. The de minimis exclusion exists as a practical matter and not one of policy; inclusion of these entities would place too high a burden on tax collectors and regulatory bodies. *Id*. While the rules could be expanded in the future to include these entities, the initial proposal excludes them to make the rules practicable. *Id*.

43 *Id.*

44 *Id*.

45 *Id*.

46 *Id*.

47 *Id*.

48 *Id*. A version of the model STTR rule permitted the low tax jurisdiction to impose the additional tax that would be due in this situation, rather than let that tax be collected by the jurisdiction in which the parent entity resided. *See* OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS*, ch. 9, (Oct. 14, 2020) [hereinafter *OECD Pillar Two Report*], https://www.oecd-ilibrary.org/sites/c65c7c20-en/index.html?itemId=/content/component/c65c7c20-. This choice encourages low-tax jurisdictions to raise their rates as the ability for other jurisdictions to collect STTR taxes effectively defeats the purpose of being a so called "tax haven." *Id.*

49 *Id.*

50 *Id*.

effective control over the other, or if there is a third entity that has effective control over both.[51] The element of control is important for the STTR to be consistent with the goals of the Inclusive Framework; the element of control ensures that the rule is only affecting payments that could be used as instruments of BEPS.[52] The OECD rules specify that the application of the STTR should be limited to a defined set of payments that are the common instruments of BEPS activities, but the model rule does not set out a definition.[53] The final important characteristic of the STTR is that it should apply only to the payment, and only as a means to allow the country in which the payer resides to bring the tax on the amount of the payment up to the agreed upon minimum rate.[54]

Pillar Two is necessary to prevent the race to the bottom—even if all participating members were able to tax business done anywhere by MNEs residing within their borders, there would still be an incentive to lower corporate income tax rates to entice more business from these MNEs.[55] Because Pillar Two seeks to unify the tax rules amongst various jurisdictions, it is more appealing to some larger countries that will be able to collect more tax revenue as domestic MNEs will no longer have an incentive to shield their profits elsewhere.[56] Even Amazon has indicated some support for Pillar Two as it believes that it will help reduce the vast complexity of the international taxation landscape.[57]

The IIR functions as a top-up tax.[58] If a subsidiary of an MNE is in a jurisdiction where it is subject to a tax rate of less than fifteen percent, then the country where the UPE resides may add the difference to the UPE's tax bill to

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51 *Id*. The rules do make exceptions for certain kinds of entities that are deemed to be beyond the scope of the rules, like investment funds, pension funds, government entities and non-profit organizations. *Id*.

52 *Id*.

53 *Id*.

54 *Id*.

55 OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global AntiBase Erosion Model Rules (Pillar Two)* at 8 (Mar. 11, 2022), https://www.oecd.org/tax/beps/tax-challenges-arising-from-thedigitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two-commentary.pdf. As will be discussed later in this comment, full implementation of Pillar Two does not in itself remove the possibility of a race to the bottom, but it does limit the potential race to the bottom to a specific subset of member nations.

56 Achin Pross, et. al., S*pecial Commentary: Let's Use Balance to Help Make Pillar Two Work*, BLOOMBERG TAX (Aug. 19, 2022, 3:00 AM), https://news.bloombergtax.com/tax-insights-and-commentary/special-commentary-lets-use-balance-to-help-make-pillar-two-work.

57 Mattia Cruz Cano, *Amazon: GloBE proposal must champion simplicity*, INT'L. TAX REV. (Dec. 17, 2019), https://www.internationaltaxreview.com/article/2a6a4npu8glibddcn5beo/amazon-globe-proposal-must-champion-simplicity.

58 *OECD Two Pillar Solution*, *supra* note 33.

ensure that the UPE is paying a minimum of fifteen percent on all of its profits.[59] This rule applies even if the UPE was already subject to a rate of at least fifteen percent in their home country.[60] The UTPR functions as a backstop of the IIR, ensuring that the UPE is not allowed to make any deductions for any top-up tax that is allocated to them from a constituent entity in a lower taxed jurisdiction and not subject to the IIR.[61] The UTPR has a much narrower scope than the IIR, as it will only apply when there is a subsidiary of an MNE that does not qualify for the IIR.[62] The UTPR also functions as a safeguard for a system in which not all countries will adopt the GloBE rules.[63] MNEs that reside in countries that have implemented a version of the IIR will be subject to its mandatory minimum corporate tax rate, and those that reside in countries that have not adopted the rules will have earnings limited by the UTPR.[64]

For example, a large MNE based in Country A makes money from the sales of digital products in Countries B and C. They are taxed at an effective rate of 10% in Country B, so under the GloBE rules the IIR would allow Country A to increase the share of taxes that the company pays to make up for the difference between 15% and the 10% rate paid in Country B. If the company's subsidiary in Country C avoided taxes by reducing their profits to zero through a royalty payment to the parent entity in Country A, the STTR would allow Country C to charge tax only on the amount of the payments made. This example illustrates that the two-pillar solution will create strong incentives for the member countries to fully tax MNEs operating within their borders, as failure to do so will allow foreign governments to claim those tax revenues instead.

The treaty-based aspect of the GloBE rules, the Subject To Tax Rule (STTR), functions to cover another form of BEPS, making certain types of payments like interest and royalties, from a country in which those payments are subject to a normal corporate tax rate to one in which the rate is much lower.[65] The OECD considers the STTR to be essential to achieving consensus on Pillar Two for

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59 *OECD Pillar Two Report*, *supra* note 48, ch. 9.

60 *See* Nirav Shah, *Simplifying the OECD's Pillar 2: A Global Tax Reform*, FINANCIER WORLDWIDE (Nov. 2022), https://www.financierworldwide.com/simplifying-the-oecds-pillar-2-a-global-tax-reform.

61 *OECD Pillar Two Report*, *supra* note 48, ch. 9.

62 *Id*.

63 Steve Wamhoff & Joe Hughes, *Revenue-Raising Proposals in President Biden's Fiscal Year 2023 Budget Plan*, INST. ON TAX'N. AND ECON. POL'Y. (Apr. 26, 2022), https://itep.org/revenue-raising-proposals-in-president-bidens-fiscal-year-2023-budget-plan/.

64 *Id*.

65 *See* Shah, *supra* note 60.

developing countries.[66] The scope of the classes of payments that could be covered by the STTR currently only covers interest and royalties, and although the rules allow it to be expanded based on agreement between the member states, today there is no further guidance on the scope of the rule.[67] One of the primary challenges faced by the STTR is that it must by design be a treaty-based rule.[68]

The STTR is one of the most important aspects of the GloBE rules for the developing world, primarily because the proposed fifteen percent minimum rule will have limited applicability to many developing nations, which often have corporate tax rates that exceed twenty-five percent.[69] For these nations, the appealing aspect of the STTR is that it might allow them to subject some payments made within companies to taxation.[70] This would work to combat some of the means of base erosion or profit sharing that involve transferring funds within a company but across country lines to shift their income towards a jurisdiction that has more favorable tax rates.[71] While this rule is important for developing nations to ensure that they have a means to address some of the most prevalent BEPS strategies employed by companies doing business within their borders, the potential for the STTR to disincentivize foreign investment, in addition to the requirement that it be implemented through creating or amending treaties, poses a significant roadblock to its implementation.[72]

There are several challenges towards implementation of the GloBE rules, the first of which is that they present a mixture of domestic and international reforms.[73] The effect of this is that some aspects of the rules can be implemented through domestic policy changes, while others will require international agreements either in the form of amendments to existing treaties or the formation of new ones.[74] The IIR is easier to implement, as it is a purely domestic rule,

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66 *OECD Pillar Two Report*, *supra* note 48; Arijit Ghosh and Ipsita Agarwalla, *OECD Two-Pillar Solution: A Light at the End of Tunnel?*, THE NAT'L. L. REV., (Oct. 17, 2022), https://www.natlawreview.com/article/technology-tax-series-issue-xii.

67 Ghosh & Agarwalla, *supra* note 66.

68 *See OECD Pillar Two Report*, *supra* note 48.

69 *See* Kevin Pinner, *Tax Deal's Shaky Future Leaves Many Nations at Crossroads*, LAW360 TAX AUTH., (Aug. 30, 2022), https://www.law360.com/tax-authority/articles/1524693.

70 *OECD Pillar Two Report*, *supra* note 48.

71 Pinner, *supra* note 69.

72 *See id*.

73 *See OECD Two Pillar Report*, *supra* note 48.

74 *See, e.g.*, Takato Masuda, *How Japan's Implementation May Change the Pillar 2 Debate*, LAW360 TAX AUTH. (Dec. 20, 2022), https://www.law360.com/articles/1560193/how-japan-s-implementation-may-change-the-pillar-2-debate; *see also* Todd Buell, *US Likely to OK Pillar 2 If Europe Does, Saint-Amans Says*, LAW360 TAX AUTH. (June 13, 2022), https://www.law360.com/tax-authority/articles/1499603.

allowing taxation of domestic parent entities whose subsidiaries' profits come from lower taxed jurisdictions.[75] The UTPR is more difficult, as unilateral domestic efforts to implement a UTPR will involve imposing taxes on domestic subsidiaries whose parent resides in a country that has not adopted the rules.[76] In the case where a UTPR imposes taxes on a subsidiary that legally transfers its money to a parent entity that does not reside in the taxing country, the taxing country would be directly taxing revenue of a foreign corporation, which would be a challenge to international tax norms.[77] In fact, even if a country were to impose a unilateral UTPR, it might be difficult for individuals to challenge it in courts.[78] This is a design feature, rather than a flow of the UTPR, as its mere existence serves as a means of encouraging countries to join the OECD inclusive framework, as states that decline to raise their corporate tax rate to the global standard might still see companies in their borders pay increased taxes, but to a foreign government.[79]

II. THE UNITED STATES TAX REGIME

Prior to the tax reforms of the Trump administration, the U.S. system contained a myriad of misaligned incentives that seemed to tax MNEs on their profits made overseas, but in reality encouraged the type of BEPS actions that the OECD Inclusive Framework sought to combat.[80] U.S. companies were taxed only on overseas profits that were repatriated, which meant that by leaving these profits overseas, companies could avoid paying taxes on them in the United States entirely.[81] The digital economy exacerbated this challenge because it became easy for MNEs to create and maintain products almost entirely in the United States while earning profits on them in other countries.[82] These profits

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75 *See OECD Pillar Two Report*, *supra* note 48.

76 Todd Buell, *Backstop Rule Breaks Tax Norm, May Unleash Legal Fights*, LAW360 TAX AUTH. (Jan. 11, 2023), https://www.law360.com/tax-authority/articles/1564677.

77 *Id.*

78 *See id.* (quoting Heydon Wardell-Burrus) ("For most taxpayers, winning a case against the imposition of the UTPR by a single jurisdiction would be winning the battle but losing the war . . . The relevant top-up tax for subsequent years would simply be reallocated to other jurisdictions which can impose the UTPR."). *Id*.

79 Buell, *supra* note 76. This form of "encouragement" is much more of a stick than a carrot, but if the goal is to completely overhaul the existing system of international taxation, then a stick may function as a more expedient tool to get the process underway.

80 Kyle Pomerleau, *A Hybrid Approach: The Treatment of Foreign Profits under the Tax Cuts and Jobs Act*, THE TAX FOUND. (May 3, 2018), https://taxfoundation.org/research/all/federal/treatment-foreign-profits-tax-cuts-jobs-act/.

81 *Id.*

82 *Id*.

could then be transferred to jurisdictions with the most favorable tax rate, effectively minimizing the total tax burden these companies faced.[83]

A. The Trump Administration

Since the United States agreed to participate in the development of the OECD Inclusive Framework, the first reform intended to bring U.S. tax policy in line with the proposal was the Tax Cuts and Jobs Act of 2017.[84] The Global Intangible Low-Tax Income (GILTI) was the main provision in that act designed to implement Pillar Two of the Inclusive Framework.[85] The most significant features of the GILTI tax are: 1) a 21% standard rate, reduced by a 50% earning deduction, and 2) an exclusion of 10% for return on foreign tangible assets.[86] Once the 50% reduction is applied to the statutory rate, MNEs were paying taxes at a 10.5% rate, more than nothing, but not quite the 15% rate that the OECD minimum tax set out. GILTI also forced companies to consider all of their foreign profits, losses and tax credits as a whole before applying the tax rate.[87] This feature of the GILTI rules renders them ineffective at combating BEPS. Aggregating all foreign profits and losses rather than treating them on a country-by-country basis allows MNEs to blend income from both high and low-tax countries.[88] Because the Trump era rules allowed MNEs to gain tax credits for paying foreign tax, the GILTI rules allowed companies to offset their "minimum" tax rate with any foreign taxes.[89]

GILTI was the first U.S. policy that taxed foreign subsidiaries of MNEs in the form of a top-up tax.[90] In theory, top-up taxes like this do encourage countries around the world to raise their corporate tax rates by removing the

83 *Id.*

84 Act of Aug. 16, 2022, Pub. L. No. 117–169, 136 Stat. 1818.

85 *Id*.

86 *See generally* Thornton Matheson, *OECD Pillar 2 Provides A Good Model for Biden US Worldwide Tax*, TAX POL'Y. CTR. (Mar. 19, 2021), https://www.taxpolicycenter.org/taxvox/oecd-pillar-2-provies-good-model-biden-us-worldwide-tax.

87 *See generally id*.

88 Press Release, U.S. Department of the Treasury, Remarks by Assistant Secretary for Tax Policy Lily Batchelder on Global Corporate Tax at the Hutchins Center at Brookings Institute and the Urban-Brookings Tax Policy Center (April 15, 2022) (on file with the U.S. Department of the Treasury) [hereinafter U.S. Dep't of the Treas. Press Release].

89 Matheson, *supra* note 86.

90 Lilian Faulhaber, Professor of L. & Assoc. Dean for Rsch. & Acad. Programs, Georgetown Univ., Global Corporate Tax Reform: Why It's Important and What It Will Do (and Not Do), Remarks at Webinar Event Hosted by the Brookings Institution, (Apr. 15, 2022), https://www.brookings.edu/wp-content/uploads/2022/03/ES_20220415_Global_Tax_transcript-1.pdf.

competitive advantage offered by having a low tax rate.[91] If a country has a corporate tax rate of 8%, an American MNE would still be forced to pay the 2.5% difference between that and the GILTI rate in the form of a top up tax.[92] While GILTI still contained carve outs that offered incentives for moving tangible assets outside of the country or hiring workers in other countries, the concern that the tax was designed to address was the ease with which MNEs can shift their digital assets, which are often more profitable than tangible ones.[93] Because one of the elements of Pillar Two is a top up tax, the OECD has acknowledged that there is potential that the framing of Pillar Two should consider the possibility that the rules will have to co-exist with the GILTI regime in the United States.[94]

B. The Biden Administration

President Biden's first foray into bringing the United States into line with the OECD Inclusive Framework came with the Inflation Reduction Act of 2022.[95] The core proposition of this act was to impose an Alternative Minimum Tax (AMT) of fifteen percent of the average annual adjusted financial statement income of domestic corporations that exceeds $1 billion over a three-year period.[96] The Inflation Reduction Act was facially an attempt to bring the U.S. tax policy in line with the fifteen percent proposal from Pillar Two of the Inclusive Framework.[97] This makes the United States the first country that is a part of the Inclusive Framework to impose a formal minimum tax on overseas earnings.[98] The key change in how the tax is enforced as compared to GILTI is that it bases the taxable amount on a company's book profits, those reported on

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91 *Id*.

92 *Id.*

93 Vikas Vasal et al., *Understanding the Global Implications of Pillar Two Model Rules*, GRANT THORNTON INT'L. (Jan. 26, 2022), https://www.grantthornton.global/en/insights/articles/understanding-the-global-implications-of-pillar-two-model-rules/.

94 *See OECD Two Pillar Solution*, *supra* note 33. The decision to account for the U.S. existing tax regime while making no other accommodations for the regimes of other participating countries is likely due to the importance of making the rules compatible with the American system. Because most of the MNEs that will fall within the scope of the rules are based in the U.S., it is essential to make sure that the rules can function alongside the ones currently in place in the U.S.

95 Act of Aug. 16, 2022, *supra* note 84.

96 J.D. Haliton, et al., *Inflation Reduction Act Includes 15% Corporate Minimum Tax on Book Income*, THE TAX ADVISOR (Jan. 1, 2023), https://www.thetaxadviser.com/issues/2023/jan/inflation-reduction-act-includes-15-percent-corporate-minimum-tax-on-book-income.html.

97 U.S. Dep't of the Treas. Press Release, *supra* note 88.

98 *Id.*

the MNE's financial books.[99] This is a significant change because many of the workarounds that previously allowed corporations to reduce their tax burden in the United States involved letting them report income that was much lower than their book income.[100] Corporations formerly enjoyed the ability to report lower income to the government for tax purposes but higher income to investors to make the company look more attractive.[101]

The Inflation Reduction Act was facially an attempt to bring the U.S. tax policy in line with the fifteen percent proposal from Pillar Two of the Inclusive Framework.[102] This makes the U.S. the first country that is a part of the Inclusive Framework to impose a formal minimum tax on overseas earnings.[103] The fifteen percent rate is not absolute, however, and there are still exceptions and carve outs for things like accelerated depreciation or foreign tax credits that might allow U.S. based enterprises to reduce their tax burden below the minimum.[104]

The scope of the new AMT is slightly narrower than the scope of the OECD's GloBE rules; it only applies to companies with average annual global incomes of over $1 billion, over a three-year period, compared with the threshold of €750 million under the proposed rules for Pillar Two.[105] The Senate Joint Committee on Taxation estimates that the new taxes would apply to roughly 150 companies in the United States[106] While the scope of the AMT differs slightly in terms of the revenue threshold for the tax to be applicable, the most significant departure from the OECD proposed rules for Pillar Two is that the Inflation Reduction Act's minimum tax is still applied on a global basis and not country-by-country.[107] This key difference means that MNEs are still able to benefit from

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99 Dylan Moroses, *Biden's Corp. Book Tax, Global Plan Diverge on Biz Incentives*, LAW360 TAX AUTH. (Apr. 27, 2022, 5:29 PM), https://www.law360.com/tax-authority/articles/1487887/biden-s-corp-book-tax-global-plan-diverge-on-biz-incentives.

100 Steve Wamhoff, *Unfinished Tax Reform: Corporate Minimum Taxes*, INST. TAX & ECON. POL'Y. (Oct. 4, 2022), https://itep.org/unfinished-tax-reform-corporate-minimum-taxes/#_ednref8.

101 *Id*.

102 U.S. Dep't of the Treas. Press Release, *supra* note 88.

103 *Id*.

104 *See* Matthew Gardner & Steve Wamhoff, *Depreciation Breaks Have Saved 20 Major Corporations $26.5 Billion Over Past Two Years*, INST. TAX & ECON. POL'Y, (June 2, 2022), https://itep.org/depreciation-breaks-have-saved-20-major-corporations-26-5-billion-over-past-two-years/; *see also* Wamhoff, *supra* note 100.

105 Moroses, *supra* note 99.

106 Letter from Thomas A. Barthold, Chief of Staff for the Joint Comm. on Tax'n, Cong. of the U.S., to Senator Ron Wyden, Senate Fin. Comm. Chairman, Congress of the U.S. (Aug. 1, 2022) https://www.finance.senate.gov/imo/media/doc/CAMT%20JCT%20Data.pdf.

107 Wamhoff, *supra* note 100.

shifting profits to lower-taxed jurisdictions, as they can be balanced with profits that remain in higher tax jurisdictions.[108] In this way, the Inflation Reduction Act rule fails to dissuade BEPS. Instead, it merely ensures that MNEs will be paying more taxes in the United States.

One key aspect of Pillar Two that is left out of the Inflation Reduction Act is a version of the UTPR, although the Biden administration's latest budget proposal for the 2023 fiscal year includes adding the UTPR to the U.S. tax code.[109] Details remain murky as to how the proposed UTPR rule would interact with the AMT of fifteen percent; the measure still allows MNEs to take deductions for items like tax credits paid in foreign countries, while the UTPR limits such deductions to the extent that they are derived from interest or royalty payments.[110] For their part in the debate, Congressional Republicans have argued that the Executive Branch does not have the authority to agree to implement Pillar Two because the UTPR provision is in conflict with existing treaties.[111] This comes after a different letter from Congressional Republicans last year warned of the potential negative impacts that implementation of the rules might have on U.S. based businesses.[112]

III. FRANCE AND THE DIGITAL SERVICES TAX

Initially, as a response to the rise of the digital economy, the European Union called for a multilateral agreement to address the shortcomings of the international taxation regime, and proposed to use DSTs as a temporary measure to make sure that member states of the European Union were not left without means to tax this new stream of revenue.[113] The intention of the European Commission with this statement was for the measures to be temporary, while the world convened to discuss a more permanent solution.[114] The advantage of using DSTs is they can be specifically tailored towards certain types of online

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108 *Id*.

109 Dylan Moroses, *Biden Budget's Int'l Tax Tweaks May Muddy US Pillar 2 Plan*, LAW360 TAX AUTH. (Apr. 14, 2022), https://www.law360.com/tax-authority/articles/1484166/biden-budget-s-int-l-tax-tweaks-may-muddy-us-pillar-2-plan.

110 *OECD Pillar Two Report*, *supra* note 48.

111 Theresa Schliep, *Global Min. Tax Violates Treaties, GOP Lawmakers Say*, LAW360 TAX AUTH. (Dec. 15, 2022), https://www.law360.com/tax-authority/articles/1558691.

112 Dylan Moroses, *GOP Sens. Press Yellen For Info On Pillar 2's Biz Impact*, LAW360 TAX AUTH. (Feb 17, 2022), https://www.law360.com/tax-authority/articles/1466204.

113 *See* European Commission Press Release IP/18/2041, Digital Taxation: Commission Proposes New Measure to Ensure that All Companies Pay Fair Tax in the EU (Mar. 21, 2018).

114 *Id*.

transactions, for example digital stock purchases, or applied broadly to all online activity.[115] This action preceded the 2020 OECD BEPS Inclusive Framework, but given that none of the discussions included in the framework are binding on any of the member states, many states within the European Union continue to use DSTs, which kick in at various revenue thresholds.[116]

France, in particular, made their three percent DST permanent in 2019.[117] At the time, French Finance and Economy Minister Bruno Le Maire acknowledged that the tax was not in accordance with the OECD recommendations but argued that it was necessary until a multi-lateral international treaty could be ratified with a more permanent solution.[118] Le Maire expressed interest in creating a lasting international solution but made clear that the tax was made unilaterally, and without consideration for potential actions of other European Union member states.[119] DSTs are unilateral measures, designed solely to allow the countries implementing them to extract some revenue from the profits of digital service providers within their borders.[120]

The French DST was highly controversial in the United States, with many congressional Republicans arguing that it specifically targeted U.S.-based MNEs.[121] In response to the measure, the U.S. Trade Representative conducted an investigation of the tax that concluded that the tax was inconsistent with established principles of international taxation, and was applied in a way that was unfair to American companies.[122] One study estimated that of all the companies that would be subject to French DSTs, only one was not based in the

115 Gordon Gray & Jennifer Huddleston, *Digital Services Taxes: A Primer*, AMERICAN ACTION FORUM (Mar. 25, 2021), https://www.americanactionforum.org/insight/digital-services-taxes-a-primer/.

116 Harpaz, *supra* note 3, at 58–59.

117 MINISTERE DE L'ECONOMIE ET DES FINANCES [MINISTRY OF ECON. & FIN.], PROJECT DE LOI RELATIVE A LA TAXATION DES GRANDES ENTREPRISES DU NUMERIQUE [BILL RELATING TO THE TAXATION OF LARGE DIGITAL COMPANIES], (Mar. 6, 2019), https://src.bna.com/F9D.

118 Hamza Ali, *France Takes a Step Close to Making 3 Percent Digital Tax Law*, BLOOMBERG TAX (Apr. 10, 2019), https://news.bloombergtax.com/daily-tax-report-international/france-takes-a-step-closer-to-making-3-percent-digital-tax-law.

119 *See* Isabel Gottlieb, *France Defends Digital Tax Effort, Promises to Work with U.S.*, BLOOMBERG TAX (Apr. 8, 2019), https://news.bloombergtax.com/daily-tax-report-international/france-defends-digital-tax-effort-promises-to-work-with-u-s.

120 Mason, *supra* note 9.

121 *See* Isabel Gottlieb, *Republican Lawmakers Seek U.S. Response to French Digital Tax*, BLOOMBERG TAX (Apr. 3, 2019), https://news.bloombergtax.com/daily-tax-report-international/republican-lawmakers-seek-u-s-response-to-french-digital-tax.

122 U.S. TRADE REPRESENTATIVE, REPORT ON FRANCE'S DIGITAL SERVICES TAX PREPARED IN THE INVESTIGATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, 1 (2019), www.ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf

United States.[123] Importantly, the U.S. Trade Representative report also concluded that the feature of the DST that taxed companies based on revenue was a violation of the U.S.-France Tax Treaty.[124] DSTs like France's are problematic because they are direct taxes on foreign profits.[125] If a U.S. MNE derives profits solely from online traffic of French customers, that profit would be realized by the American entity, which would then have to pay both statutory corporate income tax in the United States and DST in France on the same income.[126] This particular example shows how strong the possibility is that DSTs will impose double taxation on foreign MNEs. It also reveals why the DST model is of particular concern to the OECD, the United States, and MNEs; if the practice of DSTs were to become widespread, it could result in near universal double taxation of revenue for digital service providers.

Pillar One requires that member states get rid of their DSTs to avoid this potential for widespread double taxation.[127] DSTs are incompatible with the stated goals of the Inclusive Framework; they are expressly domestic actions that, although affecting international taxation rules, do not allow for coordination between countries.[128]

IV. What About the Rest of the World

As two of the early movers with respect to concrete policy changes, the United States and France have been leading the conversation around implementation of the Inclusive Framework, and European Union member states working towards a solid agreement on the implementation of Pillar Two have thus far been stymied by the requirement that changes to their tax law require unanimous consent.[129] Near the end of 2021, the European Commission proposed a set of rules that would have implemented a tax regime almost identical to the OECD GloBE rules and that was scheduled to be effective at the

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123 Gary Clyde Hufbauer & Zhiyao (Lucy) Lu, *The EU's Proposed Digital Services Tax: A De Facto Tariff*, PB18-15 PETERSON INST. FOR INT'L ECON. 2, 7 (2018).

124 U.S. TRADE REPRESENTATIVE, *supra* note 122, at 3–4.

125 *See* Harpaz, *supra* note 3, at 83–84.

126 *Id*.

127 *OECD Inclusive Framework*, *supra* note 10.

128 *See* Harpaz, *supra* note 3, at 85.

129 *See* Todd Buell, *EU's Stalled Pillar 2 Tax Holds Up Global Adoption*, LAW360 TAX AUTH. (Oct. 4, 2022), [hereinafter *EU's Stalled Pillar 2*], https://www.law360.com/tax-authority/articles/1537082/eu-s-stalled-pillar-2-tax-holds-up-global-adoption.

beginning of 2023.[130] Only two countries have objected to the proposed rules, Poland and Hungary, with the former withdrawing their objection in early 2022, leaving only a single hurdle for the European Commission to clear before it can move forward with implementation.[131] The Hungarian Finance Minister, Mihály Varga, has cited various concerns, including inflation, the war in Ukraine, and reluctance to move on the measure before a reciprocal one is passed in the United States, as reasons for opposing the minimum tax measure.[132] Seemingly impatient with the unanimity requirement, several countries within the European Union have indicated that they will pursue unilateral measures if an agreement cannot be reached.[133] The then Spanish Economy Minister, Nadia Calviño, has indicated interest in pursuing enhanced cooperation as a means to pass the reform.[134] Outside of the European Union, the United Kingdom, South Korea, and Malaysia have all committed to implementing the GloBE Model Rules.[135]

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[130] Todd Buell, *EU Wants Swift Agreement on Minimum Tax Law*, LAW360 TAX AUTH. (Dec. 22, 2022), https://www.law360.com/tax-authority/articles/1451041.

[131] *See EU's Stalled Pillar 2*, *supra* note 129. Mr. Buell notes that there has been speculation that both Poland and Hungary's motive for objecting is to try to get more funding from the European Union. *Id.* Both Polish and European Commission officials have denied that link, although Poland did consent to the rules soon after the European Union issued it more funds. *Id.* This comment will refrain from speculation regarding the true motives of either party involved.

[132] *See* Todd Buell, *Hungary Blocks EU Minimum Tax, Citing War, Inflation*, LAW360 TAX AUTH. (June 17, 2022) [hereinafter *Hungary Blocks EU Minimum Tax*], https://www.law360.com/tax-authority/articles/1503893. Mr. Buell notes that Hungary had previously expressed support for the minimum tax. *Id.* Critics of Hungary have insinuated that their objection is a play to get more pandemic recovery funds from the European Union, but unlike the similar situation last year in Poland, the European Union is not willing to release more funding due to European Commission displeasure with Hungarian Prime Minister Viktor Orbán. *Id.* Again, this comment will not delve into the veracity of these claims.

[133] Todd Buell, *Dutch Gov't Resistant to EU Nations Going It Alone on Pillar 2*, LAW360 TAX AUTH. (Oct. 13, 2022), https://www.law360.com/tax-authority/articles/1539495/dutch-gov-t-resistant-to-eu-nations-going-it-alone-on-pillar-2.

[134] Todd Buell, *EU Still Has No Unanimity on Pillar 2, Spanish Minister Says*, LAW360 TAX AUTH. (Nov. 28, 2022), https://www.law360.com/tax-authority/articles/1552649. Enhanced cooperation is a rarely used policy within in the European Union where a smaller group of member states can adopt a policy where the body as a whole fails to reach an agreement. *Id.* It would be unprecedented for it to be used for corporate taxation, but it has been considered for transactional taxes in the past. *See, e.g.*, European Commission Press Release IP/11/1085, Financial Transactional Tax under Enhanced Cooperation: Commission Sets Out Details (Feb. 14, 2013).

[135] Luis Coronado & Matt Andrew, *BEPS 2.0 Implementation Continues to Vex Multilateral Policymakers*, INT'L TAX REV. (Sept. 22, 2022), https://www.internationaltaxreview.com/article/2anlcu96gkcjpusftw64g/sponsored/beps-2-0-implementation-continues-to-vex-multilateral-policymakers.

A. Japan

Japan has passed a law that will implement the IIR aspect of Pillar Two, set to go into effect in 2024, but it has delayed their implementation of the UTPR due to concerns regarding whether it can be done without an international agreement.[136] Japan's bill would put the minimum corporate tax rate into effect for corporations that grossed more than €750 million in at least two of the past four financial years—text that mirrors the requirements of Amount A of the OECD model rules.[137] Japan's current effective corporate tax rate is 29.74%, which is far in excess of the 15% effective minimum required by the OECD rules.[138] The process of implementation in Japan is very similar to the process in many similarly situated countries; they are willing to implement the rules but are waiting for negotiations to finish between the largest countries before they fully implement the rules.[139]

B. Nigeria

Nigeria has opted out of support of the OECD GloBE rules after the publication of the detailed Two-Pillar plan.[140] However, they object to the Inclusive Framework for reasons that differ greatly from European holdouts.[141] In contrast to the European opposition to Pillar Two, the implementation of Pillar One is the sticking point for Nigeria and several other states that are not western economic superpowers.[142] The problem with Pillar One for Nigeria is that the scope is too narrow to justify what they are being asked to give up.[143] Pillar One currently only targets MNEs with over €20 billion in global revenue and ten percent profitability, which means that it excludes almost all of the

[136] Masuda, *supra* note 74.
[137] Kevin Pinner, *Japan Releases 15% Global Minimum Tax Bill*, LAW360 TAX AUTH. (Feb. 6, 2023), https://www.law360.com/tax-authority/articles/1573207/japan-releases-15-global-minimum-tax-bill.
[138] *Id.*
[139] *See e.g.*, Kevin Pinner, *Nearly 50 Jurisdictions Moving on Global Minimum Tax*, LAW360 TAX AUTH. (Feb. 15, 2023) [hereinafter *Jurisdictions Moving on Global Minimum Tax*], https://www.law360.com/tax-authority/articles/1567687/nearly-50-jurisdictions-moving-on-global-minimum-tax.
[140] Ndubuisi Francis, *Nigeria Opts Out of Global Tax Deal, Cites Economic Impact*, THISDAY (Apr. 20, 2022), https://www.thisdaylive.com/index.php/2022/04/20/nigeria-opts-out-of-global-tax-deal-cites-economic-impact#.
[141] *Id*.
[142] *See* Leanna Reeves, *Opinion: Why Global Consensus on Pillars One and Two Is Unrealistic*, INT'L. TAX REV. (Oct. 13, 2022), [hereinafter *Global Consensus Is Unrealistic*], https://www.internationaltaxreview.com/article/2aqxwn0gppdydld96n18g/opinion-why-global-consensus-on-pillar-one-and-two-is-unrealistic.
[143] *See id.*

enterprises that generate revenue through the digital economy in Nigeria.[144] Because the bulk of the benefit that comes from Pillar One is tied to the associated reallocation of their profits for taxation purposes, countries like Nigeria are wary of signing on to the proposal before they know what their share of the allocation will be.[145] Currently, Nigeria imposes a DST to gain some tax revenue from digital profits derived within its borders, and because Pillar One would require it and similarly situated countries to immediately suspend their DSTs, the question of whether the benefits outweigh the costs is a real one.[146] The stakes for Nigeria and other developing countries in modifying the GloBE rules to work for their economies are high; unilateral DSTs currently bring in revenue, but they may also be discouraging direct investment in Nigeria from MNEs.[147]

The concerns of Nigeria with regards to Pillar Two are existential rather than practical as the country already has a corporate tax rate of thirty percent.[148] In fact, many developing countries have corporate income tax rates in excess of twenty-five percent, so the concern is not that they would have to raise their rates to be competitive but rather that neighbors would be incentivized to lower their rates to the minimum to attract valuable foreign investments.[149] The fifteen percent income tax floor would also do nothing to reduce the incentive for MNEs to shift their profits out of countries that have corporate tax rates that are typical

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[144] *See* Leanna Reeves, *IBFD Interview: Why Developing Countries Want More from BEPS Rules*, INT'L. TAX REV. (Oct. 6, 2022) [hereinafter *IBFD Interview*], https://www.internationaltaxreview.com/article/2apustxnc6gutamxu8lc0/ibfd-interview-why-developing-countries-want-more-from-beps-rules.

[145] *See id.*

[146] Kevin Pinner, *Nigeria Can't Back Current OECD Pillar One, Delegate Says*, LAW360 TAX AUTH. (Aug. 12, 2021, 5:00 PM) [hereinafter *Nigeria Can't Back Current OECD Pillar One*], https://www.law360.com/tax-authority/articles/1411999; Barbara Mbaebie & Atinuke Oseni, *Nigeria: A Nation Without 'Pillars': Nigeria's Rejection Of The OECD's Two-Pillar Solution*, MONDAQ (Sept. 29, 2022), https://www.mondaq.com/nigeria/tax-authorities/1234860/a-nation-without-pillars39-nigeria39s-rejection-of-the-oecd39s-two-pillar-solution; *OECD Two Pillar Solution*, *supra* note 33. The current rate for the DST in Nigeria is 7.5 percent, which is up from the previous rate of five percent instituted in 2020. *Jurisdictions Moving on Global Minimum Tax*, *supra* note 139. Nigeria derives roughly half of its annual tax revenue from corporate income tax, so the stakes for getting tax reform on its government are high. *Id.*; *see* Mbaebie & Oseni, *supra* note 146.

[147] Mbaebie & Oseni, *supra* note 146. Recall that one of the features of DSTs that make them so onerous for MNEs is the high potential for profits to be subject to double taxation. *See* Harpaz, *supra* note 3, at 83–84. While Nigeria does not believe that the proposed Pillar One rules would be economically beneficial, the long-term economic effects of the unilateral approach may wind up being equally unsavory. Mbaebie & Oseni, *supra* note 146.

[148] *See Global Consensus Is Unrealistic*, *supra* note 142.

[149] *See IBFD Interview*, *supra* note 144.

of developing nations and into developed countries whose fifteen percent minimum rate would function as a tax haven when compared to the Nigerian rate.[150] In fact, setting the global minimum tax rate at fifteen percent might create a race to the bottom where countries that have corporate tax rates in excess of twenty-five percent will be incentivized to lower their tax rates in order to be more competitive and attract more business.[151] There are also valid concerns that implementation of Pillar Two before a treaty-based STTR rule has been implemented could initially lead to more taxable profit being shifted out of developing nations before rules that will allow them to tax those profits are put in place.[152]

While the top-up tax provisions in Pillar Two are effective in bringing all taxpaying entities up to the same rate, one of the side effects of this rule is that it may limit some countries from being able to incentivize actions through beneficial tax treatment.[153] In effect, the only way for these countries to keep these incentives intact would be to raise their corporate rate above the fifteen percent minimum and allow the incentives to reduce it back only to this fifteen percent minimum.

It is clear to officials in many developing countries that the OECD rules have been developed primarily by representatives of the G20 and the developed world, and while the rules might apply well in those countries, in the developing world they would either do little to help or in some cases have a severe negative impact.[154] Matthew Gbonjubola, a Nigerian delegate to the OECD, has lamented that the original proposal in 2013 seemed to present reform that would have been workable for Nigeria, but the changes implemented in the GloBE rules contain details that could never be signed on to by developing nations.[155] The African Tax Administration Forum (ATAF) has proposed tweaks to the Inclusive Framework that might make it more appealing to developing nations.[156] With regards to Pillar One, the ATAF concludes that the scope needs to be widened

[150] *A New Era of International Taxation Rules – What Does This Mean for Africa?*, AFR. TAX ADMIN. F. (Oct. 8, 2021) [hereinafter AFR. TAX ADMIN. F.], https://www.ataftax.org/a-new-era-of-international-taxation-rules-what-does-this-mean-for-africa.

[151] *See* Eli Flesch, *Africa Group Warns About Global Min. Tax For Mining Countries*, LAW360 TAX AUTH. (Apr. 8, 2021, 7:09 PM), https://www.law360.com/tax-authority/articles/1373490.

[152] *See generally id*.

[153] Natalie Olivo, *Pillar 2 May Spark Shifts In Latin America Incentives, Attys Say*, LAW360 TAX AUTH. (June 16, 2022, 9:31 PM), https://www.law360.com/tax-authority/articles/1503770.

[154] *See Global Consensus Is Unrealistic*, *supra* note 142.

[155] *See Nigeria Can't Back Current OECD Pillar One*, *supra* note 146.

[156] AFR. TAX ADMIN. F., *supra* note 150.

to ensure that it makes sense for African nations; this includes adding new thresholds for MNE subsidiaries that operate in countries with lower GDPs.[157] With regards to Pillar Two, the ATAF recommendation is simple: swap the priority order so that the UTPR or STTR would take priority over the IIR.[158] This change is important because, as the rules are currently written, the country where the MNE is domiciled (often the United States) will have first choice of collecting additional top-up taxes.[159] They also propose that the scope of the STTR be expanded to include service payments to address one of the common means of engaging in BEPS in Africa.[160] Finally, ATAF has requested that the minimum tax rate be increased to twenty percent, arguing that is the minimum value that would eliminate the incentive to shift profits out of African jurisdictions that typically have higher corporate tax rates.[161]

For their part, Nigeria has taken on the responsibility of beginning a discussion of a multi-lateral tax treaty that reflects the goals of all member states, not just the members of the G20.[162] Nigeria, on behalf of the members of the African Group at the United Nations, has proposed a convention on international tax cooperation.[163] A United Nations convention does not necessarily guarantee that the goals of developing nations will be given any higher weight than they are at the OECD, but the shortcomings of the GloBE rules from the perspective of Nigeria have led them to pursue another venue.[164]

V. EXAMPLES: INTERNATIONAL TAX AND GLOBE RULES IN ACTION

The following examples will illustrate how the current proposed GloBE rules would apply and how they create a system that is different from the current international taxation regime:

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157 *Id*.

158 *Id.*

159 Julie McCarthy, *The New Global Tax Deal is Bad for Development*, BROOKINGS INST. (May 16, 2022), https://www.brookings.edu/blog/future-development/2022/05/16/the-new-global-tax-deal-is-bad-for-development/.

160 AFR. TAX ADMIN. F., *supra* note 150.

161 *Id.*

162 Matthew Guerry, *Nigeria Proposes UN Tax Convention*, LAW360 TAX AUTH. (Oct. 14, 2022, 6:25 PM), https://www.law360.com/tax-authority/articles/1540072/nigeria-proposes-un-tax-convention-.

163 U.N. G.A., Draft Resolution on the United Nations Convention on International Tax Cooperation, U.N. Doc. A/C.2/77/L.11 (Oct. 10, 2022).

164 Spencer Woodman, *Global Tax Proposal Gains Ground at UN as OECD Plan Falters*, ICIJ (Oct. 18, 2022), https://www.icij.org/investigations/paradise-papers/global-tax-proposal-gains-ground-at-un-as-oecd-plan-falters/.

Example A: Pear Technology, an international technology firm based in the United States, has global revenue of $2 billion and makes $100 million in profit from Country A. Under the GloBE rules, Pear will have to pay taxes in Country A regardless of the amount of tax paid in any other country.

Example B: Still consider Pear Technology, with global revenue of $2 billion, but only $30 million in revenue from Country B. Under the GloBE rules, Pear will not have to pay taxes in Country B on any of the profit because it does not meet the threshold requirement of $75 million.

Example C: Nile River, an online retailer and marketplace, makes global revenue of $600 million but only $30 million in revenue from Country C. Nile River will not have to pay taxes in Country C because it meets neither the global revenue threshold nor the individual threshold requirement.

Example D: Still consider Nile River, with global revenue of $600 million, but with $100 million in revenue from Country D. Nile River will not have to pay taxes in Country D despite meeting the individual country requirement because its total global revenue falls below the threshold.

Example E: Drillcorp, a mining company based in South Africa, has global revenue of $1 billion and revenue of $100 million in Country E. Under the GloBE rules, Drillcorp would not be subject to the global minimum tax due to the limited scope of the proposed rules.

Example F: Back to Pear Technology, the American technology firm with global revenue of $2 billion. This time Pear makes $100 million in revenue in the United States, $100 million in revenue in France, and $100 million in Country F. Pear will have to consider its tax burden in each country individually and how they might interact with each other. For example, for profit from sales of digital services in France, Pear will owe a DST in France. Because of the way the current American corporate tax structure works, they will be able to deduct any taxes paid in foreign countries from their taxable income in the United States. Pear will need to separately consider the tax rules from Country F to see if there are deductions they can take for foreign taxes paid. This system is confusing and complicated because Pear will have to consider each country's tax system separately, and determine which taxes to pay first in order to maximize their possible deductions.

Example G: Consider the same situation as Example F. Pear Technology has global revenue of $2 billion and revenues of $100 million in each of the United

States, France, and Country F. This time the new Inflation Reduction Act tax regime is in place in the United States. Pear will first have to consider their tax burden in both France and Country F, and deduct any foreign taxes paid from their taxable income in the United States. This time, Pear will have to pay an alternative minimum of fifteen percent in the United States regardless of the total amount of deductions it is entitled to.

Some of these examples illustrate the varied, and potentially undesirable, results of different international taxation schemes. Examples F and G each describe the way international taxation currently works. The complexity and lack of predictability of the system for both the companies paying taxes and countries collecting them shows the need for a new, less complex system. It should be noted that Example G opens up the possibility that a company will be taxed twice on the same income, once when they pay taxes in a foreign jurisdiction, and then again in the United States when the alternative minimum tax might include income for which the company has already paid tax in a foreign country.

Examples A through D provide a brief illustration of how the proposed GloBE rules would work if implemented and how their scope is limited. The limitations in each of these examples give rise to several of the objections to the GloBE rules as a whole. Consider Example B; while it might make sense from a global scale to set a threshold for minimum revenue beneath which a company will not need to pay taxes, a transition to this system would deprive Country B of any taxes that they are currently collecting. If Country B has a DST, then they would be forced to give up their tax revenue and receive nothing in exchange. This rule creates a significant concern for countries where large MNEs do not make over the threshold value, as adopting the GloBE rules could significantly decrease their corporate tax revenue. Example D produces a highly questionable result; even though Nile River does significant business in Country D, they are not subject to the GloBE tax because they do not meet the global threshold.

While the result in Example E might seem puzzling, the reason that the GloBE rules do not apply in this situation is because traditional rules of international taxation with regards to physical presence would apply.[165] Drillcorp would have a nexus of contact with Country E, and the amount of taxes that they are liable for would depend on any international tax treaties between Country E and South Africa.

[165] *See* Harpaz, *supra* note 3, at 3.

CONCLUSION

The divergent approaches of both the United States and France towards implementing Pillar Two of the Inclusive Framework demonstrate one of the key issues with the future of international taxation. Both countries have, understandably, focused their efforts on changes to domestic policy, apparently without regard for the international implication of those changes. This creates a high potential that some of the MNEs that are the target of the Inclusive Framework could face a significantly higher total tax burden than the proposed fifteen percent minimum rate.

The particular impact of the changes in U.S. policy as a result of the Inflation Reduction Act leave little to no room for other countries to act in their implementation. If the ultimate goal of the Inclusive Framework is to ensure that MNEs are paying a global minimum, setting the minimum in the United States at fifteen percent means that any tax levied by other countries will be in excess of the Inclusive Framework amount. The inelegant approach of the Inflation Reduction Act reform is to create a U.S. tax regime that is akin to a DST by a different name; a unilateral measure that seeks only to increase the domestic revenue from MNEs with no due regard for the impact that policy will have on the global stage.[166] One of the major goals of the U.S. reform was to increase clarity for U.S. based MNEs, but the Inflation Reduction Act system still requires these businesses to jump through hoops to figure out their total tax liability in each country, deduct the relevant values from their U.S. tax burden, and then contend with the new AMT. Companies like Amazon initially expressed support for a new system of global taxation that emphasized clarity, but few desired for that clarity to be reached with drastically increased costs.

The ultimate challenge with the Inclusive Framework is that the OECD is a non-binding authority that needs complete cooperation amongst the member states to achieve its goals. When states depart from the OECD recommendations in implementing domestic policy, there is no means of recourse. This presents the fundamental question of whether the OECD recommendations should be followed at all. Until there is a widespread agreement to implement the Inclusive Framework (or some similar global tax scheme), the efforts of individual

[166] *See* Press Release, White House, Statement by President Joe Biden on Today's Agreement of 130 Countries to Support a Global Minimum Tax for the World's Largest Corporations (July 1, 2021) (on file in the Library of Congress). President Biden's statement understandably focuses on the effects of this tax on his American audience, but his remarks underscore the American commitment to adopting some form of global tax rules.

member states to reform their domestic policy will have little to no effect. However, the design of the rules is such that as more countries adopt the domestic rules and seriously consider implementation of the ones that require international agreement, it becomes increasingly hard for other countries to decline to participate. The UTPR is the most significant rule in this regard; as it is currently written it would seem to allow countries to tax profits made by MNE subsidiaries that reside in different countries. This essentially creates a penalty for not participating in the OECD tax scheme; the country will have the choice of joining and claiming the increased tax revenue for themselves or allowing it to be claimed by a different country.[167] Japan's commitment to implementing the IIR starting in 2023, and their plan to implement the UTPR in 2024, could function as the push that the United States and European Union need to implement their versions, which would in turn lead to increased participation from the rest of the world.[168]

One major cause for concern in the future implementation of the Inclusive Framework in the United States is the vastly different approaches taken by the two consecutive U.S. Secretaries of the Treasury: Steven Mnuchin and Janet Yellen. The dichotomy of their approaches, combined with the drastic shift in U.S. tax policy between the Biden and Trump administrations, leads to the troubling conclusion that United States' participation in the Inclusive Framework may depend entirely on who sits in the White House. A new President could be elected in 2024 and reverse all of the policies made by the Biden administration. This is not a problem unique to the United States, but merely a reminder that any agreement that requires near global cooperation will always exist in a fragile state, and changes in leadership in only a few states can have an outsized impact on global agreements. Not a single Senate Republican voted for the Inflation Reduction Act, and while the minimum corporate tax rate was not the only provision of that act, the complete lack of bipartisan support does not bode well for the longevity of the changes the act brought.

If the OECD inclusive framework is to be truly successful, then special attention must be paid to the opinions and trepidations of developing countries like Nigeria. The reasons that the ATAF have offered for why developing

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167 *See e.g.*, Natalie Olivo, *US May Feel Pressure to Enact Int'l Min. Tax Deal, Eventually*, LAW360 TAX AUTH. (June 10, 2022, 9:03 PM), https://www.law360.com/tax-authority/articles/1501736; *see also* Phil Gramm and Mike Solon, *The Global Minimum Tax Shakedown*, WALL STREET J. (Apr. 6, 2023, 6:34 PM), https://www.wsj.com/articles/the-global-minimum-tax-shakedown-oecd-eu-biden-congress-corporate-increase-consumers-yellen-729446fd.

168 *See* Masuda, *supra* note 74.

nations in Africa cannot join the Inclusive Framework and pass the GloBE rules as written challenge some of the core assumptions that the rules are built on. The scope of Pillar One was initially limited to apply only to the largest MNEs because the drafters of the agreement wanted it to have the smallest impact on the status quo.[169] This lack of impact makes sense from the perspective of developed nations, who will use implementation of the narrow scope of Pillar One to see if the GloBE rules create a system of international taxation that meets their expectations.[170] For developing nations, however, Pillar One will remove DSTs that help support their government with no guarantee of any return. Additionally, the limit of the scope of Pillar One to providers of digital services means that companies that engage in base erosion and profit shifting practices, but are not in the business of providing digital services, will still be able to abuse the interactions between tax systems to gain an advantage. A framework that is truly inclusive ought to contain measures designed to combat some of the forms of profit shifting that MNEs that are not participants in the digital economy engage in. Pillar Two similarly reflects a troubling lack of concern for the needs of the developing world. The apparent lack of consideration for the needs of non-western countries in the fashioning of rules meant to apply to the entire world is not surprising, but it does not reflect well on the drafters that the "inclusive" framework excludes any consideration for so much of the globe. Discussion of the application of the Two-Pillar system is largely framed as a problem of getting Europe and the United States to sign on, with the expectation that the rest of the world will follow suit. While this may certainly be one possible outcome (especially if those countries engage their ability of economic coercion), this should not be the primary implementation plan.

The coming years will be the most important ever for the system of global taxation. The system stands today on a precipice, with very little decided, and everything on the line.[171] A growing number of countries in Europe have publicly committed to implementing tax reform that brings them into

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169 *OECD Pillar Two Report*, *supra* note 48, ch. 9.

170 *See* Howard Gleckman, *Could a Data Tax Replace the Corporate Income Tax?*, FORBES (Oct. 18, 2022, 12:48 PM), https://www.forbes.com/sites/howardgleckman/2022/10/18/could-a-data-tax-replace-the-corporate-income-tax/?sh=6f9a98142045. This article is emblematic of one of the problems with the existing paradigm of discussion surrounding the global income tax. Mr. Gleckman's proposal to potentially shift the target of the tax is an interesting ideation on the OECD GloBE rules, but it ignores the fact that this change is still focused solely on the way that the rules would apply if implemented in a western developed country. *Id.*

171 *See* Luis Coronado & Matt Andrew, *BEPS 2.0 Implementation Continues to Vex Multilateral Policymakers*, INT'L. TAX REV. (Sept. 22, 2022), https://www.internationaltaxreview.com/article/2anlcu96gkcjpusftw64g/sponsored/beps-2-0-implementation-continues-to-vex-multilateral-policymakers.

compliance with the Inclusive Framework, but these commitments are far from universal.[172] Several member states have indicated that they will institute tax reform measures even if the European Union cannot agree to a unified measure.[173] On the other hand, members of the Biden administration, including Secretary of the Treasury Janet Yellen, are committed to bringing the United States in line with Pillar Two, but the policy that they have instituted diverges from it in a significant way.[174] Countries around the world are waiting to see how the western economic superpowers go forward. A strong cooperative effort could revolutionize global taxation and kick-start a real effort to implement the OECD GloBE rules worldwide. A series of unilateral rules that focus on domestic policy at the expense of international cooperation could lead other countries to follow suit.

The digital economy is here to stay. MNEs will continue to be more profitable than ever, and a coordinated system of international taxation could prove mutually beneficial, simplifying the rules for MNEs and ensuring that each state is able to tax their fair share of the profits. A failure to create a comprehensive, joint solution will only perpetuate the inefficiencies that currently exist and enshrine the incentive to engage in creative BEPS practices to minimize total tax liability.

WILLEM VANDERMEULEN

172 *Hungary Blocks EU Minimum Tax*, *supra* note 132.

173 Jorge Valero et al., *EU Nations Commit to Global Minimum Tax Despite Hungary Veto*, BLOOMBERG (Sept. 9, 2022, 4:17 AM), https://www.bloomberg.com/news/articles/2022-09-09/eu-nations-commit-to-global-minimum-tax-despite-hungary-veto?leadSource=uverify%20wall.

174 *Compare* J.D. Haliton, et al., *supra* note 96, *with OECD Inclusive Framework*, *supra* note 10.