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Thinking Like a Source State in a Digital Economy

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ARTICLES

THINKING LIKE A SOURCE STATE IN A DIGITAL ECONOMY

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INTRODUCTION

Taxation is often a realm of politics. Nowhere is it more manifest than in U.S. international tax policy. One cannot find a clear, single concept that drives such policy, and the rules are often described in terms such as "hybrid" and "compromise," reflecting the politics behind their enactment.[1]

The core of the international tax rules of the United States, however, has not changed much since its inception in the beginning of the last century, with two notable exceptions: the Subpart F legislation in the beginning of the 1960s[2] and the Tax Cuts and Jobs Creation Act of 2017 (TCJA).[3] Still, the United States generally taxes its residents and citizens on their worldwide income and provides relief for double taxation in the form of foreign tax credits. These credits are granted on a unilateral basis and are limited solely to cases where abuse is a concern or when the administrative burden involved in checking the authenticity of foreign tax payments is considered excessive.[4] In addition, the regime rather strictly adheres to three axioms: first, that non-residents, non-citizens are taxed solely on their U.S. source income; second, the separate corporate personality metaphor, which means that foreign corporations are not taxed on their worldwide income; and, third, taxation based on the arm's length standard, which means that cross-border related-party transactions are viewed as if conducted on the market, using comparability analysis.

The first significant departure from this general architecture of the U.S. international tax rules could be tracked to the enactment of Subpart F, which significantly gnawed at the above-mentioned axioms by taxing income of foreign subsidiaries of U.S. persons in instances where such income's non-taxation (by the United States) or deferral were considered potentially unjustified.[5] The legal construct of attributing such income directly to U.S.

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[1] *See, e.g.*, DANIEL N. SHAVIRO, FIXING U.S. INTERNATIONAL TAXATION 2 (2014).

[2] Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960.

[3] Budget Fiscal Year 2018, Pub. L. No. 115-97, 131 Stat. 2054.

[4] I.R.C. §§ 901–09.

[5] For more on the significance of the change effected by the enactment of Subpart F, *see, e.g.*, Richard J. Horwich, *The Constitutionality of Subpart F of the Internal Revenue Code*, 19 U. MIAMI L. REV. 400 (1965).

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shareholders could not mask the anti-abuse nature of these rules. Subpart F is a good example of the political nature of tax law since it came about as a compromise between the Kennedy administration, who wanted to completely eliminate deferral and Congress and industry who cared about the so-called competitiveness of U.S. multinational enterprises (MNE) in a world where other countries' MNEs were not burdened by similar rules.[6] Consequently, only the less-justified forms of deferral became subject to this regime.

The second significant departure is the TCJA, which on the one hand enacted a participation exemption,[7] a clear departure from the century-long reliance on foreign tax credits to relieve double taxation in the United States, and on the other hand expanded the worldwide taxation of U.S. taxpayers beyond potentially abusive deferral, currently taxing income from clearly non-abusive direct investment abroad.[8] Moreover, the latter rules, known as the Global Intangible Low-Taxed Income (GILTI) rules, provided for only partial elimination of double taxation.[9] Finally, the TCJA deviated from the traditional taxation of foreign income at a single rate with a complex system of multiple possible rates, and from the traditional reliance on market prices and market comparability with the use of formulary elements to calculate some items of income.[10] Again, the complexity of the TCJA and its partial departures from the traditional norms enhanced the hybridity of the international tax rules of the United States.

The two departures from the core architecture of the international tax rules are qualitatively different. The anti-abuse nature of Subpart F (and other anti-deferral rules) can be viewed as supportive of the primary rules, and indeed many other countries using similar norms eventually adopted

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[6] *Id.* at 400–01.

[7] I.R.C. § 245A.

[8] I.R.C. § 951A.

[9] I.R.C. § 960(d).

[10] The recent Base Erosion and Profit Shifting (BEPS) project even came close to recommending the adoption of CFC rules, eventually providing only "best practices" for countries on the adoption of CFC rules. *See* OECD, DESIGNING EFFECTIVE CONTROLLED FOREIGN COMPANY RULES ACTION 3: 2015 FINAL REPORT (2015). The European Union went a step further mandating CFC legislation from its Members States. *See Report from the Commission to the European Parliament and the Council on the Implementation of Council Directive (EU) 2016/1164 of 12 July 2016*, at 4, COM (2020) 383 final (Aug. 19, 2020).

Controlled Foreign Corporation (CFC) legislation of some kind.[11] Moreover, Subpart F maintained the integrity and the net income nature of the entire income tax regime. The TCJA signaled a complete change of philosophy, turbocharging the complexity of the regime, both quantitatively and qualitatively, stirring the incentives created by the rules like never before. Its impact is particularly important since it was enacted at a uniquely turbulent time for the international tax regime, which has been facing critique over its inability to deal with globalization and most importantly with the changes to the global economy as a result of the digital revolution it is facing. That critique led to the Base Erosion and Profit Shifting (BEPS) project.[12] In fact, it is common knowledge that the TCJA international tax rules were crafted to influence the BEPS project.[13] Nonetheless, the TCJA did not respond to these changes and indeed has had only a minute influence on the BEPS project thus far.[14]

The pressure to reform the U.S. international tax policy is not new, and the TCJA was preceded by many proposals for international tax reform (promoted by both Republicans and Democrats)[15] and ample academic criticism, all decrying the incompatibility of the international tax policy of

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[11] *See, e.g.*, CONTROLLED FOREIGN CORPORATIONS LEGISLATION (Georg Kofler et al. eds., 2020).

[12] The project's outcomes are available online. *International Collaboration to End Tax Avoidance*, OECD, https://www.oecd.org/tax/beps/ (last visited Apr. 11, 2021).

[13] *See, e.g.*, Reuven S. Avi-Yonah, *A Positive Dialectic: BEPS and the United States*, 114 AJIL UNBOUND 255, 255 (2020).

[14] But note that the post-BEPS work on the challenges presented by the digital economy to the international tax regime was affected by the TCJA and may adopt some of its features. *See, e.g.*, *Secretariat Proposal for a "Unified Approach" Under Pillar One*, OECD, https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf; *Global Anti-Base Erosion Proposal ("GloBE")—Pillar Two*, OECD, https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf [hereinafter OECD, *Global Anti-Base Erosion Proposal*].

[15] For analysis and description of the types of reform preceding the TCJA, see, for example, JANE G. GRAVELLE, CONG. RESEARCH SERV. RL34115, REFORM OF U.S. INTERNATIONAL TAXATION: ALTERNATIVES (2017). See also, for example, the Obama Administrations proposals, such as the Fiscal Year 2016 Revenue Proposals. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATIONS FISCAL YEAR 2016 REVENUE PROPOSALS (Feb. 2015), https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2016.pdf; Tax Reform Act of 2014, H.R. 1, 113th Cong. (2014).

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the United States and its economic position in the world.[16] In simple terms, the policy had been largely crafted for a country that was at the time a large net capital exporter (as well as a world leading exporter of goods and services), whereas now the United States has been a net capital importer since the 1980s.

This changing economic position of the United States has not affected its international tax policy. Although impure, such policy has been, and to a large extent still is, dominated by the idea of Capital Export Neutrality (CEN), compatible with an emphasis on (worldwide) residence-based taxation and antithetical to taxation at source.[17] In simple terms, the United States has been generally guided by the belief that *what's good for our MNE is good for us*.[18] This belief was transformed into rules that reduced the tax burden on exporters.[19] As already mentioned, conflicting political considerations and concern about abuse acted to limit CEN,[20] leading to the hybrid system we have now.

Still, these limits on CEN have not resulted in true reform that is compatible with the United States' now almost forty-year position as a net capital importer. This Article contributes to the vast scholarship and policy measures addressing this incompatibility with an analysis of a contemporary aspect: the U.S. response to the challenges of taxing the digital economy. A global effort to harmonize the taxation of the digital economy poses a serious concern for the United States since it seems to be directed mainly at U.S.

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[16] *See, e.g.*, Michael J. Graetz, *The David R. Tillinghast Lecture Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 269 (2001).

[17] *See, e.g.*, DEP'T OF THE TREASURY, THE DEFERRAL OF INCOME EARNED THROUGH U.S. CONTROLLED FOREIGN CORPORATIONS A POLICY STUDY 31 (2000). For more explanation and critique of CEN, see, for example, David A. Weisbach, *The Use of Neutralities in International Tax Policy*, 68 NAT'L TAX J. 635, 640 (2015); Fadi Shaheen, *International Tax Neutrality: Reconsiderations*, 27 VA. TAX REV. 203, 203 (2007); Michael S. Knoll, *Reconsidering International Tax Neutrality*, 64 TAX L. REV. 99, 100 (2011).

[18] *See, e.g.*, Laura Tyson, *They Are Not Us: Why American Ownership Still Matters*, THE AM. PROSPECT (Dec. 5, 2000), https://prospect.org/world/us-american-ownership-still-matters/.

[19] See, for example, regimes such as the Western Hemisphere Corporations, DISC, FSC, and ETI. For a short history of these regimes, see, for example, Bruce A. Daigh et al., *State Tax Issues Associated with the Extraterritorial Income Regime*, 9 ST. & LOC. TAX LAW. 1 (2004).

[20] *See* Tyson, *supra* note 18.

MNEs.[21] Yet, the failure of this global effort leaves us with a state of affairs that may not be more desirable, where countries impose domestic (typically source-based) measures directed at U.S. MNEs.[22] Unlike a coordinated source-based measure, these ("digital") taxes are as diverse as the growing number of countries adopting them, with similarly different compliance requirements, and therefore pose a significant cost to the MNE. Moreover, for the most part these taxes are presented in new forms (most notably so-called Digital Service Taxes ("DST") of different kinds), whose treatment under the current rules is uncertain (e.g., they are probably not creditable),[23] and often manifest as interim measures that further increase uncertainty for both MNEs and other governments. These developments are taking place while the United States, with the richest domestic market, continues to sit on the fence in its traditional stance.[24] This Article echoes previous critiques of the United States' general policy favoring residence taxation but concedes that this is complicated by the country's present domination of the digital market.

This Article proceeds as follows: Part I reviews the traditional U.S. international tax policy, followed by Part II that highlights the impact of the TCJA on such policy. Part III provides context to the proposals made by this Article with a discussion of the international discourse over the challenges that the digital economy presents to the international tax regime, while Part IV exposes and explains the role of the United States in this discourse. Finally, the Article concludes with modest proposals for U.S. action in response to the challenges presented by digital economy to its tax rules, proposals that could finally also consider the true position of the United States in the global economy.

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[21] *See, e.g.*, Initiation of Section 301 Investigations of Digital Services Taxes, 85 Fed. Reg. 34,709 (June 5, 2020).

[22] *See, e.g.*, Letter from Steven T. Mnuchin, Sec'y of the Treasury, to José Ángel Gurria, OECD Sec'y-Gen. (Dec. 3, 2019) [hereinafter Letter from Secretary Mnuchin].

[23] *See, e.g.*, Peter A. Barnes & H. David Rosenbloom, *Digital Services Taxes: How Did We Get into This Mess?*, 166 TAX NOTES FED. 1927 (2020).

[24] And, at best plays "defense" in response to the actions of other countries. *See, e.g.*, Yariv Brauner, *The Implementation of BEPS: The United States IFA Branch National Report*, *in* 102a IFA CAHIERS 849, 849 (2017).

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I. Traditional U.S. International Tax Policy

The traditional policy discourse in the United States contrasts CEN with Capital Import Neutrality (CIN),[25] which is the idea that the fruits of domestic investment should be taxed at the same rates regardless of the origin of the investor. CIN is consistent with the need for a tax system to buttress competitiveness that industry has long promoted with policymakers, with source-based taxation and territorial or exemption systems to relieve double taxation.[26] Realistically, CEN and CIN could not be achieved simultaneously,[27] and therefore the classic policy literature focused on which of these neutralities would better serve the interest of the relevant constituency, when typically that constituency would be the entire world.[28] In that context, economists generally preferred CEN because of its lesser distortionary effects.[29] The same general preference influenced U.S. policy, both because of the dominant position of the United States in the world economy and its position as the largest net capital exporter in the world. Other countries, of course, had different interests and hence made different choices. Those choices in turn forced the United States to soften its preference, and include CIN-like measures in combination with the CEN compatible measures,[30] leading to the current hybrid rules.

Early academic critique of the Neutralities' (CEN, CIN, etc.) discourse mainly challenged the idea that policy should maximize world welfare. Most notably, Peggy Musgrave argued that the United States should maximize its own national welfare, explaining that National Neutrality (NN), or the grant of deductions rather than credits to foreign taxes paid by American taxpayers should therefore be the preferred policy.[31] Contemporary academic critique

[25] *See* Tyson, *supra* note 18, for discussions of the different international tax "neutralities."

[26] Territorial and exemption systems are not the same, yet they have often been used interchangeably in the political discourse.

[27] *See* Tyson, *supra* note 18.

[28] Consequently, its policy aim was global welfare maximization.

[29] *See* Graetz, *supra* note 16, at 272.

[30] Culminating with I.R.C. § 245A.

[31] *See, e.g.*, Peggy B. Musgrave, United States Taxation of Foreign Investment Income: Issues and Arguments 153 (1969).

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supported the national-perspective logic advocated by Musgrave,[32] yet it has not changed American policies. Economists added to the alphabet soup of neutralities in recent years with the idea of Capital Ownership Neutrality (CON), which also used the global welfare framework,[33] and caught some political attention of supporters of the switch to territoriality for a while, yet without actual law reform. Legal academics demonstrated that the Neutralities discourse, albeit useful for thinking about the implications of different norms, cannot directly support one type of legal reform or another.[34]

Despite the political attention to the various theory-based reform proposals,[35] international tax reform came only in 2017. Such reform hardly resembled any of the priorly proposed comprehensive reforms. The TCJA was an assemblage of rule changes, some of which resembled prior proposals, while others were completely new.

II. TCJA POLICY(?)

Articulating a coherent policy for the international tax provisions of the TCJA is difficult. The reform includes provisions that stem from very different, perhaps contradicting, thought processes. The rhetoric of the Trump administration leading to the reform had promoted ideas such as territorial taxation, incentives for investment in the United States, and, correspondingly, disincentives for investment abroad.[36] These ideas

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[32] *See, e.g.*, Graetz, *supra* note 16, at 284–94.

[33] *See, e.g.*, Mihir A. Desai & James R. Hines Jr., *Old Rules and New Realities: Corporate Tax Policy in a Global Setting*, 57 NAT'L TAX J. 937, 956 (2004). Michael Devereaux advocated a slightly different version. Michael P. Devereux, *Taxation of Outbound Direct Investment: Economic Principles and Tax Policy Considerations*, 24 OXFORD REV. ECON. POL. 698, 702 (2008).

[34] *See, e.g.*, Weisbach, *supra* note 17, at 638.

[35] The Destination Based Cash Flow Tax proposal that seemed to be favored by politicians from both sides of the aisle never materialized into an actual Congressional Bill. *See, e.g.*, Alan J. Auerbach et al., *International Tax Planning under the Destination-Based Cash Flow Tax*, 70 NAT'L TAX J. 783, 783 (2017).

[36] Pete Sepp, *Coalition Letter in Support of Tax Cuts and Jobs Act Conference Report*, NAT'L TAXPAYERS UNION (Dec. 18, 2017), https://www.ntu.org/publications/ detail/coalition-letter-in-support-of-tax-cuts-and-jobs-act-conference-report (citing the bill's positive effect on domestic investment and competitiveness internationally); Press Release, Mitch McConnell, More Tax Reform Benefits Coming to Kentucky Families, Press Release (Jan. 16, 2018) (highlighting the TCJA's passing as the primary impetus for employers' increased investment in workers).

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ostensibly materialized in the form of a participation exemption for foreign dividends,[37] the first significant exemption regime employed by the United States.[38] At the same time, the reform introduced the new GILTI regime that expanded the traditional worldwide taxing regime of the United States.[39] Moreover, a careful study of the interaction between the above rules suggests that the scope of exemption may be small.[40] The GILTI rules both corresponded to the traditional CEN and departed from it by unprecedently limiting the foreign tax credit permitted for GILTI to a formulated 80%.[41] This formulary rule was joined by an even more explicitly formulary rule that exempted from (GILTI) taxation an amount equal to 10% of the tangible investment abroad of a taxpayer; both rules represent a departure from the anti-formulary traditional policy of the United States.[42]

As an expansion of U.S. worldwide taxation, GILTI may be viewed as a disincentive to investment abroad, yet its lower rates and features, such as the exemption for 10% of the tangible investment abroad of a taxpayer, work in the other direction. The same complexity of incentives characterizes the other innovation of the TCJA, known as the BEAT regime.[43] Surely, the TCJA stirred the neatness of U.S. international tax policy like no earlier

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[37] I.R.C. § 245A.

[38] It is common (even if inaccurate) in popular policymaking to equate territorial taxation and exemption. Others have elaborated on the difference between these systems, a discourse that is beyond the scope of this Essay. *See, e.g.*, Robert J. Peroni et al., *Getting Serious About Curtailing Deferral of U.S. Tax on Foreign Source Income*, 52 SMU L. REV. 455 (1999).

[39] I.R.C. § 951A.

[40] *See* Christine A. Davis, *More Anti-Simplification: How PTI and GILTI Override the Section 245A Exemption and the U.S. Territorial Tax System*, 71 MERCER L. REV. 471, 525–26 (2020).

[41] The Internal Revenue Code includes multiple mechanisms that limit foreign tax credits, yet these limits implement particular policies and are not in conflict with the general policy of CEN and the elimination of double taxation. The key limitation regime of § 904 attempts to curb averaging (blending income subject to high rate of taxation with lower taxed income), but when combined with the generous carryover rules of § 904(c) its effect is primarily to defer the credit for taxpayers that do not engage in excessive averaging. Other limitations, such as 901(j), deny the credit based on a competing (foreign) policy. None of the current limitations is formulary, arbitrarily denying a credit for *bona fide* foreign taxes. *See also* Ryan Finley, *IRS Trying to Limit TCJA's Damage to Foreign Tax Credit*, 89 TAX NOTES INT'L 1332 (2018).

[42] These were not, however, the first instances of use of formulas by the United States. *See, e.g.*, I.R.C. § 864(e), (f).

[43] *See* I.R.C. § 59A.

reform. In general, however, the reform did not cause a major departure from the hybrid nature of the U.S. international tax regime and its general preference for CEN. All that occurred while the international tax regime was forced to consider comprehensive reform to face the challenges presented to it by the digital economy.

III. The Taxation of the Digital Economy Discourse

The international tax regime has been seriously challenged by the ascent of the digital economy, primarily because that regime generally relied upon physical presence for the establishment of tax jurisdiction.[44] This challenge has recently topped the international tax agenda with the post-BEPS effort to achieve a global consensus on the solution to this challenge.[45] This challenge is not new, however, as similar issues arose in the context of the taxation of radio, satellite and other cross-border communications first,[46] followed by the treatment of catalogue sales,[47] and the advent of electronic commerce.[48] It was met with legal patches, more or less satisfactory,[49] over the years, patches that became evidently insufficient with the ascent of the digital economy in the new millennium. To a large extent the BEPS project was triggered by this challenge. The original BEPS document identified the issue as a "key pressure area" that must be addressed by the BEPS project.[50] The BEPS Action Plan made the taxation of the digital economy the primary action item on its agenda, although, soberly, promised solely a "report,"

[44] Ben Jones et al., *Taxing the Digital Economy: The Unilateral Approach*, 1389 TAX J. 8, 8 (2018).

[45] *See* OECD, ADDRESSING THE TAX CHALLENGES OF THE DIGITAL ECONOMY: ACTION 1, at 3–4 (2015) [hereinafter OECD, BASE EROSION AND PROFIT SHIFTING PROJECT].

[46] *See, e.g.*, Comm'r v. Piedras Negras Broad. Co., 127 F.2d 260, 260–61 (5th Cir. 1942).

[47] Quill Corp. v. North Dakota, 504 U.S. 298, 304–07 (1992).

[48] *See* WALTER HELLERSTEIN ET AL., ELECTRONIC COMMERCE AND MULTIJURISDICTIONAL TAXATION (2001).

[49] Most notably the eventual inclusion of the electronic commerce chapter within the OECD Model Commentaries on Article 5. *See* OCED, 2017 UPDATE TO THE OECD MODEL TAX CONVENTION 113–15 (2017) (including the electronic commerce chapter within the OECD Model Commentaries on Article 5 (¶¶ 122–31)).

[50] OECD, ADDRESSING BASE EROSION AND PROFIT SHIFTING 47 (2013).

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rather than actual action items or reform recommendations.[51] Indeed, the BEPS project delivered a report, which eventually included exposition of challenges in the taxation of the digital economy and of three possible solutions: a virtual PE (a "nexus" approach), a withholding mechanism, and an equalization levy.[52] To put it plainly, it failed to provide a concrete solution to the problem.

That challenge has not disappeared. Follow-up work occupied the next three years that resulted in a 2018 "interim report" that reflected, above all, the disagreement among BEPS countries (OECD and G20 nations) over the desired solutions and the conflict between countries supporting "interim measures" (*i.e.*, turnover taxes) and those opposing such measures and urging for focus on a sustainable long-term solution.[53] Another interim document was published in February 2019 as a public consultation document, changing course and presenting two new perspectives: a U.S./U.K.[54] proposal for a solution focusing on the profit allocation rather than on the nexus decision and a German/French proposal for an anti-base erosion tax based on the new U.S. GILTI rules.[55] Both these proposals primarily reflected the interests of their makers: countries in which jurisdictions a large portion of MNE reside. Therefore these proposals could not garner wide support.

The post-BEPS work on a solution to the challenges presented by the digital economy was purportedly taken within the inclusive framework (*i.e.*, with the cooperation of many non-BEPS countries, attempting to truly achieve a global consensus on the matter) (Inclusive Framework). Nevertheless, instead of the next document coming out of the Inclusive

[51] OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 29 (2013).

[52] OECD, BASE EROSION AND PROFIT SHIFTING PROJECT, *supra* note 45, at 13.

[53] OECD, TAX CHALLENGES ARISING FROM DIGITALISATION—INTERIM REPORT 2018 INCLUSIVE FRAMEWORK ON BEPS 20 (2018).

[54] The proposal included two different solutions, with the United Kingdom emphasizing user participation and the United States emphasizing marketing intangibles as key factors in the attribution of profits under Article 7. Both solutions address only the concerns of residence countries about profit shifting by multinational enterprises, and both essentially ignore the still unresolved issue of nexus without physical presence.

[55] OECD, ADDRESSING THE TAX CHALLENGES OF DIGITALISATION OF THE ECONOMY, PUBLIC CONSULTATION DOCUMENT 13 FEB.—6 MAR. 2019 (2019), https://www.oecd.org/tax/beps/public-consultation-tax-challenges-of-digitalisation-13-14-march-2019.htm (accessed Dec. 18, 2019).

Framework, the OECD released a mere Secretariat Proposal, reflecting the lack of agreement among the stakeholders.[56] The proposal published in Fall 2019 was released as two public consultation documents: the "Pillar One" Secretariat proposal,[57] and the "Pillar Two" proposal.[58] The former elaborated on a future virtual PE solution (including a new nexus definition and new attribution of profits rules, while the latter essentially proposed a minimum tax at the residence country level. Many have already commented on these proposals, noting their many deficiencies, a critique that this Article shares.[59]

Finally, in January 2020 the Inclusive Framework published a "statement," declaring its support of the OECD secretariat's proposal, and a decision to promote it toward a global consensus on the matter.[60] The statement acknowledges the deep disagreements over various aspects of the proposals, especially over the so-called Pillar One proposal. The most notable expression of this disagreement came in the form of a letter sent by Secretary Mnuchin to the OECD, in which he expressed the United States' wish to make Pillar One effectively elective.[61] The letter caused confusion about the United States' position on Pillar One. This was only further confounded by a follow-up letter sent to the ministers of partner OECD economies calling for a pause in Pillar One talks. In addition to opposing the implementation of DSTs, the letter also articulated the U.S. preference to treat Pillar One as a safe harbor mechanism.[62] The elective and safe harbor

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[56] It should be apparent to everybody that the entire body of work is conducted by the OECD—not a legitimate international standard-setter, despite the attempt to present it as a product of the inclusive framework. This is most apparent in the Pillar One proposal that is even named the "Secretariat Proposal." *See generally Secretariat Proposal for a "Unified Approach" Under Pillar One*, *supra* note 14.

[57] *Secretariat Proposal for a "Unified Approach" Under Pillar One*, *supra* note 14.

[58] OECD, *Global Anti-Base Erosion Proposal*, *supra* note 14.

[59] *See, e.g.*, Andrés Báez Moreno & Yariv Brauner, *Taxing the Digital Economy Post BEPS . . . Seriously*, 58 COLUM. J. TRANSNAT'L L. 121 (2019).

[60] 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 (2020).

[61] *See* Letter from Steven T. Mnuchin, *supra* note 22.

[62] *See* Letter from Steven T. Mnuchin, Sec'y of the Treasury, to the Finance Ministers of France, Italy, Spain, and the Chancellor of Exchequer of the U.K. (June 12, 2020).

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language represented inconsistent policies and have therefore been widely interpreted as an attempt by the United States to chill the process.

The January 2020 statement further notes some progress on the work on Pillar Two, without detail on concrete global agreements. It is also unclear whether an agreement on Pillar Two could materialize without agreement on Pillar One. As 2021 begins, the "pillars" paradigm continues to control the international tax agenda. The Inclusive Framework seems to be hard at work to complete the important details of the proposals, and, particularly, seems to try to accommodate the U.S. position, relying on the hope that the incoming Biden administration would be more amenable to an agreement on an international consensus. It is clear, however, that the agenda is far from being reduced to concrete proposals that countries can then convert into actual agreement, in treaties.

IV. Digital Taxes and the United States

No evaluation of U.S. policy toward digital taxation would be complete without preliminarily analyzing its unique interests, both economically, and diplomatically. This Part begins with an overview of these interests and supplements them with a look at how these interests have been protected historically. This will lead us to a discussion of the present day, where the United States is at odds with many of its allies over the future of digital taxation.

There is no country in the world that has benefitted more from the fruits of the digital economy than the United States. Of the five most valuable companies in the world, all of them are digital giants[63]—and they are U.S. based[?].[64] Apple's market cap alone dwarfs the annual GDP figures of all

[63] At time of writing, it appears that Berkshire Hathaway (not a "digital firm") is from time-to-time valued more than Facebook, which is 5th on the list referred to.

[64] M. Szmigiera, *Biggest Companies in the World by Market Capitalization 2020*, STATISTA (Mar. 12, 2021), https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-value/.

but 14 countries, including OECD allies like Mexico, Netherlands, Turkey, and Switzerland.[65]

Though not a direct measure of digital economic prowess, the technology revolution has produced enterprises whose assets consist of substantial amounts of intellectual property.[66] On this note, the United States receives more royalty and licensing income for use of IP than any other country in the world,[67] with receipts totaling $128,931,000,000 annually, second-place Japan receives less than half this at just $46,853,098,000.[68]

It is not a secret that the United States dominates this market which yields a sizeable tax base worth protecting. However, what may come as a surprise is how poorly this dominance squares with those of other OECD allies. For better or for worse, the OECD is frequently thought of as a *rich country club*.[69] Regardless of this label's veracity, it is evident that OECD member nations' economies and politics have remained relatively consistent over time; most members are European, have highly developed economies overseen by stable and (mostly) democratic political bodies, and, with a couple exceptions, tend to consist of nations that were allied against the Soviet Union. Though these generalizations remain unchanged today, the digital revolution has complicated the United States' relationship with other developed countries.

Unlike the economic successes enjoyed by OECD nations throughout the 20th and early 21st century, the digital economy remains largely

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[65] *GDP (Current US$)*, THE WORLD BANK, NY.GDP.MKTP.CD, https://data.worldbank.org/indicator/ (last visited Jan. 2, 2020).

[66] For example, Apple's tangible book value is $5.09 out of a total share price of $111.81 (4.55% of share value). Google's tangible book value per share was $259.81 out of a total stock value at $1,465.46 (17% of total share value.) *Alphabet Inc. Historical Data*, YAHOO! FINANCE, https://finance.yahoo.com/quote/GOOG/history?p=GOOG (last visited Sept. 22, 2020); *Apple Inc. Historical Data*, YAHOO! FINANCE, https://finance.yahoo.com/quote/AAPL/key-statistics?p=AAPL (last visited Sept. 20, 2020).

[67] *Charges for the Use of Intellectual Property, Payments (BoP, Current US$)*, THE WORLD BANK, https://tcdata360.worldbank.org/indicators/BM.GSR.ROYL.CD?Country=USA&indicator=898&viz=line_chart&years=1960,2019.

[68] *Id.*

[69] *See* Buttonwood, *What is the OECD?: What Does "A Club of Mostly Rich Countries" Actually Do?*, THE ECONOMIST (July 6, 2017), https://www.economist.com/the-economist-explains/2017/07/05/what-is-the-oecd.

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unexploited in these developed nations, particularly in Europe. By its own admission, the EU has struggled to develop its own technology industry.[70] None of the top ten most valuable companies residing in the European Union are highly digitalized firms. Instead, seven out of the ten are oil and automobile manufacturing companies, with the remaining three dealing primarily in financial services and insurance.[71] Moreover, the European digital data market is woefully miniature. Despite the EU's population dwarfing the United States by over 100 million people, its market is 2.5 times smaller.[72]

The focused rhetoric around the inadequacies of the international tax system's ability to capture digital wealth may be a relatively modern debate, but the challenges faced today were in large part predicted well before they came to the forefront. As early as 1996, the U.S. Department of the Treasury was exploring the potentially negative effects e-commerce would have on revenue collection.[73] This concern was mirrored by the OECD, which published a report a year later that shed light on the increasing prevalence of internet transactions.[74]

This attention prompted an agreement in 1998 oft referred to as the "Ottawa Taxation Framework."[75] This foundational accord established the position that traditional principles of international taxation should continue to govern the increasingly internet-based economy but left the door open for

[70] Europe has struggled to foster its own technology industry. Adam Satariano & Monika Pronczuk, *Europe, Overrun by Foreign Tech Giants, Wants to Grow Its Own*, N.Y. TIMES (Feb. 19, 2020), https://www.nytimes.com/2020/02/19/business/europe-digital-economy.html.

[71] D. Clark, *Largest European Companies Based on Revenue in 2020*, STATISTA (Mar. 2, 2021), https://www.statista.com/statistics/973337/largest-european-based-revenue/.

[72] EUROPEAN COMM'N, THE EUROPEAN DATA MARKET MONITORING TOOL 9 (2020).

[73] OFF. OF TAX POL'Y, U.S. DEP'T OF THE TREASURY, SELECTED TAX POLICY IMPLICATIONS OF GLOBAL ELECTRONIC COMMERCE 21 (1996).

[74] OECD, *Measuring Electronic Commerce* 3–4 (OECD Digit. Econ. Papers, No. 27); Arthur J. Cockfield, *The Rise of the OECD as Informal "World Tax Organization" Through National Responses to E-Commerce Tax Challenges*, 8 YALE J.L. & TECH. 136, 140 (2006).

[75] Cockfield, *supra* note 74, at 141 n.10 (citing ORG. ECON. CO-OPERATION & DEV., *Joint Declaration of Business and Government Representatives: Government/Business Dialogue on Taxation and Electronic Commerce* (Oct. 7, 1998), http://www.oecd.org/dataoecd/62/60/1932547.pdf).

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member nations to implement rules adapting the digital space to this aim so long as they were founded on these traditional international tax principles.[76]

Though the United States is notorious for stopping just short of making binding commitments to OECD pronouncements, it appears to have adopted a policy well within the principles advocated in the Ottawa Framework. Vice President Al Gore oversaw an interagency working group on electronic commerce that met for 18 months and produced a proposal that laid out the administration's stance on key regulatory issues concerning the "World Wide Web," including taxation.[77] On this point, the Clinton administration's view largely mimicked the OECD's, stating that "no new taxes should be imposed on Internet commerce," and advocated instead for a system "consistent with the established principles of international taxation."[78] Along this line, the group expressed similar concerns that states would attempt to over-regulate this area of commerce and responded three weeks later with the passing of the Internet Tax Freedom Act, which prevented state and local governments from imposing sales tax on internet service providers in exchange for internet access.[79] The Clinton administration's "hands off" approach to internet regulation was continued by President Bush, who extended the tax moratorium all throughout his presidency.[80] Even amidst sweeping reforms enacted by the so-called Bush Tax Cuts, these changes left the international rules mostly untouched.

Tech companies like Apple, Amazon, Google, and Facebook rose to prominence following the internet "boom" of the early 2000s, which was proceeded by the global recession of 2008–09. This brought tax to the forefront of U.S. politics, but the legislation that followed was primarily aimed at stimulating the domestic economy. The Obama administration extended the Bush Tax Cuts (with modifications), increased spending on

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[76] *Id.*

[77] *The Framework for Global Electronic Commerce*, CLINTON WHITEHOUSE ARCHIVES, https://clintonwhitehouse4.archives.gov/textonly/WH/New/Commerce/read.html (last visited Apr. 13, 2021).

[78] *Id.*

[79] *See* Internet Tax Freedom Act, Pub. L. No. 105-277, § 1100, 112 Stat. 2681, 2719 (1998).

[80] Obama would later sign into law a permanent bar on the internet tax in 2016.

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public works, and provided tax code relief for individuals.[81] But by 2012, a ballooning deficit had turned its attention to international tax concerns, where it acknowledged the tricks being exploited by MNEs to avoid paying their "fair share."[82] The G-20 followed this up at its summit where leaders endorsed the OECD's renewed focus on base erosion already explored in Part III.[83]

President Obama's support of BEPS was likely premised on the belief that it advanced his own goals at broadening the corporate tax base and strengthening the country's stagnant international tax regime.[84] Yet by the end of 2015 it appeared to both GOP lawmakers and the Treasury that the BEPS initiative looked more like a European revenue grab disguised as multilateral reform.[85] Puzzlingly, though President Obama was somewhat vocal about the EU's efforts to regulate American tech companies, he joined the G-20 chorus in its approval of the OECD's BEPS' recommendations on November 16, 2015.[86] The United States effectively took the position that its laws were already compatible with the dictates of the BEPS agreements.[87]

President Trump's foreign policy actions might lead one to conclude the current conflict over digital taxation is a byproduct of the former

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[81] ROBERTON WILLIAMS, TAX POL'Y CENTER, PRESIDENT-ELECT OBAMA'S TAX AND STIMULUS PLANS (2009), https://www.urban.org/sites/default/files/publication/30036/411816-president-elect-obama-s-tax-and-stimulus-plans.pdf.

[82] President Barack Obama, State of the Union Address (Jan. 24, 2012).

[83] *G20 Leaders Declaration*, OBAMA WHITEHOUSE ARCHIVES (June 19, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/06/19/g20-leaders-declaration.

[84] *Cf.* THE WHITE HOUSE & DEP'T OF THE TREASURY, THE PRESIDENT'S FRAMEWORK FOR BUSINESS TAX REFORM (2012).

[85] Michael Mandel, Opinion, *Obama's Corporate Tax Blunder*, N.Y. TIMES (June 9, 2015), https://www.nytimes.com/2015/06/10/opinion/obamas-corporate-tax-blunder.html; Hillary Flynn & Toby Eckert, *U.S. Departs from the Rest on BEPS*, POLITICO (June 15, 2015), https://www.politico.com/tipsheets/morning-tax/2015/06/us-departs-from-the-rest-on-beps-medical-device-tax-repeal-bill-takes-swing-at-obamacare-ahead-of-king-v-burwell-clinton-opaque-over-her-tax-reform-ideas-212543; *Hatch to Hold Finance Hearing on OECD BEPS Reports*, U.S. S. COMM. ON FIN. (Nov. 24, 2015), https://www.finance.senate.gov/chairmans-news/hatch-to-hold-finance-hearing-on-oecd-beps-reports.

[86] *See* James Vincent, *Obama Accuses EU of Attacking American Tech Companies Because It 'Can't Compete,'* FIN. TIMES: THE VERGE (Feb. 17, 2015, 7:06 AM), https://www.theverge.com/2015/2/17/8050691/obama-our-companies-created-the-inter net.

[87] Brauner, *supra* note 24, at 856, at ¶ 2.1.1.

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administration's pugnaciousness. However valid this may be, it overlooks the consistencies between BEPS concerns and their corresponding provisions in the TCJA passed by the Trump administration. In fact, the TCJA appeared to mitigate several concerns highlighted by BEPS,[88] but as the Europeans have now realized, this does not necessarily benefit them.

The reality is that the hallmark features of the TCJA like GILTI, FDII, BEAT, and the participation exemption, have been viewed as reactions to BEPS Action 1.[89] Moreover, it appears these measures have been met with some degree of success, although much of it may be attributed to the lowering of the corporate tax rate. The law prompted some of the biggest players in the digital economy to repatriate intangible assets and cash back to the United States.[90]

Though there are some indications to the contrary,[91] Europe's frosty reaction to the TCJA[92] was based on the belief that it negatively affected its tax base. Prior to the TCJA, U.S. MNEs reported over 40% of their foreign profits in the Netherlands, Ireland, and Luxembourg.[93] Of the top ten most

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[88] Mindy Herzfeld, *News Analysis: Competition or Coordination: Responses to the Tax Cuts and Jobs Act*, 89 TAX NOTES INT'L 209 (2018) (examining international provisions of TCJA as responses to competitive actions taken by other countries under the guise of the BEPS project).

[89] *See* Aparna Mathur, *The U.S. Counterpunch to the OECD BEPS Project*, AM. ENTER. INST. IFC REP., July 20, 2018, at 40; Daisuke Wakabayashi & Brian X. Chen, *Apple, Capitalizing on New Tax Law, Plans to Bring Billions in Cash Back to U.S.*, N.Y. TIMES (Jan. 17, 2018), https://www.nytimes.com/2018/01/17/technology/apple-tax-bill-repatriate-cash.html; Zoe Sagalow, *Survey Says More Overseas Earnings Bound for U.S. Due to Tax Law*, 158 TAX NOTES 1692 (2018).

[90] Wakabayashi & Chen, *supra* note 89. Apple alone moved some $252 billion in cash back. Other giants like Microsoft, Cisco, and Alphabet (Google) followed suit, see Sagalow, *supra* note 89.

[91] For example, some literature suggests that the law's emphasis on using tangible, depreciable property to lessen the bite of GILTI results in the intangibles staying in the foreign jurisdiction but increasing tangible business activities.

[92] Shortly after the bill passed, Pierre Moscovici, Tax Commissioner of the European Commission, urged the European Union to challenge the FDII and BEAT rules. FDII is being resisted on the grounds that its beneficial treatment of domestic sales of intangibles constitutes an illegal export subsidy under WTO rules. Other parts of the law, including BEAT, are being challenged as violations of tax treaties, particularly on Article 24 (discrimination) grounds.

[93] *Briefing Book, Key Elements of the U.S. Tax System: What are the Consequences of the New U.S. International Tax System?*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-are-consequences-new-us-international-tax-system (May 2020).

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popular foreign destinations for these companies to park profits, half were in Europe, and all of them OECD members.[94]

Accordingly, it is no coincidence that the years following the enactment of the TCJA have been peppered with the imposition of DSTs, which the United States has vehemently opposed from the start. When the EU first floated the idea of DSTs in October of 2018, Treasury Secretary Steven Mnuchin argued that such a tax singled out the industry and forced it to play by a different rulebook.[95]

Of course, like all geopolitical tax issues, the U.S. protest over DSTs is rooted in their potential damage to the U.S. tax base. However, there are other legal and economic factors that prop up the U.S. opposition. As to the former, the U.S. objections to DSTs echo the conclusion already reached by the OECD's Task Force on the Digital Economy, which issued reports concluding it was "difficult, if not impossible, to ring-fence the digital economy from the rest of the economy."[96] Furthermore, this position is consistent with the founding principles of digital taxation agreed to in the Ottawa Framework.[97] Then on the economic side, many have remarked that the real harms of DSTs fall on the implementing country itself more than the technical payor.[98]

More recent additions to the OECD's BEPS debacle lend even more credence to U.S. objections. The BEPS January 2020 statement on the Two-Pillar Approach unveiled a digital taxation framework that by its own admission constituted a "New Taxing Right."[99] For the United States, this served as a blatant deviation from the more conservative approaches that

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[94] *U.S. Direct Investment Abroad (USDIA), Activities of U.S. Multinational Enterprises (MNEs)*, Bureau of Econ. Analysis, https://www.bea.gov/international/di1usdop (last visited Apr. 14, 2021) (publishing Selected Data by Country 2009–2018 for All Foreign Affiliates).

[95] Press Release, Sec'y of the Treasury Steven T. Mnuchin, Secretary Mnuchin Statement on Digital Economy Taxation Efforts (Oct. 25, 2018).

[96] OECD, Base Erosion and Profit Shifting Project, *supra* note 45, at 12.

[97] Specifically, it is difficult to square the OECD's "New Taxing Right" with earlier agreements endorsing traditional approaches to internet taxation.

[98] Elizabeth Schulze, *France's Digital Tax Could Hurt Consumers More Than Tech Companies*, CNBC (July 12, 2019), https://www.cnbc.com/2019/07/12/france-digital-tax-could-hurt-consumers-more-than-tech-companies.html.

[99] OECD, *supra* note 60.

previous agreements advocated, and confirmed suspicions that BEPS was no longer the benign instrument its OECD allies purported it to be.

The chronological walkthrough of the U.S. position on digital taxation juxtaposed with the purported position of the OECD illustrates two things. For one, it illustrates BEPS' flagrant departure from what was formerly a surprisingly coherent global consensus on the future of digital taxation. The second implication from this timeline conveys the obvious, yet too often disregarded, political motivations of countries to simply increase their tax base. Countries are always adjusting rules to do this on a unilateral basis, but if the same aim can be accomplished under the guise of multilateral cooperation—all the better.

As efforts continue to modernize international tax rules to comport with the digital era, several pitfalls arise for both the United States and its OECD allies. The United States walks an awkward line in the digital tax debate. On the one hand, it has joined the global bandwagon campaigning for reform of the early 20th century tax rules that inadequately govern the increasingly intangible commerce of present day. On the other hand, the United States has benefitted more from digital entrepreneurship than any other country in the world, resulting in a sizeable tax base worth protecting.

U.S. status as a net capital importer calls into question the country's longstanding preference toward residence-based taxation. But this critique becomes complicated by the digital tax debate. As we have noted, the digital space is dominated by companies residing in the United States. Consequently, it stands to reason the United States will continue to prefer taxpayers hold intangible assets where they reside.

However, a source-based policy preference is not exactly misguided either. In fact, it contraindicates DST-implementing countries' claim that they merely desire to tax where "value creation" occurs. Take internet advertising for example. In 2018, marketers were estimated to spend about $39.1 billion on programmatic advertisements to Americans.[100] Despite constituting roughly 1/20th of the world's population, this amount represents well over half of programmatic ad spending worldwide.[101] The U.S. digital

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[100] GLOBAL DATA MARKET SIZE 2016–2018, ONAUDIENCE.COM 14 (2018).

[101] *Id.*

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advertising market as a whole is worth four times Europe's.[102] These figures are even more surprising when considering the overwhelmingly non-American makeup of common advertising platforms. Almost 90% of Facebook users, for example, come from outside the United States and Canada. Of Twitter's 330 million active users, only 60 million are American.[103] Even if we step outside the value provided by users of digital services, the trend continues in the U.S. favor. Take the video streaming market, it is projected to receive nearly half of its revenue from the United States this year.[104] Online retail is a similar story, last year Amazon reported over $170 billion in revenue from North America and just under $75 billion in the rest of the world.[105]

These statistics lead one to ponder whether the OECD's apparent preference for taxing digital commerce at the source will ultimately benefit the United States, as the numbers indicate the "value creation" generated by U.S. internet users far surpasses that of its OECD neighbors. At some point, non-U.S. digital firms will come about. Accordingly, given the maturity of the U.S. digital economy, it stands to reason that their wealth will be derived largely in the United States, which strengthens the argument for the source taxation approach.

Ultimately, there is a lack of candid discussion over the downfalls of both arguments. U.S. disengagement from the international digital tax forum only increases partner countries' incentive to establish patchwork unilateral measures that harm both sides. Going forward, the U.S. must accept the inevitability that any viable proxy for digital wealth (including that advocated by this Essay) may result in a reduction of U.S. tax revenue from digital firms. However, this concession ultimately allows the substantial size of the U.S. digital market to be used to its advantage by forcing negotiating partners to accept the sobering reality that by all suitable measures of digital wealth, the United States retains its overwhelmingly dominant position in the digital market. This would allow the United States to change the current game

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[102] *Id.*

[103] H. Tankovska, *Leading Countries Based on Number of Twitter Users as of January 2021*, STATISTA (Feb. 9, 2021), https://www.statista.com/statistics/242606/number-of-active-twitter-users-in-sele cted-countries/ (last visited Apr. 14, 2021).

[104] VIDEO STREAMING (SVOD) WORLDWIDE, MARKET REPORT, STATISTA (2021).

[105] *See* ANNUAL REPORT, AMAZON 24 (2019).

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resulting in no winners to one that gives it the final say in what crumbs it distributes from its bountiful mass of digital tax revenue.

CONCLUSION: RECALIBRATING THE U.S. INTERNATIONAL TAX POLICY

The interests of the United States in the international tax realm have been poorly communicated over the years. A precise articulation of these interests requires a precise articulation of the goals of such policy. We want to increase the welfare of U.S. taxpayers, but, at the same time, we want to ensure the success of the U.S. MNEs. The exact formula to balance the two, and even before that to identify the benefactors of the policy, are beyond the scope of this Article. It is possible, however, to establish international tax policy that would be accommodating of any such balance. Assuming that there is no political support for a complete overhaul of the international tax rules of the United States, or an international consensus for a similar overhaul of the fundamentals of the international tax regime, this Article proposes an approach that would ensure fair taxation of U.S. MNEs, and at the same time safeguard U.S. taxation of inbound investment in the United States. This approach acknowledges the dominance of the United States as an exporter of capital and high technology while not neglecting to account for its being a net capital importer and a major market for digital goods and services.

The key factor in this plan would be to increase source taxation of the fruits of inbound investment. This practically means the imposition of a withholding tax on all base eroding payments related to U.S. investment of foreign persons who are not otherwise paying tax in the United States.[106] The current rules already impose such a tax on non-business income at the rate of 30%, often reduced by tax treaties. We propose to extend the withholding requirement to all base eroding (*i.e.*, deductible) business payments.[107] The rate should perhaps be lower to balance the interests of the source and residence countries. The United States should accept similar taxes imposed on its MNEs (assuming, again, that such taxes are similarly low) in other countries to ensure fairness, legitimacy, effective network against tax avoidance, and perhaps eventually to reach a global consensus over this new

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[106] That is, in particular non-residents with income effectively connected to a U.S. trade or business. We would extend the election in I.R.C. § 871(d) to all income types, which would allow every investment to be equally taxed, on a net basis, in the United States. For additional details, see a corresponding proposal made more generally in the context of BEPS. Moreno & Brauner, *supra* note 59, at 6.

[107] All, not only the limited payments subject to the complex BEAT rules.

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"deal." This withholding tax should be creditable (or exempt) by all countries that operate under the existing international tax regime, including the United States. Treaty adjustments will be required, but the same is true for all the other proposed solutions. Finally, the United States would commit to the abovementioned reciprocity only in exchange for the elimination of all the new taxes imposed by other jurisdictions in the disguise of "interim measures," "digital services taxes," etc.

Secondly, we propose that the U.S. strengthen residence taxation of MNEs with a deferral eliminating single tax.[108] This tax could be a "minimum tax" or, better, a final single tax on all outbound business. In the current, uncoordinated international tax regime it seems that preservation of the foreign tax credit would be superior to selective exemption in such a system, but in a more ordered future this may change.[109]

Note that despite the assumption above, the proposed system would also work well in transition with possible overhauls of the international tax rules, all of which envision refocus of the regime to the source or host countries. This was true to the destination-based cash flow tax and would be true to any formulary apportionment reform. It would also nicely compliment a reform adding a value-added tax to the U.S. arsenal of taxes, which is perhaps the most likely of reforms in the post-COVID-19 era. All these eventualities would be consistent with the overall position of the United States elaborated in this Article.

In conclusion, this Article advocates a refinement of U.S. international tax policy that would fit its complex position in the increasingly digitalized economy. First, and foremost, reform should ensure sufficient taxation at

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[108] This is standardized corporate tax that we know and use currently.

[109] See the various articles by Cliff Fleming, Robert Peroni and Steve Shay demonstrating the superiority of deferral eliminating to exemption and other similar proposals. *See, e.g.*, J. Clifton Fleming, Jr. et al., *Point: The United States Should Tax U.S. Corporations on Their Worldwide Income*, 21 ABA TAX SEC. NEWSL. 14 (2001). Note also that the proposal may resemble at first glance the OECD's two-pillar approach, which should also benefit, in terms of revenue, the United States, yet it substantively defers from that proposal in at least four dimensions: first, it applies a withholding tax rather than a formulaic new tax at source; second, it applies the existing corporate tax, extended by the elimination of deferral, rather than a new, necessarily complex minimum tax à la GILTI; third, it does not ringfence the digital economy and therefore does not require always problematic scope defining definitions; and fourth, its implementation should be simpler and efficiency-promoting since it is based on the matching of taxes and deductions, promoting also voluntary information furnishing by taxpayers. For more, see *supra* notes 54–60.

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source, and be compatible with the U.S. status as a net capital importer and the world's premier market for the goods and services of the digital economy. But, the United States should still maintain its devotion to neutral (as possible) residence taxation, and ideally improve it by eliminating deferral. Co-opting our trade partners to enact similar reforms would further facilitate the system's finetuning and provide the international tax regime with the legitimacy it so desperately needs. Unlike previous reforms and proposals, this Article does not advocate fragmented, rough justice compromises, but rather full expansion of the tax net with comprehensive elimination of double taxation (by ending deferral). However, we do not presume this to be the only solution, but merely assert that the principles outlined here are crucial to any successful framework to come.

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