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AN ANALYSIS OF THE UNITED STATES' STANCE ON BEPS: PILLAR ONE

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Abstract

The current reformation of the traditional nexus and profit allocation tax principles by the Organisation for Economic Co-operation and Development comes as a welcome relief for the majority of global economies, who lose billions worth of tax revenue through their inapplicability to the modern, digital economy. However, recent actions by the United States threaten to stall any meaningful progress on developments and act to highlight its nationalistic stance on an issue which threatens multinationals headquartered in its jurisdiction and its own domestic economy. This article considers the rationale for such a stance, identifying the multitude of reasons why the United States may wish to protect its own interests in these circumstances. Ultimately, the article concludes that for the purpose of facilitating global agreement on an issue which requires consensus, the United States ought to engage more proactively in reformation discussions and be willing to sacrifice its own self-interest to provide an outcome that will benefit smaller, developing nations.

"We must, indeed, all hang together or, most assuredly, we shall all hang separately."

Benjamin Franklin

I. Introduction

The ability of modern businesses to gain access to global markets remotely has highlighted the inadequacies of traditional tax principles created over a century ago. Now, businesses are able to operate in jurisdictions whilst avoiding the requisite physical presence typically required to incur any tax obligations.[1] The

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1 OECD *Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report* (OECD Publishing, 5 October 2015) at [184].

fiscal ramifications of these practices are eye-watering, with an estimated USD 100 billion to 240 billion lost globally per year.[2]

Over the last decade, a raft of measures has been proposed to reform the international tax framework by the Inclusive Framework group – a working group of the Organisation for Economic Co-Operation and Development (OECD) – to address these practices. These measures have collectively been termed the base erosion and profit shifting Project (BEPS). This article addresses Action Plan 1 of the BEPS Project's 15-point Action Plan.[3]

Action Plan 1 aims to tackle the direct and indirect tax challenges arising from the increased digitalisation of the economy – an uncontentious facilitator for the aforementioned damaging practices.[4] Work in tackling these challenges has been separated into two pillars. Pillar One focuses on the re-allocation of taxing rights, reviewing the current profit allocation and nexus rules to determine where tax ought to be paid and on what basis.[5] Pillar Two focuses on identifying a system that ensures multinationals pay a minimum level of tax and stops the shifting of profits to low or no-tax jurisdictions by creating a global anti-base erosion mechanism.[6] This article will focus on developments under Pillar One.

A consensus-based solution to Pillar One is intended to be reached by mid-2021 by the Inclusive Framework group, a timeline which has already felt the effects of COVID-19 delay.[7] The consensus-based solution is a method typically employed by the OECD in order to create equality in voting rights amongst its members, as it requires all participating jurisdictions to come to an agreement before a solution can be passed, whilst allowing nations to abstain from voting to avoid impacting a motion.

However, a proposal made by Steven Mnuchin, the United States' Secretary of the Treasury, to implement Pillar One as a safe harbour regime has undoubtedly caused concern for the Inclusive Framework.[8] Essentially, the safe harbour would operate to allow multinationals that were caught in the scope of Pillar One to opt-in or out of the consensus-based solution.[9] For reasons explored further in this article, the safe harbour proposal by the United States is unsurprising. However, the participation of the United States in, and subsequent ratification of, a consensus-based solution

2 OECD "Ending offshore profit shifting" <www.oecd.org>.
3 OECD "Action 1: Tax Challenges Arising from Digitalisation" <www.oecd.org>.
4 OECD, above n 3.
5 OECD, above n 3.
6 OECD, above n 3.
7 OECD *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint* (OECD Publishing, 14 October 2020) at 9.
8 Letter from Steven T Mnuchin (United States Secretary of the Treasury) to Jose Angel Gurría (OECD Secretary-General) regarding a safe harbour approach to Pillar One (3 December 2019).
9 OECD, above n 7, at [167].

to Pillar One is inarguably critical given the overwhelming contribution of their multinationals to the issue at hand. Without the United States' participation, Pillar One risks ineffectiveness and any progress made towards a multilateral solution will likely be ruined by unilateral measures such as digital services taxes (DSTs).

This article outlines why the United States' safe harbour proposal is intuitively workable. It submits that the proposal aligns with the general hesitancy of the United States to accept a consensus-based solution which is inconsistent with the protection of its own self-interest. The article advises against such a nationalistic approach, considering the gravity of the issue Pillar One aims to resolve and the likely consequences that may arise if agreement fails to be reached.

Part II will outline the current international tax framework and the specific traditional principles of the tax system that the BEPS Project aims to reform. Part III will define the digital economy, specifically identifying how it has created problems for traditional tax principles. Part IV will address the chronological history of the BEPS Project, feeding in to Part V which provides an overview of the current Blueprint for Pillar One. Part VI will address the safe harbour proposal made by the United States and ultimately conclude on its unworkability. Part VII, the most substantive part of this article, will address what the writer perceives as the underlying rationale for such a proposal by the United States. To conclude the article, Part VIII will address the potential consequences of a rejection of Pillar One by the United States.

II. International Tax Framework and Traditional Tax Principles

First, this article will discuss the international tax framework and the specific traditional tax principles that Pillar One aims to reform and upon which the framework is based. An understanding of these principles is essential to grasp their inadequacies in a global digital economy.

A. International Tax Framework

The importance of a cohesive international tax system cannot be understated.[10] However, the phrase "international tax system" is somewhat of a misnomer, given there is no one overarching regime that all jurisdictions comply with, nor one overarching authority to which taxpayers are subject.[11] Therefore, the international

10 *James Coleman and others, New Zealand Taxation* (Thomson Reuters, Wellington, 2016) at 747.
11 Kevin Holmes *International Tax Policy and Double Tax Treaties*: *An Introduction to Principles and Application* (IBFD, Amsterdam, 2007) at 3.

tax system is best defined as the body of legal provisions of different countries covering tax aspects of cross-border transactions.[12] These legal provisions are constituted primarily by domestic tax laws, tax treaties and many other international law instruments.

Academics have long grappled with the question of whether an independent "world tax organisation" ought to be formed, to provide greater regulation of the tax implications of cross-border transactions and to foster coordination and cooperation surrounding tax policy. Many agree there should be. However, how such an organisation should be structured and how it ought to function remains the subject of debate.[13] Some argue that adapting existing international organisations may prove more effective, such as the OECD,[14] the World Trade Organisation,[15] or the United Nations.[16] However, it is unlikely that these organisations are inclusive enough to cater to all necessary jurisdictions, nor obtain the requisite experience with tax policy.[17] Therefore, it is the writer's view that a stand-alone world-tax organisation would be the most beneficial for the development and regulation of the international tax system. However, how it would be structured and its function remain up for debate.

B. Traditional Tax Principles

An important concern in building an effective international tax system is to ascertain what right any particular government has to tax a specific entity's wealth. This jurisdictional right to tax is a central principle of international taxation.[18] For the sake of global cohesion, international consensus has emerged on how countries shall decide who retains the right to tax an amount.[19] Effectively, income tax is

12 Holmes, above n 11, at 2.

13 See Yariv Brauner "International Trade and Tax Agreements May be Coordinated, but Not Reconciled" (2005) 25 Va Tax Rev 251; Vito Tanzi "Globalisation and Coordination of Fiscal Policies" (paper presented to the Globalisation and International Harmonisation of Tax Systems Conference, University of Trento, Trento, 27 May 2004); Victor Thuronyi "In Defense of International Tax Cooperation and a Multilateral Tax Treaty" (2001) 22 Tax Notes Intl 129; and Dale Pinto "A Proposal to Create a World Tax Organisation" (2003) 9 NZ J Tax L & Policy 145.

14 Yariv Brauner "An International Tax Regime in Crystallisation" (2003) 56 Tax L Rev 259; and Arthur J Cockfield "The Rise of the OECD as Informal 'world tax organisation' Through National Responses to E-commerce Tax Challenges" (2006) 8 Yale J L & Tech 136.

15 Reuven S Avi-Yonah "Globalisation, Tax Competition and the Fiscal Crisis of the State" (2000) 113 Harv L Rev 1573.

16 Frances M Horner "Do we need an International Tax Organisation?" (2001) 24 Tax Notes Intl 179 and Michael J McIntyre "Options for Greater International Coordination and Cooperation in the Tax Treaty Area" (2002) 56 BIFD 250.

17 Adrian J Sawyer *Developing a World Tax Organisation: The Way Forward* (Fiscal Publications, Birmingham, 2009) at 3.11.

18 Andrew Lymer and John Hasseldine "Introduction to Taxation in an International Context" in Andrew Lymer and John Hasseldine (eds) *The International Taxation System* (Kluwer Academic Publishers, Boston, 2002) 1 at 3.1.

19 Coleman and others, above n 10, at 748.

typically levied by a country on the domestic and foreign-sourced income of its residents (known as the residence principle) and on the domestic-sourced income of any non-residents (known as the source principle).[20]

1 Residence and source principles

The residence principle involves taxing a country's resident individuals or corporations on income arising domestically or on any foreign income.[21] There is no overarching determinant of residency for the international tax system, meaning that individual jurisdictions will generally have their own unique tests.

The source principle allows a jurisdiction the right to tax non-residents if they are earning income, investing wealth, or spending wealth in their jurisdiction.[22] The underlying policy for taxing income sourced in one's own country comes from the benefit theory of taxation. This theory maintains that as the jurisdiction has provided a public good for the benefit of the non-resident taxpayer to be able to engage in an income-earning activity, they should gain the right to tax their income.[23]

2 Double tax agreements

Where a jurisdiction collects tax on both residence and source-based income, it opens the door for the same person to be taxed twice on the same income in more than one country – once by the jurisdiction asserting its right to tax based on source and again by the jurisdiction of residence.[24] This is far from desirable. To prevent this, jurisdictions typically enter into double tax agreements (DTAs). DTAs impose significant limitations on the taxing power of treaty partners by allocating taxing rights between them where both have a valid claim. This reduces the risks of double taxation and mitigates the risks of under-taxation of taxpayers by promoting cooperation between the treaty partners.[25] Currently, there are over 3,000 DTAs in the global treaty network.[26]

Achieving consensus among DTAs used by different jurisdictions is clearly desirable. It allows for coordination of the exercise of taxing powers and minimises overlaps and the negative influence of taxation on cross-border economic activities.[27]

20 At 749.
21 Holmes, above n 11, at 21.
22 Lymer and Hasseldine, above n 18, at 3.2.
23 Holmes, above n 11, at 20.
24 Richard L Doernberg and others "Electronic Commerce and Multijurisdictional Taxation" (Kluwer Law International, London, 2001) at 3.35.
25 Doernberg, above n 24, at 3.35.
26 Brian J Arnold *International Tax Primer* (3rd ed, Wolters Kluwer, Alphen aan den Rijn, 2016) at 3.
27 Pasquale Pistone "General Report" in Michael Lang and others (eds) *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* (Cambridge University Press, Cambridge (UK), 2012) 1 at 1.

Recognising this, multiple international organisations have formulated their own model tax conventions to be used by jurisdictions as the basis of their DTAs. Such model conventions are now the primary source of tax treaty clauses worldwide.[28]

Both the OECD's Model Tax Convention on Income and on Capital and the United Nations Model Double Taxation Convention between Developed and Developing Countries, are recognised as the two leading model conventions for DTAs.[29] Both models are used as vehicles for aggregating the rules of tax treaties around homogenous standards to develop a consistent international treaty framework.[30] However, the influence of the United Nations' model is gradually declining, with it being confined to only a limited number of DTAs or specific clauses.[31] Despite being heavily engaged in developing both the aforementioned model conventions, the United States' Treasury has declined to fully embrace either model in their DTAs,[32] instead developing their own United States Model Income Tax Convention.[33]

As the most prevalent model in existing bilateral DTAs, the OECD Model Convention stipulates that, in relation to business profits, a DTA should provide that profits of an enterprise should be taxed exclusively by the contracting state that it resides in, unless the enterprise carries on business in the other contracting state through a permanent establishment situated therein.[34] This is referred to as the nexus principle as it identifies taxable profits by reference to their relationship to a permanent establishment.[35] Where nexus is established, the source state may only tax the profits attributable to the permanent establishment, which are the profits that the permanent establishment would be expected to make if it were a distinct and separate enterprise.[36] This is referred to as the profit allocation principle. These principles are regarded as the two fundamental principles underpinning the taxation of business profits from cross-border activities.

3. Nexus principle

The permanent establishment concept is used to determine whether or not a contracting state is entitled to exercise its taxing rights with respect to the business

28 Pistone, above n 27, at 1.
29 At 2.
30 At 6.
31 At 2.
32 Charles Gustafson "*The* USA" in Michael Lang and others (eds) *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* (Cambridge University Press, Cambridge (UK) 2012) 1149 at 1150.
33 OECD *Model Tax Convention on Income and on Capital: Condensed Version* (OECD Publishing, 2017).
34 OECD, above n 33, art 7.
35 OECD *Tax Challenges Arising from Digitalisation – Interim Report 2018* (OECD Publishing, 16 March 2018) at [378].
36 OECD, above n 33, art 7.

profits of a non-taxpayer.[37] This is generally defined by reference to a threshold determining when there is a sufficient level of economic activity to justify taxation in that state – usually one of physical presence.[38] Article 5 of the OECD Convention defines a permanent establishment as a "fixed place of business through which the business of an enterprise is wholly or partly carried on".[39]

4. Profit allocation principle

Once it has been established that a country has the right to tax a business's profits, profit allocation rules act to determine the relevant share of the taxable profits. The internationally accepted principle underlying profit allocation is the arm's length principle, which is applied to the business profits attributable to a permanent establishment of a non-resident taxpayer.[40] The arm's length principle requires an analysis of the functions performed, assets used and risks assumed by a business through its permanent establishment to determine the permanent establishment's exact contribution to the creation of value reflected in the entity's profits.[41]

Clearly, there is still a reliance on an entity's physical presence in a jurisdiction to determine nexus and allocate profits.[42] Given the ability to create value remotely in the ever-increasing digital economy, it appears the applicability of these traditional principles may no longer hold true. Despite the obvious need for their reform, the actions of the United States risks jeopardising any meaningful update.

III. Digital economy

Digitalisation is often considered as the most important development of the economy since the industrial revolution and is one of the major drivers of growth and innovation.[43] However, as aforementioned, the increasingly digitalised nature of the economy has created a significant challenge for traditional tax principles.

37 OECD *Addressing the Tax Challenges of the Digital Economy, Action 1: 2014 Deliverable* (OECD Publishing, 16 September 2014) at 40.
38 OECD, above n 35, at [378].
39 OECD, above n 33.
40 OECD, above n 35, at [378].
41 At [378].
42 At [379].
43 Marcel Olbert and Christoph Spengel "International Taxation in the Digital Economy: Challenge Accepted?" (2017) 9 WTJ 3 at 4.

A. Definition

The digital economy is a transformative process brought about by advances in information and communication technology, improving business processes and bolstering innovation across the economy.[44] In an attempt to keep up with the competitive market, businesses are becoming increasingly digitalised to "enhance productivity, enlarge market research and reduce operational costs".[45] Sectors as diverse as retail, manufacturing, logistics and media have all implemented technological elements into their everyday practice, to the extent that it is no longer practical to separate the digital economy from the mainstream economy.[46]

B. Three Core Features

Digital businesses generally consist of three core features: scale without mass, a reliance on intangible assets and substantial user value creation. Individually, each of these three features create fundamental issues for the nexus and profit allocation rules as they currently exist, allowing multinationals to avoid income tax obligations in certain jurisdictions in which they operate remotely.

1. Scale without mass

Increasing digitalisation allows "businesses to locate various stages of their production process across different countries, gaining access to a larger number of customers across the globe".[47] This allows a business to be heavily involved in the economic life of many jurisdictions, despite not having any physical presence – thus achieving scale without mass.[48] Businesses with large digital operations can therefore actively avoid the nexus principle, given their ability to engage with customers over the internet without having the physical presence generally required by DTAs for income tax to be charged in the customer's jurisdiction.[49] Further, the lack of activities carried out in the jurisdiction by a business means that there is no profit to attribute to that permanent establishment even if the nexus was established, highlighting the inapplicability of the profit allocation rules.[50]

44 OECD, above n 37, at 11.
45 OECD, above n 1, at [109].
46 Joachim Englisch "BEPS Action 1: Digital economy – EU Law Implications" (2015) 3 BTR 280 at 281.
47 OECD, above n 35, at [33].
48 At [33].
49 Grant Robertson and Stuart Nash *Options for taxing the digital economy: A Government discussion document* (June 2019) at [2.10].
50 Robertson and Nash, above n 49, at [2.10].

2. Reliance on intangible assets

The investment in, and development of, intangibles such as intellectual property and patents, is a core contributor to value creation and economic growth for companies in the digital economy.[51] The location in which a business controls its intangible assets can have a material impact on where that business books its profits and is subject to tax.[52] The use of intangible assets, such as trademarks and other intellectual property, can often be hard to value and are also highly mobile, meaning that income attributable to them can easily be moved to low tax countries.[53]

3. Data and user participation

Businesses are making increasing and more intensive use of data, allowing them to significantly improve their products and services.[54] Data analysis allows firms to extract more of their consumers' surplus through pricing and increase potential profitability. As a business collects more data, the benefits of the use of that data increase exponentially with the ability to understand its consumers better.[55]

Data analysis is no new concept. However, digitalisation has enabled users to play an increasingly significant role in allowing businesses to gain insights into market and demand trends.[56] Moreover, the analysis of user data enables businesses to acquire a significant competitive advantage by focusing on the improvement and personalisation of user experience.[57] The significant value that multinationals derive from the active participation of users in their online platforms and the data they are able to collect is unable to be recognised by the current profit allocation rules.[58]

C. Profit Shifting

An understanding of the techniques multinationals use to reduce their tax liability through profit shifting from high-tax countries to low-tax countries is also essential.[59] Common across all of these techniques is the necessity of having a foreign subsidiary in a low-tax jurisdiction, which is mostly taxed as an independent corporate entity.[60] This separate entity gives multinationals incentives to shift

51 OECD, above n 35, at [138].
52 At [135].
53 Robertson and Nash, above n 49, at [2.10].
54 OECD, above n 35, at [139].
55 At [140].
56 At [143].
57 At [143].
58 Robertson and Nash, above n 49, at [2.10].
59 Harry Huizinga and Luc Laeven "International profit shifting within multinationals: A multi-country perspective" (2008) 92 Journal of Public Economics 1164 at 1165.
60 Urban-Brooking Tax Policy Center "What are the consequences of the new US international tax system?" <www.taxpolicycenter.org>.

reported profits to low-tax jurisdictions by under-pricing sales to them and over-pricing purchases from them.[61]

Transfer pricing rules aim to prevent such practices by requiring multinationals to use an arm's length standard, meaning they must set prices for transactions within the corporate group that are equal to the prices that would prevail if the transactions were between independent entities. However, multinationals can avoid such standards when they sell items that are unique to the firm, such as patents, for which there is no established market price.[62]

Multinationals also utilise the transfer of their intangibles to overseas affiliates in low-tax jurisdictions as a method of profit shifting. These intangibles will generally earn a large share of the multinational's worldwide profits and enable it to book those profits in that low-tax jurisdiction.[63] Multinationals may even initially establish their intellectual property in low-tax jurisdictions, receiving all royalties paid for the use of this intellectual property in the low-tax jurisdiction, sometimes even avoiding any tax obligation at all.[64]

IV. Overview of the BEPS Project

For the better part of the last decade, it has been the OECD's mission to facilitate agreement on the reform of the aforementioned traditional tax principles to cope with the evolving digital economy. This Part will outline the chronological history of this mission.

A. Action Plan One

The OECD was prompted to begin to lay the foundation for an internationally coordinated tax regime to prevent BEPS practices after the Global Financial Crisis in 2009, which highlighted the insufficient tax revenue of many jurisdictions.[65] As part of its BEPS Project, the OECD released its first report in 2013, clarifying that developments in modern global business had outgrown the current international tax rules.[66] It called for an Action Plan to be devised, constructing a path forward

61 Urban-Brooking Tax Policy Center, above n 60.
62 Urban-Brooking Tax Policy Center, above n 60.
63 Urban-Brooking Tax Policy Center, above n 60.
64 Andrew Henderson "Low-Tax Countries for Intellectual Property: The Ultimate Guide" (7 December 2020) Nomad Capitalist <https://nomadcapitalist.com>.
65 Michael Cadesky "The US View on BEPS" (paper presented at the Asia Oceania Tax Consultants' Association 2014 Conference, Taipei, October 2014) at 8.
66 See OECD *Addressing Base Erosion and Profit Shifting* (OECD Publishing, 12 February 2013) at 47.

for the OECD and providing governments with the framework to minimise BEPS practices.[67]

This Action Plan was released in July 2013,[68] identifying 15 separate action areas that would holistically address BEPS practices and the international tax system.[69] Action Plan 1, the focus of this article, aimed to identify the main difficulties that the digital economy poses for the application of existing international tax principles and develop detailed options to address these difficulties.[70] Together with the Task Force on the Digital Economy, a group whose purpose was to identify issues raised by the digital economy, the OECD worked to complete reports on the 15 actions by 2015.[71] This package of measures represented the first substantial renovation of the international tax rules in almost a century.[72]

The 2015 Action 1 Report identified new circumstances that had specifically arisen due to digitalisation. Its primary conclusion was that it would be difficult, if not impossible, to ring-fence the digital economy from the rest of the economy for tax purposes.[73] The Report also identified several broader tax challenges that went beyond BEPS, namely: nexus, data and characterisation issues.[74] These issues were pertinent to the question of "how taxing rights on income generated from cross-border activities in the digital age should be allocated among countries",[75] and whether the existing paradigm used to determine where economic activities are carried out and value is created for tax purposes continue to deliver appropriate results.[76] These were the issues that related specifically to the traditional nexus and profit allocation rules. Recognising that this was a substantial issue, the OECD called for further work on this area, with a report to be delivered by 2020.[77] It is these issues that comprise both Pillar One and Pillar Two.

67 At 51.
68 See OECD *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing, 19 July 2013).
69 The 15 Actions that were identified by the OECD were: Action 1: Address the tax challenges of the digital economy; Action 2: Neutralise the effects of hybrid mismatch arrangements; Action 3: Strengthen CFC rules; Action 4: Limit base erosion via interest deductions and other financial payments; Action 5: Counter harmful tax practices more effectively, taking into account transparency and substance; Action 6: Prevent treaty abuse; Action 7: Prevent the artificial avoidance of PE status; Actions 8, 9, 10: Assure that transfer pricing outcomes are in line with value creation; Action 11: Establish methodologies to collect and analyse data on BEPS and the actions to address it; Action 12: Require taxpayers to disclose their aggressive tax planning arrangements; Action 13: Re-examine transfer pricing documentation; Action 14: Make dispute resolution mechanisms more effective; and Action 15: Develop a multilateral instrument.
70 OECD, above n 37.
71 At 25.
72 OECD, above n 1, at 3.
73 At 11.
74 OECD, above n 1, at 13.
75 At [340].
76 At [249].
77 At 13.

B. Interim Report

The OECD established the Inclusive Framework group in 2016 to monitor the implementation of the BEPS Project. Its formation came in response to a common criticism that the reform was focused principally on developed nations, ignoring the needs of developing nations who were often hit the hardest by BEPS practices.[78] It allowed those who elected to join the group to work on an equal footing with all other members. There are currently 139 members of the Inclusive Framework group – including the United States – who are all dedicated to ensuring that the tax challenges of digitalisation are adequately addressed.[79]

A Multilateral Instrument (MLI) was created through Action 15, which entered into force on 1 July 2018.[80] Once ratified, it enabled all jurisdictions to swiftly transfer the results of the BEPS Project into their bilateral treaties, expelling the need for countries to expend significant resources negotiating each treaty individually.[81] The MLI currently has 95 signatories, with a further four jurisdictions expressing their intent to sign shortly.[82] However, notably, the United States has decided not to sign the MLI. The United States' Treasury Deputy International Tax Counsel, Henry Louie, stated that the United States did not need to sign the MLI, citing the consistencies of their existing tax treaty policy with most of the MLI and concerns surrounding mandatory arbitration provisions.[83]

The Inclusive Framework was tasked with delivering an interim report on their work on addressing the broader tax challenges going beyond BEPS, which was released in 2018.[84] The report analysed how certain characteristics prevalent in highly digitalised business models, such as scale without mass, heavy reliance on intangibles and data and user participation may have reduced the relevance and effectiveness of the fundamental principles of profit allocation and nexus.[85] The Inclusive Framework agreed to:[86]

78 Kerrie Sadiq, Adrian Sawyer and Bronwyn McCredie "Jurisdictional responses to base erosion and profit shifting: a study of 19 key domestic tax systems" (2019) 16 eJournal of Tax Research 737 at 745.
79 OECD "Members of the OECD/G20 Inclusive Framework on BEPS" (August 2021) <www.oecd.org>.
80 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (open for signature 8 June 2017, entered into force 1 October 2018).
81 OECD "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Information Brochure" (May 2020) <www.oecd.org>.
82 OECD "Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (18 December 2020) <www.oecd.org>.
83 Orbitax "Treasury Official on Why U.S. Did Not Sign BEPS Multilateral Instrument" <www.orbitax.com>.
84 OECD, above n 35.
85 At [371].
86 At [373].

> … undertake a coherent and concurrent review of the two key aspects of the existing tax framework, namely the profit allocation and nexus rules that would consider the impacts of digitalisation on the economy.

A consensus-based solution to these issues was to be delivered by 2020.[87]

C. Programme of Work & a Unified Approach

To maintain progress on reaching a consensus-based solution by 2020, Inclusive Framework members were requested to make proposals to address the issues and identify possible solutions to these broader tax challenges. These included the "user participation", "marketing intangibles" and the "significant economic presence" proposals, which all focused on the allocation of taxing rights through modifications to the rules on nexus and profit allocation, as well as other unresolved BEPS issues.[88] The Inclusive Framework proposed to examine these proposals under two pillars. Pillar One would primarily address the allocation of taxing rights between jurisdictions and fundamental features of the international tax system, such as the traditional notions of permanent establishment and the applicability of the arm's length principle.[89] Work under Pillar Two would explore basis taxing rights that would strengthen the ability of jurisdictions to tax profits where the other jurisdiction with taxing rights applies a low effective rate of tax to those profits.[90]

A Programme of Work was adopted by the Inclusive Framework in May 2019, identifying and allocating work to explore the aforementioned different proposals made by its members.[91] Acknowledging the commonalities between the proposals, it noted that the options available would need to be reduced and some gaps bridged to deliver a consensus-based solution to Pillar One.[92] Without bridging these gaps, it would not be possible to deliver such a solution and may encourage jurisdictions to adopt uncoordinated unilateral tax measures – something the OECD was looking to avoid as it would undermine the relevance of the international tax framework.[93]

87 At [374].

88 See OECD *Public Consultation Document: Addressing the Tax Challenges of the Digitalisation of the Economy* (OECD Publishing, 13 February 2019 – 6 March 2019) at [16]–[55].

89 OECD *Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note* (OECD Publishing, 23 January 2019) at 2.

90 OECD, above n 89, at 2.

91 OECD *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy* (OECD Publishing, 31 May 2019).

92 At [9].

93 At [11].

These options were further refined to develop a "Unified Approach" to Pillar One.[94] This approach was based on the commonalities between the three proposals, taking into account the ultimate aim of the proposals, the views expressed during public consultations and the need to deliver a solution that is as simple as possible, yet catered for all jurisdictions.[95] This approach was released to the public for comment in a public consultation document, attracting more than 300 submissions.[96] Considering the expressed views on the technical and policy aspects of the proposal, the Inclusive Framework released the outline of the architecture of Pillar One in January 2020, intending to reach a consensus on this architecture by July 2020.[97]

Ultimately, this consensus was not reached and has still not been reached. This is largely down to the effects of COVID-19, which has provided a substantial roadblock to physical meetings between participating jurisdictions and diverted attention away from progressing Pillar One discussions to matters of public safety and economic stability. Further progress on Pillar One was published in the Report on Pillar One Blueprint, released in October 2020; however, the political consensus that was aimed to have been reached by the end of 2020 is no longer possible.[98] The Inclusive Framework group intends to reach a full consensus on Pillar One by mid-2021.[99]

D. Pillar Two

Progress has also been made by the Inclusive Framework group on Pillar Two during this time, with the Pillar Two Blueprint released simultaneously with Pillar One.[100] Pillar Two is designed to ensure that large multinationals pay a minimum level of tax regardless of where they are headquartered or where they operate.[101] It aims to accomplish this through the implementation of four new rules. Firstly, the income inclusion rule taxes a domestic taxpayer on income derived by their foreign subsidiary up to a minimum rate if this income is not already taxed at the source.[102] Secondly, the undertaxed payments rule would operate to deny deductions at source

94 OECD *Public Consultation Document: Secretariat Proposal for a "Unified Approach" under Pillar One* (OECD Publishing, 9 October 2019 – 12 November 2019).
95 OECD, above n 94, at [13].
96 OECD, above n 94.
97 OECD *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy* (OECD Publishing, January 2020).
98 OECD, above n 7.
99 At 9.
100 OECD *Tax Challenges Arising from Digitalisation – Report on the Pillar Two Blueprint* (OECD Publishing, 14 October 2020).
101 At [8].
102 OECD, above n 100, at [411].

to payments not subject to an effective minimum tax at residence.[103] Thirdly, a switch-over rule would let residence jurisdictions apply global taxation rather than exemption to income that is not subject to minimum tax at source.[104] Lastly, where minimum tax is not paid at residence, the Subject to Tax Rule would subject it to withholding tax at source.[105]

While Pillar Two is not the focus of this article, it is recognised that there is an inter-relationship between Pillar One and Two, in that presumably Pillar One would be applied to a multinational before applying Pillar Two and that any taxes collected through Pillar One would count towards the minimum taxes paid under Pillar Two.[106]

V. Pillar One

Pillar One seeks to adapt the international income tax system to new business models through changes to the profit allocation and nexus rules applicable to business profits.[107] By doing so, its intended goal is to expand the taxing rights of market jurisdictions where there is an active and sustained participation of a business in the economy of a jurisdiction through activities in, or remotely directed at, that jurisdiction.[108]

The current Pillar One Blueprint comprises of three key primary components: Amount A, Amount B and the promotion of tax certainty through an effective dispute prevention and resolution mechanism.[109] To provide context for the United States' safe harbour proposal, it is necessary to outline the proposed Pillar One Blueprint. However, it is beyond the scope of this article to provide any conclusions on the technicalities of the Blueprint or its proposed new taxing rights.

A. Amount A

Amount A aims to provide a new taxing right by allocating a portion of the residual profits of a business to market jurisdictions.[110] It is the most substantive taxing right aimed to be introduced by Pillar One. It will apply to those multinationals which are within its scope and that meet the new nexus test.

103 Reuven S Avi-Yonah "A Positive Dialectic: BEPS and the United States" (2020) 114 AJIL 255 at 259.
104 Avi-Yonah, above n 103, at 259.
105 OECD, above n 100, at 163.
106 Grant Thornton "Is a global minimum tax to be introduced?" (21 January 2020) <www.grantthornton.global>.
107 OECD, above n 7, at [6].
108 At [6].
109 At [7].
110 At [7].

1. Businesses in scope

Amount A aims to impact two broad sets of businesses: first, those who provide automated and standardised digital services; and second, those that generate revenues from selling goods or services to consumers (that is, consumer-facing businesses). It is understood that these two types of businesses and their reliance on technology exemplify the policy concern that Pillar One aims to address most adequately.[111] Political agreement has yet to be reached on the necessary scope for Amount A.

(a) Automated digital services

Automated digital services, or ADS, provide digital services remotely to customers in markets using little or no local infrastructure. ADS can derive substantial value from interaction with their customer base, benefitting from data contributions made by users and intensive monitoring of the users' activities.[112]

The Blueprint outlines those businesses included in the scope of an ADS – otherwise known as the "positive list". This includes:[113]

- online advertising services;
- sale or other alienation of user data;
- online search engines;
- social media platforms;
- online intermediation platforms;
- digital content services;
- online gaming;
- standardised online teaching services; and
- cloud computing services.

Businesses that will not fall within the scope of an ADS include;[114]

- customised professional services;
- customised online teaching services;
- online sale of goods and services other than ADS;

111 At [23].
112 At [24].
113 At [29].
114 At [30].

- revenue from the sale of a physical good irrespective of network connectivity; and
- services providing access to the Internet or other electronic network.

The Blueprint further provides a general definition of ADS to ensure rapidly changing business models that do not easily fit into the above categories can be caught under the scope of an ADS. This definition is built on two elements; firstly, it must be an automated business; and secondly, it must be digital.[115]

(b) Consumer-facing businesses

A consumer-facing business, or CFB, is a business that generates revenue from the sale of goods and services commonly sold to consumers of items for personal use, including those that sell indirectly through intermediaries and by way of franchising and licensing.[116] However, the definition of a CFB will only apply to multinationals whose face is apparent to the consumer and the retailer or other contractual counterparty of the consumer. Third-party multinationals such as manufacturers, wholesalers and distributors that have no relationship with the customer will not be included in the definition.[117]

(c) Exclusions

Certain businesses that do not present the policy challenges that Pillar One aims to address will not be included in Amount A's scope. This includes specific natural resources, certain financial services, construction, sale and leasing of residential property, and international air and shipping businesses.[118]

2. Threshold

Consensus is yet to be reached on the applicable global revenue threshold that a multinational must meet to fall within Amount A's scope. The Blueprint suggests that there would be little advantage in using a threshold below the current EUR 750 million threshold used for Country-by-Country reporting, estimating that approximately 2,300 multinationals would fall within this scope.[119]

A further threshold test, known as the de minimis foreign in-scope revenue test, serves to remove multinationals from Amount A's scope where they exceed the gross

115 At [26].
116 At [33].
117 At [33].
118 At [35].
119 At [181].

revenue threshold above but only have a small amount of foreign source in-scope revenue.[120]

3. Nexus

The formulation of the new nexus rules, which determines the entitlement of a market jurisdiction to tax Amount A allocations, is one of the most significant modernisations of the traditional tax principles. For in-scope multinationals, the new nexus rules would be based on indicators of a significant and sustained engagement with market jurisdictions, instead of one of physical presence.[121] The new nexus rules will be designed as a standalone provision to avoid any unintended effects on existing tax or non-tax rules.[122]

The new rules will likely apply differently to both ADS and CFB. For ADS, nexus could only be established by exceeding a market revenue threshold for in-scope revenues, given their ability to engage in a market without physical presence, nullifying any physical presence requirement's effectiveness.[123] For CFB, a similar market revenue threshold would apply; however, further plus factors have been identified to provide a higher nexus standard given CFB are less able to participate remotely in market jurisdictions, such as having a fixed place of business connected with deriving in-scope revenue.[124]

These nexus rules would be supported by sourcing rules, which would determine the revenue that would be treated as being derived from a particular market jurisdiction.[125] To source the relevant in-scope revenue to a market jurisdiction, a sourcing rule would be used along with a list of acceptable specific indicators that a multinational could use to identify the jurisdiction of source.[126]

Further work is to be completed on refining and concluding on the inevitably challenging nexus rules.[127]

4. Reallocating residual profit

The calculation and allocation of the applicable residual profits of a business will be determined by a formula created by the Inclusive Framework group, which differs from the allocation of profits under the arm's length principle.[128] This formula will be based on a three-step approach.

120 At [183].
121 At [194].
122 At [189].
123 At [190].
124 At [192].
125 At [218].
126 At [219].
127 At [217].
128 At [496].

First, a profitability threshold will be established to isolate the residual profit subject to reallocation, limiting the interaction between Amount A and the remuneration of routine activities under conventional transfer pricing rules. Second, a reallocation percentage will be defined to identify an appropriate share of residual profit allocated to market jurisdictions. Last, the allocable amount will be distributed among the eligible market jurisdictions (determined by applying the relevant scope, nexus and revenue sourcing rules described above).[129]

B. Amount B

Amount B aims to standardise the remuneration of related party distributors that perform defined "baseline marketing and distribution activities".[130] Similarly to Amount A, both a "positive" and "negative" list of characteristics is provided in the Blueprint to ascertain whether a business is in-scope.[131]

The purpose of Amount B is two-fold. First, it is intended to simplify the administration of transfer pricing rules for tax administrations and lower compliance costs for taxpayers. Second, it is intended to enhance tax certainty and reduce controversy between tax administrations and taxpayers.[132] The quantum of Amount B would be based on comparable company benchmarking analyses under the Transactional Net Marginal Method and will likely vary by both industry and region.[133] Further agreement is to be sought on the breadth of baseline activities that should be included in Amount B's scope.

C. Improved Tax Certainty Processes

It is widely accepted that tax certainty is one of the critical components of Pillar One. The Blueprint embeds a mechanism to ensure that the application of the new taxing rights to a particular multinational is agreed upon among all interested jurisdictions.[134] This mechanism is likely to be a panel that would work alongside the relevant multinational and jurisdictions to ensure an equitable outcome is met.[135] Further, the Blueprint includes an innovative dispute resolution mechanism that will provide appropriate mandatory binding rulings relating to disputes around the Amount A taxing right.[136]

129 At [496].
130 At [649].
131 At [667]–[672].
132 At [11].
133 At [14].
134 At [17].
135 At [17].
136 At [19].

VI. The United States' Safe Harbour Proposal

The progress on Pillar One's design was threatened by a letter addressed to the OECD Secretary-General Jose Angel Gurría by the United States' Secretary of the Treasury, Steven Mnuchin. In December 2019, Mnuchin proposed that Pillar One should be rewritten as an optional safe harbour regime.

In a reasonably succinct letter to the Secretary-General, Mnuchin stated:[137]

> … The United States supports the discussions at the OECD to address the issues faced by the international tax system.
>
> We believe that it is very important that these talks reach agreement in order to prevent the proliferation of unilateral measures, like digital services taxes, which threaten the longstanding multilateral consensus on international taxation
>
> … However, we have serious concerns regarding potential mandatory departures from arm's-length transfer pricing and taxable nexus standards – longstanding pillars of the international tax system upon which U.S. taxpayers rely. Nevertheless, we believe that taxpayer concerns could be addressed and the goals of Pillar One could be substantially achieved by making Pillar One a safe-harbor regime …"

In reply, Gurría agreed with the necessity for a global solution to avoid the proliferation of unilateral measures.[138] However, he noted that throughout the extensive consultation process for Pillar One's development, the notion that it could be a safe harbour regime had never been discussed. Gurría also highlighted the Inclusive Framework's tight deadlines and the potential impact that Mnuchin's proposal may have on these deadlines. Despite these concerns, the Inclusive Framework have promised to address this proposal after the architecture of Pillar One has been finalised.

A. Safe Harbour Operation

So, what may Pillar One look like as a safe harbour regime? While the United States' Treasury have failed to provide ultimate clarity on what they envisioned, the current Pillar One Blueprint provides a clearer picture.

137 Mnuchin, above n 8.
138 Letter from Jose Angel Gurría to Steven T Mnuchin regarding the United States' proposal to make Pillar One a safe harbour (4 December 2019).

A safe harbour would essentially enable multinationals to opt into applying Pillar One on a global basis, including the Amount A allocation, the Amount B fixed margin mechanism, and the mandatory binding dispute prevention and resolution procedures.[139] Recognising the inherent difficulties in reaching a consensus on the scope of businesses that ought to be caught in Pillar One, the United States believes that allowing multinationals to make the decision to be subject to Pillar One would provide the greatest tax certainty.[140] The United States intends that this proposal would make Pillar One more attractive to electing multinationals, notwithstanding the marginal increase in their global tax liabilities resulting from Amount A allocations.[141] This would also ensure that the political challenges of mandating changes to longstanding international tax principles could be avoided.[142]

The United States proposes that a safe harbour for Pillar One would be part of a comprehensive agreement that replaces DSTs and other similar unilateral measures.

B. Unworkability

It is the view of the writer that providing a multinational with the ability to elect in or out of Pillar One inherently reduces tax certainty and blatantly conflicts with the objective of the BEPS Project to provide international consistency. Uncertainty would arise in relation to how many companies would elect to be subject to Pillar One, and if they do, how much that will increase their tax liability, as they are moving income from lower-tax jurisdictions to higher tax jurisdictions.[143] Such a regime is likely to primarily benefit the taxpayer, as they would only opt-in when it presents them with an opportunity to receive a tax benefit.[144]

A consequence of this is that the proposal is unlikely to gain the backing of other Inclusive Framework members, as no jurisdiction wants its assertion of fiscal authority to be contingent on a foreign taxpayer's preferences.[145] This was demonstrated through members' immediate reaction. The proposal was described as "nonsensical" by some European counterparts and was openly mocked by the

139 OECD, above n 7, at [167].
140 At [165].
141 At [166].
142 At [167].
143 See the comments of Brian Jenn, former Deputy International Tax Counsel for the United States Treasury Department in Ryan Finley and Stephanie Soong Johnston "The US 'Safe Harbor' Proposal: Rocking the OECD's Pillar 1 Boat?" (2019) 96 Tax Notes Intl 979 at 981.
144 See Robert Goulder "Breaking up with BEPS" (2020) 97 Tax Notes Intl 219 at 220.
145 Goulder, above n 144, at 220.

OECD's top tax official as equivalent to suggesting that death should also be made optional.[146]

Furthermore, if the safe harbour was applied, it would mean that those who did not opt-in would still be regulated by the current nexus and profit allocation rules.[147] Notwithstanding a global reform to update these rules in domestic legislation and DTAs, multinationals would continue to partake in the same activities that the BEPS Project was created to prevent.

VII. Underlying Rationale

The United States' safe harbour proposal is unsurprising. Generally, it has remained on the sidelines for most of Pillar One discussions, providing only lukewarm responses at best to developments made towards a consensus-based solution.[148] Commentators suggest that the underlying motive behind this is to derail Pillar One, for reasons which are to be discussed.[149] While the United States is clearly opposed to Pillar One as it currently stands, suggestions of complete derailment may be too extreme.

This Part will identify the United States likely underlying rationale for its opposition towards the current consensus-based solution to Pillar One. It submits that a number of factors have collectively contributed to this stance; however, the general theme of these factors is one of nationalism and a protection of the United States' own self-interest.

A. Protection of United States' Multinationals

It is no secret that Pillar One is a response aimed against what are primarily United States' multinationals, given they are the source of many of the most extreme profit shifting examples. In that regard, it can be expected that the United States will rally to their defence to some extent.[150]

146 Jefferson VanderWolk "The OECD's Two Tax Pillars on Digitalization – A Multilateral Project in Search of a Shared Purpose" (28 September 2020) Bloomberg Tax <www.news.bloombergtax.com>.

147 Goulder, above n 144, at 220.

148 Elodie Lamer and Sarah Paez "US Withdrawal from Digital Talks Marks 'Collective Failure'" (2020) Tax Notes Today Federal <www.taxnotes.com/tax-notes-today-federal>.

149 Vijay Govindarajan and others "Tech Giants, Taxes, and a Looming Global Trade War" (24 August 2020) Harvard Business Review <www.hbr.org>.

150 Cadesky, above n 65, at 8.

1. Extent of the problem

The severity of United States' multinationals' profit shifting is laid bare when one looks at the statistics. In 2016, a study performed by the Institute on Taxation and Economic Policy estimated that USD 2.6 trillion was held offshore by global multinationals, with two-thirds of that being held by United States' multinationals.[151] United States-headquartered companies also occupy a disproportionate share of the Forbes Global 2000 list of top global companies, with their share far outweighing the United States' total share of world GDP.[152]

Given their general domination of the rankings in terms of revenue, it is no surprise that United States' multinationals have also been at the forefront of devising tax planning strategies to reduce their global tax liabilities. An analysis performed by economist Kimberly Clausing in 2012 found that seven of the top nine locations where United States' multinationals booked their profits had tax rates of 5 per cent or less, but accounted for more than 50 per cent of all foreign income earned by United States' multinationals.[153] Quite remarkably, a report found that United States' multinationals collectively report earning profits in tax havens such as Bermuda and the Cayman Islands that are more than 15 times the countries' gross domestic product.[154]

The world's most profitable technology company, Apple, has created subsidiaries in low-tax jurisdictions such as Ireland, the Netherlands, Luxembourg and the British Virgin Islands to reduce its worldwide tax bill by billions of dollars each year.[155] It was a pioneer of accounting strategies such as the "Double Irish With a Dutch Sandwich", which allowed it to shift its profits into tax havens worldwide and effectively achieve a single-digit tax rate on its earnings.[156] In fact, Apple has managed to avoid paying taxes completely in some jurisdictions that it operates in.[157] Apple itself holds around USD 252 billion in profits offshore to avoid paying corporate tax in the United States.[158]

151 Patricia Cohen "A Tax Cut That Lifts the Economy? Opinions Are Split" *The New York Times* (online ed, New York, 2 November 2017).
152 Kimberly A Clausing "Fixing Five Flaws of the Tax Cuts and Jobs Act" (2020) 11(2) CJTL 31 at 54.
153 Kimberly A Clausing "The Effect of Profit Shifting on the Corporate Tax Base in the United States and Beyond" (2016) 69 Natl Tax J 905 at 911.
154 Institute on Taxation and Economy Policy "Fortune 500 Companies Hold a Record $2.6 Trillion Offshore" (28 March 2017) <www.itep.org>.
155 Charles Duhigg and David Kocieniewski "How Apple Sidesteps Billions in Taxes" *The New York Times* (online ed, New York, 28 April 2012).
156 Duhigg and Kocieniewski, above n 155.
157 Matt Nippert "Apple pays zero tax in NZ despite sales of $4.2 billion" *The New Zealand Herald* (online ed, Auckland, 18 March 2017).
158 Josh Hoxie "Apple Avoided $40 Billion in Taxes. Now it Wants a Gold Star?" (19 January 2018) Fortune <www.fortune.com>.

Other large United States-based technology companies such as Facebook, Microsoft, Amazon and Alphabet also operate with similar strategies to reduce their tax liabilities.[159] For example, Facebook was able to reduce its taxes to EUR 3.2 million in Ireland despite earning more than EUR 800 million in the jurisdiction. It did this by using royalty payments as a tool for moving almost EUR 750 million to the Cayman Islands and its Californian parent.[160] Strategies like these, which present an organisation with an unrealistic tax liability given their revenues, has seen many multinationals agreeing to repay jurisdictions a substantial amount in order for them to recoup some of their taxable revenue.[161] Mark Zuckerberg, the CEO of Facebook, has even publicly backed the OECD's tax reform attempts.[162] However, the legitimacy of this support is questionable considering the continuance of Facebook to engage in these profit shifting practices.

2. Rationale for protection

There is no mistaking the significantly detrimental effect that United States' multinationals' profit shifting activities have on the United States' corporate tax base. In absolute terms, the United States experiences the highest annual corporate tax losses of any country in the world,[163] despite United States' corporate profits being at historically high levels.[164] It is estimated that multinationals' profit shifting now costs the United States roughly around USD 80 billion annually.[165]

Domestically, however, the economic benefits that United States' multinationals provide are inarguable. The United States' economy's overall strength is largely driven by the productivity and competitiveness of the companies that operate and are headquartered in its jurisdiction – namely, multinationals.[166] Despite representing only a minimal number of total American businesses (less than 1 per cent), United States' multinationals comprise a large fraction of GDP, exports, imports, and

159 Hoxie, above n 158.
160 Christian Fuchs *The Online Advertising Tax as the Foundation of a Public Service Internet* (University of Westminster Press, London, 2018).
161 BBC "Facebook agrees to pay France €106m in back taxes" (24 August 2020) <www.bbc.com/news>. Facebook agreed to pay the French government EUR 106 million to settle a dispute over revenues earned in the country.
162 BBC "Facebook boss 'happy to pay more tax in Europe'" (14 February 2020) <www.bbc.com/news>.
163 Niall McCarthy "Tax Avoidance Costs the U.S. Nearly $200 Billion Every Year" *Forbes* (online ed, New Jersey, 23 March 2017).
164 Kimberly Clausing "Options for International Tax Policy After the TCJA" (30 January 2020) Center for American Progress <www.americanprogress.org>.
165 Bill Parks "Corporate tax avoidance demands a global solution" (6 November 2019) MarketWatch <www.marketwatch.com>.
166 Matthew J Slaughter *How US Multinational Companies Strengthen the US Economy* (Business Roundtable and The United States Council Foundation, 2009) at 1.

research and development.[167] By employing millions, investing billions into research and development and, ultimately producing trillions in goods and services, United States' multinationals help to provide an overall benefit to the domestic economy.[168]

Effectively, multinationals' ability to strengthen the domestic economy is enhanced, not reduced, by their global engagement.[169] The United States is a slow-growth market compared to many emerging jurisdictions around the globe today, meaning that the overall strength of United States' multinationals and their domestic economic contributions is increasingly tied to their success overseas. To achieve substantial revenue growth, it is critical that United States' multinationals must expand their reach to foreign customers.[170]

The United States' economy would inarguably be negatively impacted if it was made less attractive to engage in foreign investment. It would leave United States' multinationals and their suppliers, workers and local communities where they operate worse off and less competitive in the global economy.[171] Furthermore, it would encourage these multinationals to shift their operations outside of the United States to tax havens that did not ratify Pillar One to avoid a substantial tax liability. Even if many multinationals remained headquartered in the United States, the United States would likely bear a large cost of the reallocation of profits to the market jurisdiction where the value-generating took place.[172]

For the reasons stated above, it is clear that the United States is not only protecting its own multinationals, but also its own economy by opposing Pillar One as it currently stands. Clearly, Pillar One consensus is of less significance to the United States than most other jurisdictions, given the dominance of its multinationals globally and the domestic benefits that these organisations provide.[173]

B. Domestic Prevention Mechanisms

The United States' current domestic tax legislation attempts to thwart profit shifting activities of its multinationals through a number of provisions. It is these provisions which the United States are likely to rely on as rationale for not engaging wholeheartedly with Pillar One discussions.

167 See In Song Kim and Helen V Milner *Multinational Corporations and their Influence Through Lobbying on Foreign Policy* (Brookings Institution, March 2020) at 2. For example, 24 per cent of private sector GDP and 26 per cent of private sector employee compensation.
168 Slaughter, above n 166, at 7.
169 Business Roundtable "How U.S. Multinational Companies Strengthen the U.S. Economy: Data Update" <www.businessroundtable.org>.
170 Business Roundtable, above n 169.
171 Theodore H Moran "American Multinationals and American Economic Interests: New Dimensions to an Old Debate" (July 2009) Peterson Institute for International Economics <www.piie.com>.
172 Mindy Herzfeld "Is the OECD's Project Salvageable?" (2019) 165 Tax Notes Federal 1546 at 1547.
173 Cadesky, above n 65, at 3.

1. Previous deficiencies

The shifting of profits offshore by United States' multinationals has largely been facilitated by the domestic tax framework's inefficacy in the United States. Effectively, the framework provided multinationals with a myriad of incentives and opportunities to avoid paying domestic taxes on their foreign income. This was evident in several characteristics of the old system.

First, until recently, the United States operated with one of the highest corporate tax rates in the OECD, sitting at 35 per cent.[174] Contrary to deriving higher taxes through this rate, the rate encouraged multinationals to shift their economic activities to their affiliates in low-tax jurisdictions in an attempt to avoid such a high corporate tax liability.[175] As a result of this high rate, many multinationals saw the domestic framework as uncompetitive, given it hampered their ability to compete with other companies in different jurisdictions.[176] This prompted many to seek a lighter tax burden in low-tax jurisdictions.

Second, the United States previously operated with a worldwide system of taxation. Essentially, this meant that resident individuals and corporations were taxed on their worldwide income, regardless of where it was derived.[177] While the United States had the authority to tax corporations deriving global income, their worldwide system provided two caveats which essentially rendered it powerless to prevent multinationals profit-shifting. First, it provided corporations with foreign tax credits for any taxes which they had already paid abroad. Second, any tax that a corporation derived from foreign profits was not due until those profits were repatriated to the United States.[178] This essentially provided a two-fold mechanism for corporations to reduce their tax liability. Corporations could book their profits in a low-tax jurisdiction, providing them with a small tax credit in the United States. Once this tax credit was exhausted, corporations could leave their profits offshore and avoid paying taxes in the United States as they had not yet been repatriated, giving them tax-free access to their earnings offshore.[179] This encouraged corporations to earn income in jurisdictions with as low a rate of tax as possible,[180]

174 Danielle Kurtzleben "Fact Check: Does the US Have the Highest Corporate Tax Rate in the World?" *National Public Radio* (online ed, Washington DC, 7 August 2017).

175 Kimberly A Clausing "Taxing Multinational Companies in the 21st Century" in Jay Shambaugh and Ryan Nunn (eds) *Tackling the Tax Code: Efficient and Equitable Ways to Raise Revenue* (Brookings Institution Press, Washington DC, 2020) 237 at 241.

176 At 241.

177 Alex Trostorff and B Trevor Wilson "Worldwide Tax System vs. Territorial Tax System" (1 February 2017) The National Law Review <www.natlawreview.com>.

178 Clausing, above n 164.

179 Clausing, above n 164.

180 Cadesky, above n 65, at 1.

meaning the United States' government raised almost no revenue from the taxation of foreign income.[181]

2. Tax Cuts and Jobs Act 2017

In late 2017, Congress enacted the Tax Cuts and Jobs Act (TCJA), providing sweeping changes to domestic tax rules.[182] The TCJA aimed to provide a mechanism to combat corporate tax avoidance and the shipment of jobs and profits overseas,[183] whilst enticing corporations to repatriate their foreign earnings at a one-time low rate.[184] The reform drastically reduced the corporate tax rate from 35 per cent to 21 per cent and implemented a territorial system of taxation which only imposed tax on income derived in the United States.[185] These reforms were made with the view to discourage multinationals from shifting their profits outside of the United States and to provide an incentive to earn income domestically. It was also proposed that the new territorial system would collect more tax on multinationals domestically, as it taxes their foreign income as it is earned rather than when it is repatriated.[186]

However, not all foreign income is exempt from tax under the TCJA. There are two base protection measures in the TCJA; first, a tax on global intangible low-taxed income (GILTI);[187] and second, a minimum tax known as the base erosion and anti-abuse tax (BEAT).[188] These measures were created to target profit shifting activities of United States' multinationals directly.

The GILTI applies to all United States-based multinationals and is payable only on returns relative to physical assets exceeding 10 per cent. The tax will be due if a company's foreign income is not sufficiently taxed abroad and is assessed on a global basis, so foreign tax credits from tax paid in higher-tax countries can offset the minimum tax arising from operations in low-tax countries.[189] The further BEAT tax will affect all multinationals, being triggered by excessive deductible payments to related parties.[190] It is recognised that the GILTI operates with a similar purpose and overlapping scope as Pillar Two, and consideration is to be taken into account as to how these two frameworks will interact.[191]

181 Clausing, above n 164.
182 Tax Cuts and Jobs Act of 2017 Pub L No 115-97, 131 Stat 2054.
183 Jesse Drucker and Jim Tankersley "How Big Companies Won New Tax Breaks from the Trump Administration" *The New York Times* (online ed, New York City, 30 December 2019).
184 Michael Croker "The rise of tax nationalism" (4 December 2017) Chartered Accountants ANZ <www.charteredaccountantsanz.com>.
185 Clausing, above n 164.
186 Clausing, above n 164.
187 At 2208.
188 At 2226.
189 Clausing, above n 175, at 247.
190 At 247.
191 OECD, above n 100, at [25–28].

3. Impact on the United States' position on Pillar One

The enactment of the TCJA is likely highly influential in the United States' current opposition to Pillar One, as it is essentially their answer to combatting profit shifting that affects the United States. Commentators even go so far as to suggest that the OECD should be worried about the "US BEPS project" as it proves that unilateral action can be taken to address multinationals profit shifting activities.[192] The existence of the TCJA as a domestic mechanism to protect against profit shifting practices serves as a motive for the United States' hesitancy to collaborate on a globally beneficial solution to Pillar One.

The United States would benefit more from multinationals bringing their offshore profits back home under the TCJA instead of granting additional taxing rights on these profits to other jurisdictions under Pillar One. Therefore, it would offer little benefit for the United States to exert significant efforts into arriving at a Pillar One solution that is detrimental to its interests. Such an approach is heavily unilateral and sacrifices global benefit for the prioritisation of the United States' own self-interest.

However, if the United States perceives that the TCJA will act as a suitable alternative to Pillar One (and BEPS generally) in preventing profit shifting by multinationals, it is likely mistaken. Commentators suggest that the TCJA contains loopholes that render it largely ineffective in preventing the most significant profit shifting activities.[193] For this reason, in the writer's opinion, the TCJA cannot legitimately be used as rationale for the United States' opposition to Pillar One.

Research suggests that the GILTI and BEAT provisions do not achieve their purpose of encouraging repatriation of foreign profits to the United States whilst discouraging shifting of profits and intangible assets offshore.[194] In fact, multinational firms were less enabled by the reduction in repatriation costs to increase domestic investment than incentivised to increase foreign investment.[195] GILTI's method taxes intangible income over 10 per cent of subsidiaries' tangible

192 Aparna Marthur "The US counterpunch to the OECD BEPS Project" (20 July 2018) American Enterprise Institute <www.aei.org>.

193 Andrew Schwartz and Galen Hendricks "One Year Later, the TCJA Fails to Live Up to Its Proponents' Promises" (20 December 2018) Center for American Progress <www.americanprogress.org>; and Chuck Marr, Brendan Duke and Chye-Ching Huang "New Tax Law Is Fundamentally Flawed and Will Require Basic Restructuring" (14 August 2018) Center on Budget and Policy Priorities <www.cbpp.org>. But, see Reuven S Avi-Yonah "A Positive Dialectic: BEPS and the United States" (2020) 114 AJIL 255.

194 See Brooke Beyer and others "The Effect of the Tax Cuts and Jobs Act of 2017 on Multinational Firms' Capital Investment: Internal Capital Market Frictions and Tax Incentives" (paper presented to the annual meeting of the American Accounting Association, San Francisco, August 2019).

195 At 23.

property in a country.[196] Therefore, the greater the value of the intangible assets, the less income is within reach of United States' tax authorities. This could motivate companies to continue to increase their capital investments as a way of reducing GILTI.[197]

The potential lifespan of the TCJA is also currently shrouded in uncertainty and follows a concerning trend of general opposition to its existence. Before the TCJA was passed into law, it faced significant backlash not only from the Democrats, but also those within the Republican Party and respected economists. Nancy Pelosi, Speaker of the House of Representatives, lamented the legislation, stating that it acted only to put more money into the pockets of the wealthiest, whilst providing an incentive for corporations to shift their jobs overseas.[198] Former Mayor of New York, Michael Bloomberg, labelled the TCJA as an "economically indefensible blunder" which would not encourage corporations to reinvest their cash reserves back into the United States' economy.[199] The current president-elect, Joe Biden, has expressed his dissatisfaction with many aspects of the TCJA and has already made known his intention to amend the legislation significantly. Joe Biden intends to raise the corporate tax rate to 28 per cent, double the effective tax rate on GILTI earned by United States' multinationals to 21 per cent and impose a 15 per cent minimum tax on book income for companies reporting a net income of more than USD 100 million but owe no United States income tax.[200] However, given the Republicans currently control the Senate, as will be discussed further in this article, getting these changes through may prove difficult for the Biden administration.

While the TCJA does have a sunset, the corporate and business provisions are generally permanent notwithstanding repealment.[201]

C. Influence of United States' Multinationals

United States' multinationals' global economic dominance and domestic contributions allow them to exercise significant political influence.[202] This influence has likely been used to shape the United States' stance on Pillar One.

196 At 9.
197 Michael Cohn "TCJA boosted multinationals' investments overseas more than in US" (24 July 2019) Accounting Today <www.accountingtoday.com>.
198 Interview with Nancy Pelosi, Speaker of the House of Representatives (Kate Bolduan, At This Hour, CNN, 2 November 2017).
199 Michael Bloomberg "Billionaire Michael Bloomberg: 'The Tax Bill Is an Economically Indefensible Blunder'" (15 December 2017) Money <www.money.com>.
200 Deloitte "A change in course: Tax policy implications of a Joe Biden presidency" (7 November 2020) <www2.deloitte.com>.
201 All individual and passthrough provisions of the TCJA will have expired by 2025.
202 Kim and Milner, above n 167, at 2.

Political lobbying in the United States occurs in a significantly broad range of policy areas. Given multinationals' notable interest in the operation of the domestic tax framework, lobbying over tax policy has become a frequent occurrence. America's largest multinationals have lobbied Congress on tax issues for decades, dedicating millions to hiring lobbyists to meet with lawmakers to exert political sway.[203]

This influence was no more evident than during the drafting of the TCJA. In the quarter leading up to its enactment in 2017, five of the largest tech companies in the United States increased their lobbying spending by a collective 24.3 per cent compared to the same quarter in 2016.[204] Microsoft alone had 81 different lobbyists working to influence Congress, specifically on tax issues, presumably surrounding an adequate reduction of the corporate tax rate.[205] In total, more than 4,600 lobbyists were engaged specifically on the tax rewrite, working out to be around 13 lobbyists for every member of Congress.[206] Evidence of this lobbying can be seen in specific carveouts in the TCJA, which highlights the legislation's inability to restrict profit shifting activities sufficiently.[207]

United States' multinationals have not been tight-lipped on their opposition of Pillar One. The Alliance for Competitive Taxation, an organisation made up of more than 40 United States multinationals in a range of industries, believed that Pillar One lacks sufficient mechanisms to prevent double taxation and effectively resolve disputes. This would increase compliance and administrative burdens for most multinationals.[208] Similarly, the Business Roundtable, an association whose members are Chief Executives of large United States' multinationals, submitted that Pillar One would unequivocally deter them from continuing to expand their overseas operations.[209] If these multinationals were to be restricted from expanding overseas, it would consequentially negatively impact the domestic economy.

203 Alexia Fernández Campbell "The 4 companies that lobbied most on tax overhaul – and what they got for it" (7 December 2017) Vox <www.vox.com>.

204 Mark Sullivan "Big Tech's Lobbying Splurge Is About to Pay Off With the Tax Vote" (1 December 2017) Fast Company <www.fastcompany.com>.

205 Sullivan, above n 204.

206 Richard Lardner "Money spent on lobbying skyrocketed during tax overhaul" *The Associated Press* (online ed, New York City, 12 February 2018).

207 Drucker and Tankersley, above n 183. Senate Republicans were forced to draft the legislation in a way that payments made by an American company to a foreign affiliate for something that went into a product would be excluded from tax.

208 Email from Alliance for Competitive Taxation to the OECD submitting their comments on the Secretariat Proposal for a "Unified Approach" under Pillar One at 9.

209 Email from Business Roundtable to the OECD submitting their comments on the Secretariat Proposal for a "Unified Approach" under Pillar One at 2.

D. Loss of Political Power

The United States' gradual loss of global influence, coupled with the domestic political power that comes with the ability to influence tax policy, both have a significant impact on the United States' current opposition to Pillar One.

1. Internationally

The United States has been the central player in international affairs since the end of World War Two, leading the creation of new international organisations such as the United Nations, NATO, the International Monetary Fund and the World Bank.[210] It is these successes that have seen the United States described as an "indispensable nation".[211] However, these days appear to be gone. While there is no mistaking that the United States still hold significant influence and power, it is now considerably lower than what was held decades ago.[212] Recent years have seen the nation abandon an approach grounded in alliances and collaboration with multilateral institutions, to the point where it is now seen as withdrawn and inward-looking, making it an unreliable partner.[213]

This gradual decline of the United States' dominance has largely been facilitated by the emergence of new global powers, which are beginning to assert an influential role in international policy.[214] An example of these emerging powers is what is known as the BRICS nations – a term coined to identify Brazil, Russia, India, China and South Africa.[215] The BRICS nations account for more than 40 per cent of the world's population and represent just under 22 per cent of the global economy in terms of combined GDP.[216] The political co-operation between these nations has created a potentially powerful global grouping, which has risen concurrently with the United States' decline in global influence.[217] This has added a new element to traditional multilateral negotiations, which typically heavily relied on the United States' participation.

210 Gordon Adams "A new world is dawning, and the US will no longer lead it" (26 June 2018) The Conversation <www.theconversation.com>.
211 Interview with Madeleine Albright, United States Secretary of State (Matt Lauer, The Today Show, NBC-TV, 19 February 1998), transcript provided by United States Department of State (Washington DC).
212 See generally Wouter Lips "Great powers in global tax governance: a comparison of the US role in the CRS and BEPS" (2019) 16 Globalizations 104.
213 Dan Balz "America's global standing is at a low point. The pandemic made it worse" *The Washington Post* (online ed, Washington DC, 26 July 2020).
214 Adams, above n 210.
215 Jim O'Neill *Building Better Global Economic BRICS* (Goldman Sachs, Global Economics Paper No 66, 30 November 2001).
216 Peter Lowe "The rise of the BRICS in the global economy" (2016) 41 Teaching Geography 50 at 50.
217 At 50.

However, given the nature of the issue that BEPS is trying to address, and the Inclusive Framework's function, the United States has been provided with an opportunity to flex its once-dominant muscles. As Pillar One requires a consensus-based solution, there must be no votes rejecting the proposal for it to be passed. If the United States were to vote against the proposal, it would be unable to pass in its current form and would need to be re-drafted to gain its acceptance. Usually, nations will abstain from voting where they oppose a proposal, which allows the proposal to be passed and avoids re-negotiation. Understandably in this instance, the United States is unlikely to take such a route. By threatening to vote against a solution to Pillar One that does not have its best interests at heart, it allows the United States to emphasise its perceived pre-eminence in the international tax system and provides it with somewhat of an upper hand in negotiations. Traditionally, United States' diplomacy has been critical to facilitating multilateral agreements. If it managed to persuade the Inclusive Framework to implement a safe harbour for Pillar One, it may assist the United States in reasserting its dominance in global affairs, if that is still possible.

2. Domestically

In a similar vein, any effort to coordinate international tax rules, such as Pillar One, necessarily involves a loss of domestic autonomy and, therefore, domestic political power.[218] This argument is supported by Julie Roin, who states that "tax base harmonisation reduces legislative control over national tax policy without creating a corresponding increase in control over worldwide tax policy".[219]

Significant domestic political power is also held by the leaders of individual states in the United States. Similarly to the more senior United States' politicians, these leaders understand the consequences of assigning over the authority to create such revolutionary new tax principles to a multilateral authority. Further, if a consensus-based solution can be reached on Pillar One, it would likely give the OECD the requisite confidence to go forward with the BEPS Project and continue to harmonise tax laws, which may continue to negatively affect United States' multinationals.[220] These multinationals generally provide domestic politicians with some form of "accompanying recompense" in return for favours, generally in the form of tax leniency.[221] Loss of the ability to provide favours consequentially

218 Mindy Herzfeld "The Case Against BEPS: Lessons for Tax Coordination" (2017) 21 Fla Tax Rev 1 at 37.
219 Julie Roin "Taxation without Coordination" (2002) 31(S1) JLS S61 at S79.
220 Herzfeld, above n 218, at 2.
221 Roin, above n 219, at S81.

decreases a domestic politician's power and provides a further motive for the United States to impose a roadblock to a successful conclusion on Pillar One.[222]

VIII. Evaluation of the United States' Stance on Pillar One

A. Rationalisation

The stance of the United States on Pillar One, whilst holistically damaging, is to some degree justifiable. It is important to rationalise with the hesitancies of the United States around Pillar One and the domestic roadblocks that will likely obstruct a Pillar One ratification to fully understand their position.

1. Pillar One uncertainty

The United States has not been provided with any assurance that existing unilateral measures – such as DSTs – will be revoked or withdrawn upon Pillar One's agreement. In fact, they appear to be proliferating.[223] If DSTs were to operate alongside Pillar One, both multinationals and the United States would stand to lose considerably more. Therefore, it is clearly not in the United States' best interests to push for more significant tax liabilities for its multinationals under Pillar One, when the uncertainty of unilateral measures still looms. Further, there is also the uncertainty of whether another nation in the Inclusive Framework fails to ratify Pillar One and takes its own unilateral measures, which would again negatively impact the United States. Couple this with the fact that members of the Inclusive Framework have not hesitated to declare their opposition to mandatory binding arbitration, meaning that effectively a jurisdiction may impose their own penalty outside of an OECD-based dispute resolution decision, and its concerns appear increasingly reasonable.[224]

Also, whilst it is not disputed that United States' multinationals ought to be paying more tax than they are, they are still operating inside the parameters of the law. Their consequent labelling as "tax cheats" could therefore be deemed to be unfair.[225] Attempting to defer blame solely onto multinationals fails to address the broader issue of the inadequacy of the rules that regulate them.

222 Herzfeld, above n 218, at 38.
223 Herzfeld, above n 172, at 1549.
224 At 1549.
225 Cadesky, above n 65, at 8.

2. Partisan politics

The United States operates in a hostile and partisan political environment. This environment has traditionally made domestic progress on the structural reform of the international tax system next to impossible.[226] It is important to understand how this environment makes ratification of Pillar One significantly difficult.

(a) Overview

The United States' Federal Government operates with three branches: Legislative, Executive and Judicial. It is the Legislative branch that is empowered by the Constitution to enact legislation and will ultimately be responsible for ratifying Pillar One into domestic law. The legislative branch is governed by Congress, which is comprised of the Senate and the House of Representatives.[227]

The House of Representatives comprises 435 elected members, divided among the 50 states in proportion to their total population, with an additional six non-voting members.[228] Members of the House are elected every two years.[229] The Senate is composed of 100 Senators, who are elected for six years by their state. However, this is staggered so that every two years, one-third of the Senate comes up for re-election.[230] Currently, the Senate majority is held by the Republican Party,[231] whereas the House Majority is Democratic.[232]

Issues generally arise when legislation goes through Congress. This is because in order for legislation to be passed, both the House and the Senate must pass the same bill by a majority vote, requiring collaboration between two factions of Congress that are generally led by opposing parties. This has led to United States' politics becoming exceptionally polarised, with Congress members becoming increasingly less accepting of enacting anything proposed by the opposition party,[233] leading many to see Congress as a "dysfunctional government".[234]

226 Mitchell A Kane "A United States Perspective on the Relevance of the OECD BEPS Project to the Taxation of Non-residents" [2017] NZ L Rev 175 at 176.
227 USA Gov "Branches of the U.S. Government" <www.usa.gov>.
228 The White House "Our Government: The Legislative Branch" <www.whitehouse.gov>.
229 The White House, above n 228.
230 The White House, above n 228.
231 United States Senate "Party Division" <www.senate.gov>. At the time of writing, the Senate Majority lay with the Republican Party, although if the Democratic candidates won the remaining two seats in the Georgia run-off elections, it would divide the Senate with a 50:50 seat split, leaving the deciding vote with Vice President-elect Kamala Harris, who would then give the Democratic Party the majority.
232 United States House of Representatives "Party Divisions of the House of Representatives, 1789 to Present" <https://history.house.gov>.
233 Pietro S Nivola "Partisanship in Perspective" *National Affairs* (online ed, United States, 2010).
234 Nivola, above n 233.

(b) Impacts on Pillar One

The political environment in the United States makes ratification of Pillar One difficult, given that it will inevitably face significant opposition in either the House or the Senate due to the partisanship of both United States' political parties. This difficulty in ratification has been further compounded by the explicit opposition towards multilateralism displayed by Donald Trump, the soon to be leaving president of the United States. In the time that Donald Trump has spent in office, he has seen the United States withdraw from the Paris Climate Change Agreement, the Iran nuclear deal and the Trans-Pacific Partnership. His administration has also defunded and disengaged from the United Nations and threatened to defund the World Trade Organisation.[235] This has all been carried out as part of his primarily nationalistic goal to put "America First".[236] These nationalistic examples of Donald Trump's wish to put United States' interests first shows why it comes as no surprise that a Pillar One solution that disadvantaged its multinationals was unlikely to be presented to Congress during his term.

Donald Trump's perspective on multilateralism can be contrasted to that of President-elect Joe Biden. Joe Biden has already declared that he wishes to restore traditional international alliances and re-engage globally on issues Donald Trump previously chose to neglect, such as climate change and trade.[237] He has also maintained that his administration would see the United States return to the Paris Climate Change Agreement.[238]

Despite being more favourable to multilateralism, there still appears to be no reason to assume that a Biden administration will be any more willing to accept a Pillar One solution which still disadvantaged United States' multinationals.[239] The Democratic Party has openly opposed tax measures that single out digital businesses, indicating changes to tax rules that target income from digital services will remain of real concern to Joe Biden.[240] Ultimately, Joe Biden will still face the same limitations that most Presidents have faced before him, in that he will still be limited by what can be sold politically and by what Congress is willing to accept.[241]

235 Alex Pascal "Against Washington's 'Great Power' Obsession" *The Atlantic* (online ed, Washington DC, 24 September 2019).

236 Nolan D McCaskill "Spicer: Trump's foreign policy is still 'America first'" (10 April 2017) Politico <www.politico.com>.

237 Michael Mundaca *Joe Biden is President-elect: What's next for US tax and trade policy?* (EY, 10 November 2020) at 5.

238 At 5.

239 Tom Pullar-Strecker "Next OECD boss faces uphill battle securing tax deal with Biden, experts say" (17 November 2020) Stuff <www.stuff.co.nz>.

240 Mundaca, above 237, at 6.

241 Josh White "Is Biden's victory good news for the OECD digital tax talks?" (12 November 2020) International Tax Review <www.internationaltaxreview.com>.

Even without Congress's limitations, it is unlikely that Joe Biden would place the United States into such a disadvantageous position. Given Joe Biden will not be inaugurated until 20 January 2021, it leaves him little time to shape his Treasury and outline his approach to Pillar One before consensus is aimed to be achieved in mid-2021.[242]

B. Evaluation

As shown throughout this article, the rationale for the United States' current opposition to Pillar One is heavily nationalistic. Nationalism is not necessarily a bad trait. However, in such a situation where global consensus is paramount to prevent the destruction of not only developing economies, but already established ones, the United States' stance on Pillar One is unsustainable.[243]

Nationalism is commonly understood to describe two phenomena; first, the attitude that the members of a nation have when they care about their national identity; and second, the actions that the members of a nation take when seeking to achieve self-determination.[244] Both elements are visible in understanding the United States' rationale for opposing Pillar One. This can be contrasted with globalism, which is defined as "the idea that events in one country cannot be separated from those in another and that economic and foreign policy should be planned in an international way".[245] The BEPS Project represents a globalism approach, as it is trying to create a global solution for the greater good, instead of individual, unilateral measures.

The United States' nationalistic approach effectively turns a blind eye to the effects of the practices of its own multinationals on developing nations. This approach would have been accepted a century ago, where the international tax system was developed in the interests of richer, developed countries and to the disadvantage of developing countries. However, shifts in the global balance of power now mean that inequalities resulting from such an approach are no longer acceptable.[246] The active pursuit of disproportionately low tax liabilities by United States' multinationals also runs contrary to the increasingly accepted belief that organisations owe a duty to

242 See United States Constitution, amend XX, § 1, which stipulates that the term of a President shall end at noon on the 20th day of January.
243 Herzfeld, above n 218, at 35.
244 Stanford Encyclopedia of Philosophy "Nationalism" (29 November 2001) <https://plato.stanford.edu>.
245 Cambridge Dictionary "globalism" <https://dictionary.cambridge.org>.
246 Herzfeld, above n 218, at 35.

pay an appropriate share of tax as part of their corporate social responsibility.[247] Whilst minimising this liability provides a benefit to multinationals, it passes the burden of ensuring sufficient tax revenue is derived by a jurisdiction onto smaller taxpayers who are less capable of satisfying this burden. Multinationals ought to comply with their broader responsibility to society.[248]

Clearly, the United States still holds significant influence in the international arena. If this were not the case, it would be unlikely that its inactivity in Pillar One discussions would have gained such attention. However, this article submits that it may well see this influence decrease if it continues to put its own self-interests in the way of enabling the Inclusive Framework to arrive at a globally beneficial Pillar One solution. The United States is willing to sacrifice a solution that is beneficial to the significant majority, for a solution that is largely only beneficial for itself. Such an approach is likely to severely damage relationships with other jurisdictions, if it has not already. If the United States is to return as the world's dominant superpower, it will have to begin to think more broadly. As a leader, one must look after the interests of the greater good, as opposed to solely focusing on one's own needs.

Of course, it is understandable that the BEPS Project and Pillar One, particularly given its revolutionary nature, is ambitious. By grouping 15 Action items into a single endeavour, one would be mistaken for assuming that there is a unifying theme across them all.[249] But, in truth, there is likely not. Add to this attempting coordination between jurisdictions with hugely disparate views of the function of an income tax, and disagreement is bound to arise.[250] While a consensus-based approach has generally worked so far for the OECD on other issues, this is by far the toughest. However, it is the writer's view that the United States, as a leader, should be facilitating such an agreement for the greater good, rather than jeopardising it. To the extent that the fundamental challenges of Pillar One require the need for coordination, claims of exceptionalism or self-interest ought to be bracketed in the first instance.[251]

247 Reijo Knuutinen "Corporate Social Responsibility, Taxation and Aggressive Tax Planning" (2014) 1 Nordic Tax J 36 at 36. See also Hans Gribnau "Corporate Social Responsibility and Tax Planning: Not by Rules Alone" (2015) 24 Social & Legal Studies 225; and Thomas Scheiwiller and Susan Symons "Corporate responsibility and paying tax" OECD Observer <https://oecdobserver.org>.

248 See generally "Big business is beginning to accept broader social responsibilities" *The Economist* (online ed, London, 22 August 2019).

249 Kane, above n 226, at 198.

250 H David Rosenbloom and Joseph P Brothers "Reflections on the Intersection of US Tax Treaty Policy, US Tax Reform and BEPS" (2015) 78(8) Tax Notes Intl 759 at 764.

251 Kane, above n 226, at 175.

C. Potential Consequences of the United States' Approach

To understand why the United States' nationalistic approach ought to be bracketed, the potential consequences of its withdrawal from Pillar One discussions need to be examined. Ultimately, there are two possible consequences, both of which have negative ramifications.

First, if the United States were to withdraw from Pillar One, it may cause Pillar One to completely collapse, given it is seen as imperative for the United States to ratify Pillar One. Such a collapse would likely see countries taking unilateral measures, such as DSTs, and those that already have these in place may no longer continue to hold them back. This would trigger tax disputes and inevitably heighten trade tensions, possibly bringing to fruition trade wars.[252]

Second, a solution to Pillar One may still proceed without the United States. This is undesirable, given the necessity for a genuinely collaborative multilateral solution being required to solve the issue at hand, which inevitably needs the United States' participation. Such an option may only benefit developing countries with large markets if agreed-on formulas could be arrived upon that benefitted them.[253] This situation would also be detrimental to United States multinationals, arguably more so than they perceive. This is because countries who have ratified Pillar One will now have the ability to assert more taxing rights over United States multinationals subsidiaries who operate in their jurisdiction. This may force multinationals to unwind their global supply chain or principal company structure and move their intellectual property back to the United States to ensure protection under tax treaties.[254] This is likely to reduce a multinational's revenue and subsequently have a detrimental effect on the United States' domestic economy.

Calmer heads ought to prevail here. The United States risks jeopardising the most progressive tax reform in the last century, which could compound the detriments of its multinationals' tax avoidance to developing countries even further. Without a doubt, the most beneficial solution would be for the United States to resume participation and play a meaningful role in facilitating a Pillar One solution which will benefit everyone, as opposed to solely themselves. As Pascal Saint-Amans, Director of the OECD's Centre for Tax Policy and Administration, rightly stated, "what lies in the balance is the result of decades of multilateral efforts to create a

252 OECD "OECD Secretary-General Angel Gurría has reacted to recent statements and exchanges regarding the ongoing negotiations to address the tax challenges of the digitalisation of the economy" (18 June 2020) <http://www.oecd.org>.

253 Herzfeld, above n 172, at 1550.

254 At 1550.

predictable international framework that fosters tax certainty".[255] The United States ought not to jeopardise this.

IX. Conclusion

The BEPS Project provides a welcome reform to an international tax system that has been outgrown by an evolving digital economy. The work undertaken by the Inclusive Framework group under Pillar One to update the fundamental nexus and profit allocation rules is arguably the most significant piece of the BEPS puzzle. This is in no small part due to the necessity of mitigating tax avoidance by large multinationals. Whilst considerable progress has been made on developing a solution to Pillar One, the United States' current stance has presented a substantial roadblock to developments.

This article critiques this stance and argues that the United States ought not to prioritise its own self-interest. It identifies the rationale for the United States' perspective, including the protection of its own multinationals, domestic legislation which aims to encourage repatriation of multinational profits back to the United States, the influence of these multinationals domestically and the loss of influence that supporting a multilateral solution could cause to the United States. It argues that although the United States' perspective is justifiable in some regards, its approach ought to be one that favours multilateralism as opposed to nationalism. The consequences of such an approach by the United States could be catastrophic to any future multilateral developments in tax policy, as unilateral measures taken by individual jurisdictions are likely to cause significant friction.

X. Post-Script

Following the submission of this dissertation, an alteration in the stance of the United States towards Pillar One occurred. The new United States' Secretary of the Treasury under President Joe Biden's administration, Janet Yellen, announced that the Treasury had dropped the contentious safe harbour proposal at the end of February 2021. Yellen affirmed the Biden administration's commitment to reaching a consensus-based solution on Pillar One by the mid-2021 deadline.

In April 2021, the Biden administration clarified its position in relation to Pillar One in a presentation made to members of the Inclusive Framework. It reinforced that despite its willingness to return to the table, it could not accept any result that was discriminatory towards United States' multinationals. As a result, it provided

255 See Stephanie Soong Johnston "More Trade Groups Call for OECD Tax Overhaul Delay During Crisis" (2020) 98 Tax Notes Intl 94 at 95.

a new proposal for Pillar One which would see it target no more than 100 of the largest multinationals by increasing the total revenue and profit margin thresholds applicable to bring a multinational into its scope.

Whilst the willingness of the United States to return to meaningful discussions on Pillar One is a promising sign, it is unclear how this proposal will affect the current Pillar One Blueprint or the Inclusive Framework's proposed timeline. The significant reduction in scope proposed by the United States is stark when contrasted with the estimated 2,300 multinationals which were to be caught in the current Blueprint. The coming months will tell whether the United States is willing to compromise on its proposal to reach a solution which is more in line with the current Blueprint, or whether its re-engagement was cause for a false sense of optimism.