2022

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Recommended Citation
5 British Tax Rev. 504 (2022)

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Abstract

The US Treasury has negotiated a multilateral tax deal under the framework of the OECD that includes Pillar 1, a plan to reallocate global profits of multinationals to market jurisdictions, and Pillar 2, a proposal for a global minimum tax. Global adoption of Pillar 1 directly hinges on US legislative action, and wide take-up of Pillar 2 may also depend on US modification of existing laws to conform to the OECD agreement. But while widespread implementation of the OECD agreement depends on US legislative action, uncertainty remains as to whether a deal negotiated by the Biden administration will be accepted and acted upon by the US Congress. In the short term, at least, any such action is unlikely. This article takes an historical look at the circumstances that have led to significant reforms of US international tax laws in the past as a lens through which to view the likelihood of a Congress acting on the OECD agreement. Historically, major international tax changes have been motivated primarily by domestic economic and foreign policy. But the reforms being proposed today do not appear—to members of either party—to solve the most pressing concerns of members. The justifications advanced by the Biden administration officials for the reforms embedded in the OECD agreement bear but a tenuous relationship both to the local political concerns that motivate individual members of Congress to act, and to the larger considerations of international competitiveness and foreign policy that have encouraged Congressional action in the past.

(1) Introduction

To a large extent, the ultimate success of the OECD project to address tax challenges arising from the digitalisation of the economy hinges on US participation—specifically, on the US Congress signing up to the terms of the agreement negotiated by the US Treasury Department within the OECD framework. To better understand the lens through which members of Congress might view the deal, and the likelihood of the US Government implementing any part of the deal struck in October 2021, the author reviews a selection of major US international tax law changes over the last century. Understanding the factors influencing US international tax reform through history helps shape our understanding of the extent to which Congress might be willing to adopt—or reject—the changes now on the table.

The evolution of US international tax rules over the last 100 years illustrates how Congress has used tax rules to help manage the balance between encouraging US investment overseas and domestic investment, and the need to protect the US tax base when weighed against the broader economic benefits that may be derived from encouraging foreign investment. Similarly, the goals of encouraging inbound investment into the US are weighted against the desire to ensure a level playing field for domestic and foreign businesses. Maintaining the balance between encouraging cross-border trade, advancing foreign policy goals, and preventing the shifting of profits across borders has been and remains an ongoing exercise that is morphing continually in response to larger domestic and international political pressures. The more significant drivers of change in US international tax law are greater economic and political trends, rather than revenue needs or fiscal policy. This history helps shed light on how Congress may approach the OECD proposals both at their current stage and as they evolve.

To gain a broader understanding of the lens through which Congress may act on the OECD 2-pillar proposal,[1] Part (2) of this article begins with an overview of three of the most significant aspects of changes to US international tax law since the adoption of the corporate income tax: the enactment of the US foreign tax credit in 1918 (and subsequent modifications thereto); the anti-deferral rules (subpart F) enacted in 1962; and the enactment of a global minimum tax (the tax on global intangible low-taxed income, or GILTI) in 2017. Part (3) returns to the present day to consider how the factors that drove international tax law changes in earlier periods might—or might not—be at work today to motivate Congress to adopt the OECD proposals. Part (4) concludes.

(2) The backdrop

(a) The foreign tax credit

(i) Enactment and limitation

The basic principles of the US international tax regime, which were put into place in the first decades of the twentieth century, were a derivative of, and consistent with, American foreign policy during that time. This policy included the choice to relieve double taxation by means of a foreign tax credit.

Prior to the introduction of the foreign tax credit by the Revenue Act of 1918,[2] relief from double taxation was provided by way of a deduction for foreign taxes paid.[3] Beginning in 1921, the credit was expanded to include not only taxes paid directly by a US taxpayer (the direct credit), but also a portion of the taxes paid by a foreign corporation, if a sufficient stake in the company was owned by a US corporation (the indirect credit).[4] A limitation was imposed so that the credit could only be taken against foreign source income. Although the foreign tax credit limitation has been modified by Congress numerous times over the course of the past century, the basic idea that the foreign tax credit could only be used to offset the US tax liability that would otherwise be imposed on a relevant item of income, and could not be used to offset US tax imposed on income earned domestically, remains.[5]

[1] For a high-level outline of the deal agreed to in October 2021, see OECD, "Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy" (8 October 2021), *https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm* [Accessed 15 October 2022].
[2] Revenue Act of 1918, Pub. L. No.65-254, 40 Stat. 1057, 65th Cong. (1918). Unless otherwise specified, all "section" references are to the Internal Revenue Code of 1986, as amended, and all "Reg. §" references are to the US Treasury regulations promulgated thereunder.
[3] For the history of the 1918 enactment, see Roswell Magill and William C. Schaab, "American Taxation of Income Earned Abroad" (1958) 13 Tax L. Rev. 115.
[4] See Revenue Act of 1921, Pub. La. No.67-98, 42 Stat. 227 (1921).
[5] See Michael J. Graetz and Michael M. O'Hear, "The 'Original Intent' of U.S. International Taxation" (1997) 46 Duke L.J. 1021, 1022–1023.

(b) Situating the foreign tax credit in its time

The decision by Congress to enact a foreign tax credit to replace the previous means of relieving double taxation on foreign earnings—a deduction for foreign taxes paid—must be understood in the context of the US' role in the world in the early 20th century.[6] Insular for most of the 18th and 19th centuries, US participation in global affairs arrived with "comparative suddenness" in the late 19th century.[7] A congruence of political, economic, and ideological factors made conditions ripe for increased investment by US businesses in Europe (and, to a lesser extent, Latin America and Asia). Early 20th century progressive ideology found expression in international economic policy and the idea that government policies were best implemented through private business.[8]

In the post-First World War era, as the US retreated from international diplomacy, the private sector took on the role of spreading US interests abroad consistent with contemporary thinking that "presumed [a] mutuality of interests of the public and private spheres",[9] and an aversion to interventionist government regulation.[10] Increased trade and investment by the private market was perceived as a necessary stabilising force in post- First World War Europe.[11] US policies were geared to ensuring repayment of the debt incurred by other countries to the US during the First World War, protecting Europe's political stability, and building the US export economy.[12] The government also saw replacing European capital in the Caribbean and Central America with US private capital as advancing US foreign policy interests.[13]

[6] For an argument against the foreign tax credit, see Daniel Shaviro, "The Case Against the Foreign Tax Credit" (2011) 3 J. of Legal Analysis 65.

[7] See Benjamin H. Williams, *Economic Foreign Policy of the Unites States* (New York: McGraw Hill, 1929), p.vii. On the role of the US in global economic affairs in the interwar period, see generally Adam Tooze, *The Deluge: The Great War, America, and the Remaking of the Global Order, 1916-1931* (London, Allen Lane, 2014).

[8] Robert Freeman Smith, "Republican Policy and the Pax Americana 1921-1932" in William Appleman Williams (ed.), *From Colony to Empire: Essays in the History of American Foreign Relations* (New York: John Wiley & Sons, 1972), pp.253–292, in the SHAFR Guide Online (referring to the movement's "firm faith in the ability of private enterprise capitalism to promote progress and prosperity").

[9] Emily S. Rosenberg, *Spreading the American Dream: American Economic and Cultural Expansion, 1890-1945* (New York: Hill and Wang, 1982), p.xi; Smith, "Republican Policy and the Pax Americana 1921-1932" Williams (ed.), *From Colony to Empire: Essays in the History of American Foreign Relations* (1972), p.263 (describing "the fundamental identity of interests of the industrial-creditor nations").

[10] These views were expressly articulated by senior officials in the Department of Treasury, whose plans for the rejuvenation of Europe in the post-War period were primarily reliant upon private investment, seen as "more efficient and in accord with capitalist doctrine". See Frank Costigliola, *Awkward Dominion: American Political, Economic, and Cultural Relations with Europe, 1919-1933* (Ithaca, New York: Cornell University Press, 1984). See also Smith, "Republican Policy and the Pax Americana 1921-1932" in Williams (ed.), *From Colony to Empire: Essays in the History of American Foreign Relations* (1972), p.257 (on dollar diplomacy "preventing the spread of revolutionary nationalism").

[11] See Williams, *Economic Foreign Policy of the United States* (1929) (arguing that "investment in European countries are a real force for peace and moderation").

[12] Joseph Brandes, *Herbert Hoover and Economic Diplomacy* (Pittsburgh: University of Pittsburgh Press, 1962) describing how from its position as a debtor nation at the beginning of 1914, the US became, over the next 14 years, a net creditor of over $8 billion; Costigliola, *Awkward Dominion: American Political, Economic, and Cultural Relations with Europe, 1919-1933* (1984), p.66 (noting that senior government officials "realized full well that America's creditor position required that the rest of the world obtain sufficient dollars to pay its debts and buy United States goods" and that this meant "pushing foreign sales of manufactured and agricultural goods.").

[13] See Williams, *Economic foreign Policy of the United States* (1929), pp.52–56.

Expanding US economic interests abroad, a key aspect of US foreign policy, was also closely tied to US domestic prosperity.[14] Both ensuring that European nations would be able to repay their outstanding debts to the US and the US economy's dependence upon exports made the economic success of European nations key to American prosperity.[15] The increasing dependence of US domestic policy and national security on profitable overseas trade increased the US Government's interest in international economic policy.[16] Economic investments abroad were also viewed as necessary to protect the country from future military threats.[17] US businesses helped strengthen and enhance the US presence worldwide; in turn, businesses relied upon the government to protect their investments.[18]

The Department of Commerce under Herbert Hoover played a large role in making sure that considerations of market access featured in US diplomacy and also relied on private interests as a tool of foreign policy;[19] in return, the department assisted US business in its overseas expansion.[20] After the Department of Commerce successfully advanced legislation in 1919 to encourage exports, US investments in businesses overseas grew accordingly.[21] Expansion of US business

[14] Smith, "Republican Policy and the Pax Americana 1921-1932" in Williams (ed.), *From Colony to Empire: Essays in the History of American Foreign Relations* (1972), p.256. See Lloyd Gardner, "A Progressive Foreign Policy" in Williams (ed.), *From Colony to Empire: Essays in the History of American Foreign Relations* (1972); see also Costigliola *Awkward Dominion: American Political, Economic, and Cultural Relations with Europe, 1919-1933* (1984) (describing how "economics and politics were inseparable").

[15] Government officials portrayed the rebuilding of Europe as a matter "of daily importance to every worker or farmer in our country". Costigliola, *Awkward Dominion: American Political, Economic, and Cultural Relations with Europe, 1919-1933* (1984), p.60. See Memorandum of Norman Davis and Thomas Lamont to Woodrow Wilson (15 May 1919) quoted in Costigliola *Awkward Dominion: American Political, Economic, and Cultural Relations with Europe, 1919-1933* (1984): "Many of [America's] industries are dependent for their success on stable conditions in Europe. America's prosperity in the last decade has been largely coincident with the growth of its export trade to the Continent of Europe"). Brandes, *Herbert Hoover and Economic Diplomacy* (1962), pp.xi-xii. Herbert Hoover described the question of the repayment of the debt as "one of the most complex and difficult in character that the American people have ever confronted": Herbert Hoover, address delivered at Toledo, Ohio (16 October 1922), quoted in Williams, *Economic Foreign Policy of the United States* (1929), p.217.

[16] Rosenberg, *Spreading the American Dream: American Economic and Cultural Expansion, 1890-1945* (1982): "As American traders and investors enlarged their international stakes, many people argued that the national welfare depended, in part, on continued access to global opportunities." At XX.

[17] Robert Dallek, *The American Style of Foreign Policy: Cultural Politics and Foreign Affairs* (New York: Random House Inc, 1983), p.106; Rosenberg, *Spreading the American Dream: American Economic and Cultural Expansion, 1890-1945* (1982), p.63, noting that "Woodrow Wilson and his advisers, like their predecessors, continued to view strategic and economic concerns as inseparable".

[18] Williams, *Economic Foreign Policy of the United States* (1929), p.vii, noting that "[t]he export of capital in recent years has elevated the policy of protection of investments abroad to a position of supreme importance in American foreign policy".

[19] See Robert L. Rabin, "Federal Regulation in Historical Perspective" (1986) 38 Stan. L. Rev. 1189, 1241; see generally Brandes, *Herbert Hoover and Economic Diplomacy* (1962).

[20] Joseph Brandes describes how Hoover "mobilized his Department's resources to awaken the country to such [foreign] opportunities and to aid those willing to participate in foreign economic activity": Brandes, *Herbert Hoover and Economic Diplomacy* (1962), p.10.

[21] Rosenberg, *Spreading the American Dream: American Economic and Cultural Expansion, 1890-1945* (1982), p.25 (noting that "from 1897 to 1914, American direct investments abroad more than quadrupled"). In 1929, a contemporary noted that "[t]he growth in the export of American manufactured goods since 1914 has been remarkable": Williams, *Economic Foreign Policy of the United States* (1929), p.263.

interests overseas was not limited to encouraging exports of final products; US companies also began to grow their foreign manufacturing capabilities.[22]

(c) International tax rules as a foreign policy tool

The international tax rules put into place in the early 20th century reflect the overarching foreign and domestic policy goals of the time—those of protecting and expanding opportunities for US overseas investment and ensuring that debtor nations had the means to repay their US obligations. Foremost among these tax rules was the foreign tax credit[23] which, while primarily enacted to prevent double taxation, was also viewed as a means of encouraging foreign trade and preventing revenue loss through "incorporation of foreign subsidiaries or expatriation".[24] At the same time, enactment of the foreign tax credit also meant rejecting the idea of exempting foreign earned income from US tax altogether, a policy strongly advocated by the Department of Commerce because it provided even stronger incentives for overseas investment.[25]

International tax rules written in the interwar period, including enshrining the principle of deferral from immediate US taxation of income earned abroad by foreign subsidiaries of US companies, also reflect the US position at the time as the world's principal creditor nation and the desire to ensure that foreign countries could repay US debt.[26] While direct investment abroad was perceived as taking away jobs from American workers, indirect investment avoided such concerns while still providing European countries with the cash to repay their war debts.[27] Adoption of deferral as a bedrock international tax tenet may reflect the influence of US lenders in the policy arena.[28]

In sum, enactment of the foreign tax credit was consistent with and derivative of US international economic and foreign policy of the interwar period. Encouraging overseas investment through tax rules fit well with the type of limited governmental interference advocated by the progressive foreign policy ideology. The pro-business legislation was not seen as providing unwarranted support for private interests but as levelling a playing field in which European

[22] Rosenberg, *Spreading the American Dream: American Economic and Cultural Expansion, 1890-1945* (1982), p.123 (noting how US direct investment in the 1920s almost doubled).
[23] Gardner, "A Progressive Foreign Policy" in Williams (ed.), *From Colony to Empire: Essays in the History of American Foreign Relations* (1972), pp.204, 248; Graetz and O'Hear "The "Original Intent" of U.S. International Taxation" (1997) 46 Duke L.J. 1021, 1049 (noting the role played by the "growing recognition of a need to encourage private investments by Americans in Europe" in enactment of the foreign tax credit).
[24] Smith, "Republican Policy and the Pax Americana 1921-1932" in Williams (ed.), *From Colony to Empire: Essays in the History of American Foreign Relations* (1972), p.267; Magill and Schaab, "American Taxation of Income Earned Abroad" (1958) 13 Tax L. Rev. 115, 118.
[25] 61 Cong. Rec. 5870 (1921). See, e.g.H. David Rosenbloom and Stanley I. Langbein, "United States Tax Treaty Policy: An Overview" (1981) 19 Colum. J. Transnat'l L. 359, 366.
[26] Gardner, "A Progressive Foreign Policy" in Williams (ed.), *From Colony to Empire: Essays in the History of American Foreign Relations* (1972).
[27] Brandes, *Herbert Hoover and Economic Diplomacy* (1962), p.163 (noting that while Hoover's Commerce Department "encouraged, on general principles, the indirect or portfolio investment of American capital in foreign bonds or stocks, this was not true of direct investment in foreign manufacturing plants").
[28] See Graetz and O'Hear, "The "Original Intent" of U.S. International Taxation" (1997) 46 Duke L.J. 1021, 1058 (arguing that source rules for interest income enacted in 1921 were significantly influenced by the large US creditor position); Eyal Benvenisti, "Exit and Voice in the Age of Globalization" (1999) 98 Mich. L. Rev. 167, 178 (noting the role played by interest groups in the development of international law).

companies were actively supported by their home states.[29] Reliance on private industry to pursue policies that would advance US foreign policy interests, and encouragement given to such private interests by the government, was consistent with other pro-international business legislation passed in this time.[30] Enactment of the foreign tax credit was viewed as removing an "impediment to foreign trade by U.S. nationals and to their investment in areas outside the United States".[31] In contrast to other measures under consideration at the time, it presented less overt support for foreign investment and better protected US labour interests.

(d) Modifications of the foreign tax credit over time

Consistent with the objectives behind the foreign tax credit's enactment, the Board of Tax Appeals (the precursor to the US Tax Court) initially gave the credit a broad scope. In a series of early decisions it extended the credit to any tax another country might call an income tax.[32] That broad scope was somewhat restricted by the Supreme Court in 1938 when it held that a foreign tax would need to meet the US standard of an income tax to qualify for the foreign tax credit.[33] Partly in response to a series of decisions in which the Internal Revenue Service (IRS) and the Office of Bilateral Trade Affairs (BTA) narrowed the credit and denied taxpayer claims for creditability, Congress enacted section 903 in 1942 to allow a credit for a tax paid in lieu of an income tax if it is "otherwise generally imposed by any foreign country". The legislative history indicates that Congress disapproved of the relatively narrow interpretation of the term income tax being followed by the IRS and the BTA.[34]

While over the next two decades, the IRS issued a series of memoranda and revenue rulings that limited the circumstances in which a foreign tax could qualify as a creditable tax under section 903,[35] one can still see the continued influence of the broader foreign policy objectives on the Treasury's foreign tax credit policy through the 1950s. In 1954, the IRS issued a general counsel memorandum supporting the allowance of a credit for Saudi Arabian taxes, stating that "[t]he maintenance and continuation of a supply of oil from the Middle East is a vital military necessity for the preservation of the Western World".[36] A couple of decades later, however,

[29] See Rosenberg, *Spreading the American Dream: American Economic and Cultural Expansion, 1890-1945* (1982), p.49 (describing how European governments "encouraged, subsidized, and even sometimes partially owned the international companies or cartels operated by their citizens", and how many US businesses viewed these practices as "threatening", and encouraged the US Government to provide them with greater support). See also Graetz and O'Hear, "The "Original Intent" of U.S. International Taxation" (1997) 46 Duke L.J. 1021, 1049–1050 (explaining that "[t]rade abroad was considered crucial to the nation's economic well-being and was thought to require appropriate support from the government", and that "[r]elief from double taxation constituted just such appropriate support").

[30] Characterising the building blocks of the international tax rules as enacted in order to encourage American overseas investment contradicts the prevailing notions of viewing these rules from the perspective of satisfying concerns of global efficiency. See Graetz and O'Hear, "The "Original Intent" of U.S. International Taxation" (1997) 46 Duke L.J. 1021, 1027–1028.

[31] Elizabeth Owens, "United States Income Tax Treaties: Their Role in Relieving Double Taxation" (1963) 17 Rutgers L. Rev. 428, 445.

[32] *Keen v Comm'r*, 15 B.T.A. 1243 (1929). See also *Burk Bros v Comm'r*, 20 B.T.A. 657 (1930).

[33] *Biddle v Comm'r*, 302 U.S. 573 (1938).

[34] S. Rep. No. 1631 (1942).

[35] See Rev. Rul. 76-215, 1976-1 C.B. 194; Rev. Rul. 78-410, 1978-2 C.B. 347; and Rev. Rul. 78-234, 1978-1 C.B. 237.

[36] G.C.M. 28595, A-469660, published as Rev. Rul. 55-296, C.B. 1955-1, 3.

largely in response to the increased activity of US oil and gas companies overseas (and the corresponding increase in attempts to claim a foreign tax credit), in 1979 the IRS issued proposed regulations under sections 901 and 903 that significantly narrowed the interpretation of a creditable foreign income tax. Those regulations created major controversy and were withdrawn and reproposed several times before eventually being finalised in 1983.[37]

From1983 to 2022, the regulations defined a creditable foreign tax as a foreign tax whose predominant character was that of an income tax in the US sense.[38] In practice, a tax on net income generally qualified. But in 2022, in response to the enactment in other countries of digital services taxes that applied primarily to US tech companies, the Treasury substantially revised the regulations and imposed jurisdictional requirements similar to those that had been adopted, but then discarded, in 1980. Under these new rules, a foreign tax is creditable when it is imposed on a non-resident only if it is imposed on a base that meets an attribution requirement, generally meaning that the base is limited to income attributable, "under reasonable principles" (defined to mean US tax law principles defining effectively connected income), to the non-resident's activities in the country.[39] Treasury statements surrounding issuance of the new regulations suggest that it views the regulations as playing an important role in discouraging other countries from adopting digital services taxes and encouraging US companies to support its ongoing efforts to obtain congressional support for the OECD deal.[40] The 2022 Regulations represent a major policy shift, but they were adopted by the executive branch without the need for congressional action or approval.

(e) Deferral

(i) The pre-subpart F period

Although the foreign tax credit as the primary means by which the US Government eliminates double taxation on its taxpayers' foreign earned income has remained a constant for the last 100 years, views regarding the extent to which the US Government should tax US taxpayers on the foreign earned income of foreign subsidiaries underwent a significant shift starting in the late 1950s.[41] The importance of overseas investment to rebuild war-torn Western Europe remained

[37] Daniel Horowitz et al, "The Final Foreign Tax Credit Regulations: A Summary and Analysis" (1982) 21 *Tax Notes* 203. The 1980 temporary and proposed versions of the regulations required that a foreign income tax follow "reasonable rules regarding source of income, residence, or other bases for taxing jurisdiction": 45 Fed. Reg. 75,647 (17 November 1980); T.D. 7739, 1 IRB 15 (1981). These rules too were the subject of major controversy, and the government was forced to withdraw and repropose them. 48 Fed. Reg. 14,641 (5 April 1983); T.D. 7918 (1983).
[38] T.D. 7918, 48 Fed. Reg. 46276 (12 October 1983).
[39] Taxes imposed on residents are creditable only if imposed on a tax base determined in a manner consistent with arm's length transfer pricing principles. Reg. § 1.901-2(b)(5).
[40] See preamble to final foreign tax credit regulations (T.D. 9959 (12 January 2022)) (stating that it was "necessary and appropriate to adapt the regulations under sections 901 and 903 to address this change in circumstances" in which "countries seeking additional revenue have chosen to abandon international norms to assert taxing rights over digital service providers" and that "these novel extraterritorial taxes…are contrary to the text and purpose of section 901 and therefore must be addressed now"); see comments by former Treasury official Lafayette "Chip" Harter (stating that "the nexus requirement is a tool that the United States is using to promote 'a coherent set of international tax rules' that appropriately allocates taxing jurisdiction among countries regarding cross-border transactions"), quoted in Annagabriella Colon, "Pending FTC Regs Deemed Part of U.S. Defense of Global Tax Rules", 2021 TNTI 78-2.
[41] Brandes, *Herbert Hoover and Economic Diplomacy* (1962), p.202.

a core aspect of US foreign policy throughout the 1940s, and in the 1950s, encouraging overseas investment implemented US foreign policy by spreading capitalism and democracy and containing communism.[42] Few changes were made to US international tax policy during these years[43] as international tax rules continued to deliberately encourage foreign investment.[44] It was not until shifts in the US balance of payments became a concern, coinciding with increasing awareness of the planning opportunities provided by low-taxed holding company jurisdictions, that significant changes were proposed to the international tax regime to address both sets of concerns.[45]

Policy discussions around the need for changes to the principle of deferral that began in the mid-1950s demonstrate the competing tensions of encouraging overseas investment while addressing balance of payments concerns. A paper by Vasujith Ram describes a 1955 academic study that analysed the role US tax laws played in encouraging direct foreign investment by US corporations and that recommended granting special tax-exempt status to US companies that operated overseas (that is, equalising the tax treatment of subsidiaries engaged in business abroad, regardless of domicile).[46] In the same year, a paper prepared for the House of Representatives' Ways and Means Committee on the relationship between the taxation of income earned overseas and international economic policy[47] described how the US Government's encouragement of foreign investment helped facilitate other countries' economic growth, with cascading positive results including US economic growth and political security and stability around the world. At the same time, the report recognised that taxpayers were able to use holding companies located in low-tax jurisdictions to accumulate low-taxed passive income that escaped residual US tax until repatriated. Despite their awareness of the tax benefits and planning opportunities that deferral provided, policymakers declined to propose changes to the regime because the policy

[42] Michael J. Graetz, "The David R. Tillinghast Lecture: Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies" (2001) 54 Tax L. Rev. 261, 308, *https://scholarship.law.columbia.edu/faculty_scholarship/391* [Accessed 15 October 2022]. See also Robert J. Patrick J., "U.S. Tax Treaties with Developing Countries" in Robert Hellawell (ed.), *United States Taxation and Developing Countries* (1980), pp.307, 309 (noting that in the 1950s, U.S. government officials closely identified private investment abroad with the fight against Communism).

[43] As part of a lengthy article on the history of subpart F, Vasujith Ram surveyed the literature and academic material from the 1950s and found that the policy discussed was focused on extension (or expansion) of deferral to promote foreign investment. Much of the discussion on the debate over enactment of the subpart F regime that follows draws on his research. Vasujith Ram, "Contextualizing the History of Subpart F" (2018) 161 *Tax Notes* 315.

[44] Graetz, "The David R. Tillinghast Lecture: Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies" (2001) 54 Tax L. Rev. 261, 294. Reflecting the need for increased investment overseas, proposals were made during the 1940s and 1950s to replace the foreign tax credit with an exemption system. See Sol Picciotto, *International Business Taxation. A Study in the Internationalization of Business Regulation* (Westport: Praeger, 1992), p.109.

[45] Although prior to enactment of subpart F there were rules enacted that taxed some foreign earnings on a current basis, these provisions were primarily enacted as anti-abuse rules, rather than aiming to end deferral as a policy matter. See for example, foreign personal holding company rules enacted in 1937. Boris Bittker and James Eustice, Federal Income Taxation of Corporations and Shareholders, 7th edn (2000 and Supp. 2020–23), §15.40.

[46] Edward R. Barlow and Ira T. Wender, *Foreign Investment and Taxation* (Harvard Law School, International Program in Taxation, 1955) (cited in Ram, "Contextualizing the History of Subpart F" (2018) 161 *Tax Notes* 315).

[47] Joint Committee on the Economic Report, Federal Tax Policy for Economic Growth and Stability, Hearings before the U.S. Jt. Cmte. on the Economic Report, Subcommittee on Tax Policy, 84th Cong., 1st Sess., (5–9, 12 -16 December 1955), p.iii.

"promoted American investment and private enterprise…serving America's economic as well as geo-political interests".[48]

In 1958, Stanley Surrey, the most prominent tax policy official and academic of the time,[49] laid out the tax planning opportunities that deferral permitted but nonetheless continued to endorse it as a foundational US tax principle[50] on the grounds that it was beneficial in encouraging US taxpayers to invest overseas. Rejecting proposals then being made to limit deferral, Surrey argued that

> "tax history, the fact that the organization of so much of our foreign investment is built on this rule, and the desirable accommodation to international relationships which it produces all favor continuance of the rule".[51]

(f) Subpart F enactment

The enactment of subpart F in 1962 constituted the first major change to US international tax rules since adoption of the foreign tax credit, eliminating deferral on broad categories of foreign transactions. But as enacted, it was significantly narrower than President Kennedy's original proposal to end deferral, which itself was part of a broader programme of economic reforms to address domestic economic concerns, specifically around the balance of payments,[52] through policies that would curtail overseas investment.[53] As concerns regarding the balance of payments converged with unease about the tax planning opportunities presented by low-taxed jurisdictions and foreign holding companies, a 1960 report prepared by a committee headed by Surrey called for a re-examination of deferral within the context of the balance-of-payments situation. The report suggested specific measures, such as the removal of tax incentives that promoted private capital investment abroad, to improve the economy and address these concerns. Tax policy goals changed to reflect shifts in attitudes regarding the need for government policy to support incentives for overseas investment.

Kennedy's initial proposal to address the balance of payments deficit included legislation to stop tax haven abuse by ending deferral in developed countries, while conversely encouraging investment in the US as a means of stimulating the domestic economy. In addressing Congress, Kennedy said that ending deferral would not put US companies at a disadvantage, arguing that "their access to capital markets at home and abroad, their advanced technical know-how, their

[48] Ram, "Contextualizing the History of Subpart F" (2018) 161 *Tax Notes* 315, 316.
[49] For an overview of Surrey's contributions to the field, see Lawrence Zelenak and Ajay Mehrotra, "Stanley S. Surrey: A Life in Taxes (June 12, 2022)" in "Stanley S. Surrey: A Life in Taxes" introductory chapter in L. Zelenak and A. Mehrotra (eds), *A Half-Century with the Internal Revenue Code: The Memoirs of Stanley S. Surrey* (Durham: Carolina Academic Press, 2022), Northwestern Public Law Research Paper No.22-21, Duke Law School Public Law & Legal Theory Series No.2022-36.
[50] Stanley Surrey, "United States Taxation of Foreign Income" (1958) 1 J. of Law & Econ. 72.
[51] Surrey, "United States Taxation of Foreign Income" (1958) 1 J. of Law & Econ. 72, 94.
[52] C. Fred Bergsten et al, *American Multinationals and American Interests* (1978), p.170, Patrick at p.310 (noting that the "late 1950s and early 1960s witnessed a major deterioration in the U.S. balance of payments position" and a shift from the previous "uncritical attitude toward increased foreign investment"); Bruce F. Davie and Bruce F. Duncombe, *Public Finance* (1972), p.505 (noting that the "change in the procedure of taxing foreign source income was made not only for equity reasons but also to diminish the attractiveness of direct foreign investments in order to promote balance of payments stability").
[53] Charles Kingson, "The Coherence of Int'l Taxation" (1981) 81 Columb. Law Rev. 1151, 1161.

energy, resourcefulness and many other advantages" would allow US companies to "continue to occupy their rightful place in the markets of the world".[54] At the same time, the White House wanted to retain the incentives to invest in developing countries and did not extend proposals to end deferral to investments in developing countries.

Although the more limited exceptions to deferral ultimately enacted represented a curtailment of Kennedy's initial proposals,[55] the Revenue Act of 1962 still constituted a fundamental departure from previous international tax policy.[56] Subpart F, as enacted in 1962, required current inclusion of specific categories of foreign earnings of controlled foreign subsidiaries domiciled in developed countries: passive income (including interest, dividends, and capital gains), and highly mobile operating income (sales income earned in a jurisdiction other than where the manufacturing took place, and some types of services income).[57]

The limited anti-deferral rules adopted in 1962 illustrate how Congress, in enacting international tax rules, balanced responses to macro-economic developments with awareness of the benefits of US foreign investment.

(g) From subpart F to GILTI

(i) Policy proposals

Although at a high level the subpart F rules remained mostly fixed for over 50 years, recognition of the need for change began to grow by the late 1990s, sparked by a number of developments in corporate tax planning and larger economic trends. These developments ultimately led in 2017 to a vast expansion of the subpart F anti-deferral rule, through which it morphed into a system bearing a closer resemblance to a global minimum tax than a controlled foreign corporation regime. Tax planning opportunities provided by deferral played a role in the 2017 changes, exacerbated by the interaction between US and foreign tax laws and accounting rules, as well as significant increases in the activities of US companies overseas and the shift to an economy highly dependent on intangibles. Here, too, it was the tension between behaviours incentivised by existing tax rules and broader economic policy goals, and the distortions that tax rules created for the larger economy and investment decisions, that created the momentum that eventually led to the impetus for change.

On the tax side, one important development that eventually prompted closer scrutiny of the benefits of deferral was the promulgation of check-the-box regulations by the US Treasury.[58] These rules allowed US companies to shift income among foreign subsidiaries and take advantage

[54] John F. Kennedy, "Special Message to the Congress on Taxation" (20 April 1961), "111. Tax Treatment of Foreign Income, 1", *https://www.presidency.ucsb.edu/documents/special-message-the-congress-taxation* [Accessed 15 October 2022].
[55] See ss.951–964.
[56] Revenue Act of 1962 § 12(a), Pub. L. No.87-834, 76 Stat. 960, 1008. See William D. Popkin, "Less Developed Countries and the Revenue Act of 1962" (1964) 40 Ind. L.J. 1 (noting that the "primary reasons for the Treasury's proposals to discourage foreign investment were the outflow of gold and the drain on domestic investment"). See also Ross at 704 (ascribing the policy changes as in part due to "the coincidence of the international economic circumstances").
[57] See Revenue Act of 1962; see also S. Rep. No. 1881, 87th Cong., 2d Sess. 3305 (1962).
[58] Reg. § 301.7701-1 et seq., T.D. 8632, 60 Fed. Reg. 65553 (20 December 1995).

of foreign tax planning opportunities without triggering US tax under the subpart F rules (because one could shift income among different entities that were respected for foreign tax purposes but disregarded for US tax purposes).[59] The reduction of foreign corporate tax rates also was significant, because it meant that on repatriation, US taxpayers would be subject to significant additional US tax liability.[60] Accounting rules that allowed companies not to record the additional US tax liability so long as there was an intent to reinvest the earnings overseas allowed companies to report lower effective tax rates for financial accounting purposes, which enabled them to record higher earnings per share, leading to hundreds of billions of dollars held offshore (known as the lockout effect).[61] But larger economic trends also played an important role. One Treasury economist estimated that US companies' share of foreign earnings relative to overall earnings grew from 37 per cent in 1996 to 51 per cent in 2004.[62] The growth of global supply chains also played a role.[63] In addition, the shift towards a technologically-based economy and away from manufacturing meant that higher profits could be generated by fewer workers.[64]

One of the first comprehensive sets of solutions proposed to address this multitude of concerns was developed in a 2001 paper by Treasury economist Harry Grubert and John Mutti of the American Enterprise Institute (the Grubert-Mutti proposal).[65] They suggested adopting a territorial system that exempted foreign earnings from US tax, while also strengthening subpart F rules. Almost 20 years later, the proposal's key points found their way into the law changes enacted by the Tax Cuts and Jobs Act 2017, or the TCJA.[66] But the path was far from direct. A tax reform advisory panel convened under President George W. Bush in 2005 largely adopted the Grubert-Mutti proposal, and recommended exempting dividends paid from the active earnings of controlled foreign corporations (CFCs) and foreign branches from US tax, with most subpart

[59] The check-the-box rules have spawned voluminous commentary. See, e.g. Reuven Avi-Yonah, "To End Deferral as We Know It: Simplification Potential of Check-the-Box" (1997) 74 *Tax Notes* 219.

[60] See Sean Bray, "Corporate Tax Rates around the World, 2021" (*The Tax Foundation*, 9 December 2021), *https://taxfoundation.org/publications/corporate-tax-rates-around-the-world/#:~:text=The%20Decline%20of%20Corporate%20Tax%20Rates%20since%201980,-Over%20the%20past&text=The%20weighted%20average%20statutory%20corporate,over%20the%2041%20years%20surveyed.&text=All%20regions%20saw%20a%20net,rates%20between%201980%20and%202021* [Accessed 15 October 2022].

[61] See "Testimony of Michelle Hanlon before the United States Senate Committee on Finance, March 6, 2012" (describing the accounting treatment under rule ASC 740 for earnings considered "permanently reinvested"), *https://www.finance.senate.gov/imo/media/doc/Testimony%20of%20Michelle%20Hanlon.pdf* [Accessed 15 October 2022]. On lockout, see Fadi Shaheen, "Understanding Lockout" (2016) 69 Tax L. Rev. 231.

[62] Harry Grubert, *Foreign Taxes and the Growing Share of U.S. Multinational Company Income Abroad: Profits, Not Sales, are Being Globalized* (Department of the Treasury, 2012), Treasury Office of Tax Analysis Working Paper 103, *https://home.treasury.gov/system/files/131/wp-103.pdf* [Accessed 15 October 2022].

[63] **See Richard Baldwin** "Global supply chains: Why they emerged, why they matter, and where they are going" (July 2012), CTEI Papers CTEI-2012-13.

[64] Lisa De Simone, Jing Huang and Linda K. Krull, "R&D and the Rising Foreign Profitability of U.S. Multinational Corporations" (July 2019), *https://ssrn.com/abstract=3050016* or *http://dx.doi.org/10.2139/ssrn.3050016* [Accessed 15 October 2022].

[65] Harry Grubert and John Mutti, *Taxing International Business Income: Dividend Exemption versus the Current System* (Washington: AEI Press, 2001).The following discussion draws heavily on M. Herzfeld, "Designing international tax reform: lessons from TCJA" (2021) 28 Int'l Tax & Publ. Fin. 1163.

[66] The official name is "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018" Pub. L. No.115–97, 131 Stat. 2054 (hereinafter the Tax Cuts and Jobs Act, or TCJA).

F income continuing to be taxed on a current basis.[67] In a 2007 paper, Grubert and economist Rosanne Altshuler proposed pairing worldwide taxation with a reduced rate on foreign-source income.[68]

Between 2006 and 2011, several trends intensified pressure to reform the US international tax system, including increasing numbers of inversions by US companies,[69] the ever-growing hoard of cash held offshore by US companies, and additional scrutiny of the overseas tax planning activities of US multinationals, both in the US and abroad.[70] In 2011 House Ways and Means Committee Chair Dave Camp released a comprehensive tax reform draft that included a dividend exemption system and three alternative subpart F income categories intended to address base erosion concerns made more acute under a territorial system: the third proposed a new category referred to as foreign base company intangible income that would be eligible for a 40 per cent deduction.[71] In 2012 Senator Michael Enzi introduced a Bill that included international reforms, among them a 95 per cent dividend exemption,[72] and that would have taxed income earned in countries with tax rates of no more than half the US rate as subpart F income, while exempting active business income (although not intangible income).

Concurrent with legislative efforts, the Obama administration proposed various international tax reform proposals. Its 2012 framework for business tax reform (and later budgets) included proposals for a minimum tax (of 19 per cent) on foreign earnings.[73] Before proposing a minimum tax, the administration considered other ideas for limiting deferral, including the creation of a new category of income (foreign-based company digital income, or foreign-based company excess intangible income) taxable as subpart F and allocated to a separate foreign tax credit basket. The new category would have applied to income earned in countries with tax rates under 10 per cent and would have been phased out as foreign tax rates increased to 15 per cent.

In a 2013 article, Grubert and Altshuler evaluated different proposals for the reform of the international tax system. The authors concluded that a per-country minimum tax that allowed expensing for real investment would be the best way of achieving the multiple goals of reducing

[67] Connie Mack 111, Chairman et al, *Simple, Fair, and Pro-Growth: Proposals to Fix America's Tax System* (2005), Report of the President's Advisory Panel on Federal Tax Reform (2005), *https://home.treasury.gov/system/files/131/Report-Fix-Tax-System-2005.pdf* [Accessed 15 October 2022].

[68] Harry Grubert and Rosanne Altshuler, *Corporate Taxes in the World Economy: Reforming the Taxation of Cross-Border Income* (New Brunswick: Rutgers University, 2007), Rutgers University, Department of Economics, Departmental Working Papers 200626, *https://ideas.repec.org/p/rut/rutres/200626.html* [Accessed 15 October 2022].

[69] See Congressional Research Service, *Corporate Expatriation, Inversions, and Mergers: Tax Issues*, CRS R43568, last updated 17 June 2021.

[70] See hearings before the Senate Permanent Subcommittee on Investigations, "Offshore Profit Shifting and the U.S. Tax Code - Part 2 (Apple Inc.)" (21 May 2013), *https://www.hsgac.senate.gov/subcommittees/investigations/hearings/offshore-profit-shifting-and-the-us-tax-code_-part-2* [Accessed 15 October 2022]; Julie Martin, "U.K. Committee Grills Google, E&Y, and HMRC Over Low Tax Bill" (2013) 70 Tax Notes Int'l 823.

[71] Tax Analysts, "Ways and Means Discussion Draft Explores International Corporate Taxation", 2011 *Tax Notes Today* 208.

[72] S. 2091, 112th Cong. (2012), United States Job Creation and International Tax Reform Act of 2012, *https://www.congress.gov/bill/112th-congress/senate-bill/2091/text* [Accessed 15 October 2022].

[73] White House and the Department of the Treasury, *The President's Framework for Business Tax Reform, A Joint Report by The White House and the Department of the Treasury* (2012), 2012 TNT 36-18; Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2015 Revenue Proposals* (2015), *https://home.treasury.gov/system/files/131/General-Explanations-FY2015.pdf* [Accessed 25 October 2022].

lockout, disincentivising income shifting and removing distortions in the choice of location.[74] Under their proposal, the normal return earned by CFCs would be exempt from US tax, current or future. Parts of Grubert and Altshuler's 2013 proposal are evident in the design of GILTI. A 2013 bipartisan paper on international tax reform published by the Senate Finance Committee summarised the objectives that members of Congress were trying to achieve with international tax reform: increasing US competitiveness and creating US jobs; reducing tax incentives for multinationals to locate themselves overseas and accumulate foreign earnings abroad; preventing base erosion and profit shifting to low-taxed foreign entities; and reducing complexity, uncertainty, and compliance burdens.[75] The Senate staff highlighted concerns with the US system, such as a lack of competitiveness caused by the high corporate tax rate, worldwide taxation, base erosion and profit shifting, and lockout.

To address these concerns, a broad plan for reform introduced by Camp in 2014 included a proposal for a new category of subpart F income (foreign-based intangible income) equal to the excess of a foreign subsidiary's gross income over 10 per cent of its adjusted basis in depreciable tangible property, as well as a deduction for foreign-based intangible income.[76] Camp also proposed a 95 per cent dividends received deduction on foreign-source dividends. In 2014 the Senate Republican staff released a paper on comprehensive tax reform proposing adoption of a territorial system to address the lockout effect and improve competitiveness.[77] The Senate staff recognised that at least some scholars preferred a worldwide system (that is, no deferral) but said that adopting such a regime "would clearly place the United States outside of the world norm" and represented substantively bad tax policy.[78]

As the policy papers and legislative proposals that were the precursors to GILTI indicate, the need for reform of US international tax rules was driven by perceptions of distortions in economic activity and cross-border cash flows created by those rules, wider economic changes, and the desire for greater US "competitiveness" (an ambiguous term in this context), along with concerns about cross-border profit shifting.

(ii) The political story

The foregoing discussion shows that the policy ideas behind GILTI had been developing for over a decade before its enactment as part of the TCJA. The rationales expressed by politicians concerning the need for the specific reforms proposed in 2017 were consistent to an extent, but not entirely, with policymakers' reasoning. In the aftermath of the 2016 election, the Republican

[74] Harry Grubert and Rosanne Altshuler, "Fixing the System: An Analysis of Alternative Proposals for the Reform of International Tax" (2013) 66 Nat'L Tax J. 671.

[75] International Competitiveness. Senate Finance Committee Staff Tax Reform Options for Discussion, 9 May 2013, *https://www.finance.senate.gov/imo/media/doc/050813%20International%20Competitiveness%20Options%20Paper1.pdf* [Accessed 15 October 2022]. For a summary of various proposals, see Joint Committee on Taxation, *Report to the House Committee on Ways and Means on Present Law and Suggestions for Reform Submitted to the Tax Reform Working Groups* (2013), JCS-3-13.

[76] H.R. 1, Tax Reform Act of 2014.

[77] Republican Staff Committee on Finance, United States Senate, *Comprehensive Tax Reform for 2015 and Beyond* (2014), pp.238 et seq., *https://www.finance.senate.gov/imo/media/doc/Comprehensive%20Tax%20Reform%20for%202015%20and%20Beyond%20(C).pdf* [Accessed 15 October 2022].

[78] For an overview of these proposals, see Mindy Herzfeld, "The Origins of GILTI" (2018) 90 Tax Notes Int'l 1466.

led Congress and administration, which had made tax reform a key plank of their agenda,[79] articulated the following goals of tax reform: economic growth; job creation;[80] the competitiveness of American businesses internationally; the protection of domestic jobs; the need to have tax rules that encouraged companies to retain manufacturing assets and intellectual property in the US;[81] and protection against profit shifting and base erosion.[82]

A framework on tax reform released by the White House and Congressional leaders in 2016 articulated the Republican administration's support for "pro-American" tax reform",[83] which was defined as making America the "jobs magnet of the world" by leveling the playing field for American businesses and workers, and thereby ensuring the repatriation of trillions of offshore dollars to reinvest in the American economy. The framework promised that proposed changes to the tax law would put an "end to the incentives for shipping jobs overseas". It proposed to achieve these goals by, among other means, taxing the foreign profits of US multinationals on a current basis, at a reduced rate.[84] Contemporary reports suggest that GILTI was intended as an anti-base erosion measure to limit the incentives for US multinationals to relocate overseas, especially to low-tax jurisdictions. Officials considered those anti-base erosion measures uniquely necessary as part of the transition to a (nominal) participation exemption system.[85]

(3) Back to the OECD deal

The foregoing brief overview of the landscape that gave rise to the changes to US international tax rules adopted over the last century highlights how, more than revenue needs and fiscal policy considerations, international tax reform has generally been driven by larger macro-economic changes and cross-border business trends, including the advancing of US economic interests by protecting domestic businesses. It is against this backdrop that this author will now consider how Congress might evaluate the changes that are being proposed by the OECD reforms. As the previous discussion highlights, at the end of the day, any decision by Congress to enact

[79] See, e.g. "Brady Pushes for End to 'Made in America' Tax", 2016 *Tax Notes Today* 246; Jonathan Curry and Stephen Cooper, "Trump and GOP Outline Paths to 2017 Tax Reform" (2016) 153 *Tax Notes* 1400, 1400 (quoting Senate Majority leader Mitch McConnell as saying that "[t]ax reform would lower corporate tax rates and encourage US businesses to keep jobs in America"). This discussion draws heavily on M. Herzfeld, "US Tax Reform: A Multilateral Success?" [2019] B.T.R. 487.

[80] See, e.g. KPMG, "Legislative update: Comprehensive tax reform in 2017, predicts Brady" (15 November 2016), *https://home.kpmg/us/en/home/insights/2016/11/tnf-legislative-update-comprehensive-tax-reform-in-2017-predicts-brady.html* (quoting Ways and Means Chairman Kevin Brady as emphasising that tax reform "would focus on economic growth (growth in both jobs and wages) and 'leapfrog' the US to a leadership position for those making global investments").

[81] See "Brady Says Tax Reform Bill Would Grow Economy, Give Tax Relief", 2017 *Tax Notes Today* 221.

[82] See, e.g. Blair Guild, "Trump Outlines Tax Overhaul Goals" (*CBS News*, 30 August 2017), *https://www.cbsnews.com/news/trump-tax-reform-speech-springfield-mo-live-updates/* [Accessed 15 October 2022].

[83] US Department of the Treasury, press release, *Unified Framework for Fixing Our Broken Tax Code* (27 September 2017), *https://www.treasury.gov/press-center/press-releases/Documents/Tax-Framework.pdf* [Accessed 15 October 2022].

[84] US Department of the Treasury, press release, *Unified Framework for Fixing Our Broken Tax Code* (27 September 2017), p.9. See also Tax Analysts, "Framework Will Deliver Pro-American Tax Reform, Brady Says", 2017 *Tax Notes Today* 187.

[85] Mindy Herzfeld, "Tax Cuts Chaos, Part III: Can Treasury Fix It?" (2018) 90 Tax Notes Int'l 921.

international tax law changes will be based on whether or not doing so will advance US domestic economic and foreign policy goals.[86]

(a) Morphing GILTI into GLOBE

The 2017 US tax reform implemented by the TCGA, and in particular the enactment of GILTI, may have been the impetus for Pillar 2 of the OECD project.[87] But in proposing adoption of a global minimum tax (the Global Anti-Base Erosion (GloBE) rules) on a country-by-country basis, the Pillar 2 proposal also made US reform of GILTI apply on a country-by-country basis (rather than in the aggregate, as enacted in 2017 by the TCGA)—a key step in the worldwide adoption of Pillar 2. To see whether Congress might be inclined to modify GILTI so that it conforms to the OECD's proposals, we look first at what we know about the degree to which GILTI might be considered to have achieved its objectives. To the extent to which GILTI is viewed as having advanced the objectives of the 2017 US tax reform (much of which was driven by bipartisan concerns) successfully, the appetite for further changes may be limited. Although it is too soon to evaluate the success of the international tax changes adopted by the TCJA fully, the data and analysis undertaken to date suggests that, with regard to its primary objectives of eliminating lockout, encouraging retention and repatriation of US intellectual property, and reducing incentives for profit shifting out of the US, the TCJA changes have been successful.

On profit shifting, a recent paper by economists Javier Garcia-Bernardo, Petr Janský and Gabriel Zucman is helpful. These authors show how US corporations have tended to book a larger share of their profits in the US after the TCJA, a conclusion that they say is consistent with incentives introduced by the law.[88] The change that they highlight, however, is relatively small: their data shows that the US corporate share of profits booked abroad has decreased by about 3–5 percentage points since 2017, to approximately 27 on aggregate for all US companies. But the aggregate number is somewhat skewed, because the authors show how six large companies (Alphabet, Microsoft, Facebook, Cisco, Qualcomm, Nike) saw a decrease in their share of foreign earnings of over 20 percentage points, which they correlate with changes in profit shifting attributable to repatriation of intellectual property to the US. Based on this data, the authors say that just a few large firms drive the macroeconomic decline in the relative percentage of US multinationals' profit booked overseas.

Garcia-Bernardo, Janský and Zucman's conclusion contrasts with the conclusions highlighted in a paper written by T.J. Atwood and Tyler P. Johnson, accountants at the University of Arkansas, who determined that US multinational corporations increased income shifted to foreign sources in the first two years following the TCJA's effective date. These authors found that financially constrained companies increased income shifting more, while companies with greater operational

[86] The ultimate product of a legislative session is driven by the makeup of that particular Congress. Where individual members' votes are crucial, the interests of key members can play an outsized role.
[87] For previous analysis of these questions, see Mindy Herzfeld, "Can GILTI + BEAT = GLOBE?" (2019) 49 *Intertax* 504.
[88] Javier Garcia-Bernardo, Petr Janský and Gabriel Zucman, *Did the Tax Cuts and Jobs Act Reduce Profit Shifting by US Multinational Companies?* (2022), NBER Working Paper No.30086, *https://gabriel-zucman.eu/files/GBJZ2022.pdf* [Accessed 15 October 2022].

uncertainty increased income shifting less than others.[89] Some of the differences between the two papers may be due to the different disciplines of the respective authors' research—one paper looks at economic data while the other is focused on accounting. Or it might be due to the different time periods being studied.

Another economics study from the Penn Wharton Budget Model and conducted by Alexander Arnon, Zheli He, and Xiaoyue Sun analysed two different types of data: from Compustat and balance of payments, direct investment income measures, and found that both showed a similar pattern with respect to the foreign profits of US companies immediately before and after the TCJA's enactment.[90] Both sets of data showed that foreign profits rose sharply from 2016 to 2017 and continued growing in 2018, but then declined in 2019 and especially in 2020. This study concludes that, when compared with its 2018 peak, the foreign income of US companies was 15 to 25 per cent lower in 2020 (depending on the measure being used). Meanwhile, domestic profits followed a similar pattern to that of foreign profits from 2017 to 2019 but the two diverged in 2020, with domestic profits staying flat while foreign profits fell by more than $100 billion. In 2020, the share of US companies' domestic profits relative to worldwide profits was 56 per cent, a 5 percentage point increase from the prior and preceding years. Specifically, this study shows that US multinationals shifted at least $140 billion in profits back to the US between 2018 and2020 in response to the TCJA resulting in an increase in reported US income of $25 billion in 2018, $45 billion in 2019, and $70 billion in 2020.

For a variety of reasons, Arnon et al also conclude that the total amount shifted back to the US is probably higher.

In sum, the Penn Wharton Budget study finds that the behaviour of multinationals changed beginning in the year after the enactment of the TCGA in ways that had been both intended and expected given the substance of the law, and to a meaningful degree. The study's conclusions are caveated by the explanation that aggregate calculations cannot provide an insight into whether and how any particular company may have changed its behaviour in response to the law change. The data—and any data that attempts to study the effects of the TCJA—is also caveated to the extent that it reflects information from 2020, a year that coincided with the COVID-19 pandemic and the collapse of the world's economy.

Other studies have examined data on cross-border mergers and acquisitions and in so doing have shown that US companies increased their acquisitions of foreign assets and companies significantly in 2018 and 2019 relative to an historical period.[91] Analysis by Andrew Lyon of PricewaterhouseCoopers has shown that the average value of US acquisitions of foreign assets and companies grew by 50 per cent in 2018 and 2019 compared with the average for the two prior years, while foreign acquisitions of US assets and companies fell in value by 25 per cent in that period. Lyon suggests that the increase in US acquisitions of foreign assets is consistent with the TCJA having made the USA more attractive domicile.

[89] T.J. Atwood and Tyler P. Johnson, "U.S. Multinational Corporations' Initial Income-Shifting Response to the TCJA" (23 September 2021), *https://ssrn.com/abstract=3929698* [Accessed 15 October 2022].

[90] "Penn Wharton Budget Model, Profit Shifting and the Global Minimum Tax" (21 July 2021). This analysis was conducted by Alexander Arnon, Zheli He and Xiaoyue Sun, available at *https://budgetmodel.wharton.upenn.edu/issues/2021/7/21/profit-shifting-and-the-global-minimum-tax* [Accessed 15 October 2022].

[91] Andrew Lyon, "Insights on Trends in U.S. Cross-Border M&A Transactions After the Tax Cuts and Jobs Act" (2020) 100 Tax Notes Int'l 497.

But the data is far from conclusive. Harald J. Amberger and Leslie Robinson in their accounting paper found that although US acquirers with little foreign presence prior to the TCJA were more likely to acquire a foreign target after the TCGA's enactment, overall US acquirers were less likely to acquire targets in low-tax countries after the TCJA's enactment.[92] Amberger and Robinson said that their results were consistent with the conclusion that the TCJA prompted fewer but more value-enhancing, less tax-motivated, foreign merger and acquisitions (M&A) deals by US firms. Brooke Beyer et al in another accounting paper found that, in response to GILTI, companies with more foreign cash and a greater likelihood of being affected by the GILTI regime increased their foreign but not their domestic capital expenditure.[93]

In sum, empirical studies to date tend to support the proposition that many of the objectives advanced by proponents of the TCJA in enacting GILTI may be met, but it is still too early to tell, and the analysis will never be definitive given that the data is muddied by the economic upheavals caused by COVID-19 two years after enactment.

(b) Administration rationales

Despite a lack of concrete data demonstrating the need for further reforms, the Biden administration has staked its progressive agenda on reforming GILTI to tax foreign earnings on a country-by-country basis. A 2020 report, *Taxing Multinational Companies in the 21st Century*, for the Hamilton Project by economist Kimberly Clausing,[94] who shortly after the report was published took a position as the chief tax economist at the Treasury, concluded that while the TCJA may have produced some favourable results, it did not resolve the dilemma of policies that erode the corporate income tax as a revenue source because it did not "adequately address profit shifting or offshoring incentives within the tax code", nor did it improve the competitiveness of US multinationals. Clausing presented what she called "simple changes" to "rebalance" the system, among them modifying GILTI so that it was assessed on a per-country basis. In a 2020 paper, *5 Lessons on Profit Shifting From U.S. Country-by-Country Data*, based on 2017 data (that is., not reflecting the TCJA), Clausing similarly concluded that relatively modest tax reform measures—including reforming GILTI on a country-by-country basis—could increase government revenue substantially and stem tax competition pressure.[95]

If Clausing has portrayed the reform of GILTI so that it is assessed on a country-by-country rather than an aggregate basis as a crucial reform needed to prevent profit shifting, other administration officials have highlighted other benefits that could be expected if GILTI was reformed to make it more consistent with the OECD's Pillar 2 proposal. Speaking in May 2022 at a virtual event organised by the Hamilton Project, Brian Deese of the National Economic Council explained the reasons for the administration's strong support for the OECD project,

[92] Harald J. Amberger and Leslie Robinson, "The Initial Effect of U.S. Tax Reform on Foreign Acquisitions" (28 May 2020), WU International Taxation Research Paper Series No.2020-06, Tuck School of Business Working Paper No.3612783, *https://ssrn.com/abstract=3612783* [Accessed 15 October 2022].
[93] Brooke Beyer et al, "Early Evidence on the Use of Foreign Cash Following the Tax Cuts and Jobs Act of 2017" (2 April 2021), *https://ssrn.com/abstract=3818149* [Accessed 15 October 2022].
[94] Kimberly Clausing, "Taxing Multinational Companies in the 21st Century" (28 January 2020), *https://www.hamiltonproject.org/papers/taxing_multinational_companies_in_the_21st_century* [Accessed 15 October 2022].
[95] Kimberly Clausing, "5 Lessons on Profit Shifting From U.S. Country-by-Country Data" (2020) 169 *Tax Notes Federal* 925 [Accessed 15 October 2022].

Pillar 2 in particular.[96] Under Deese's characterisation—which is consistent with statements made by other senior administration officials—changes to GILTI to make it consistent with the OECD model rules for a global minimum tax are needed to stop the race to the bottom in corporate income tax rates, which has led to the erosion of institutions' trust in the ability of government to enforce tax on capital income.

Deese said that the administration is focused on trying to solve these problems for several reasons, which include: the need to generate sufficient revenue from capital income to fund investments while keeping tax on labour at reasonable levels; the disconnect between corporate revenue and corporate profits, which he said was made worse by the 2017 tax changes; and the desire to shift the conversation so that it is about corporate dynamism instead of tax competition. According to Deese, the US economy loses out the most when it is a competition over tax regimes. Finally, Deese characterised the OECD deal as representing a goal in and of itself, in that it demonstrates that countries can work multilaterally to solve the problem of too low corporate tax collections on multinational companies, and that countries are able to tax capital effectively in a way that is fair and stable. He stressed the importance from a broader perspective of demonstrating to the public that multilateral institutions can solve important economic problems, saying that

> "if we can fix this to a more durable system, we can build trust in our own workers and across the world that working multilaterally to solve these types of economic problems is in their interests as well."

Deese's comments in this regard are consistent with statements made by Secretary Yellen, who has said that the "administration's leadership in negotiating this multilateral tax agreement is emblematic of our larger commitment to multilateral collaboration".[97]

Assistant Treasury Secretary for Tax Policy Lily Batchelder has made similar points. Speaking virtually at a Tax Council Policy Institute symposium on 20 May 2022, Batchelder said the OECD deal would make the economic playing field "more balanced and fair" while enabling citizens across the globe to be more "trusting in their government".[98] She said that the potential benefits of the deal include increased opportunities for small and medium-sized businesses and the ability of multinationals to use more of their revenues on business operations instead of tax compliance. The essence of these comments was reiterated in remarks given by Batchelder at a DC Bar tax conference in May 2022.[99] There, she said that workers would benefit significantly from the proposed changes because the reforms would ensure that the owners of capital fairly share the burden of financing government investments, while the deal would also bring important benefits to US businesses. Batchelder went on to say that small businesses in particular would benefit because they will no longer face a competitive disadvantage compared to large

[96] See Hamilton Project, "Tackling International Tax" (13 May 2022), *https://www.hamiltonproject.org/events/tackling_international_tax* [Accessed 15 October 2022].
[97] Stephanie Soong Johnston, "OECD Global Tax Deal a Testament to Multilateralism, Yellen Says", 2022 TNTI 15-3.
[98] Alexander Rifaat, "Batchelder: Global Tax and IRS Funding Would Restore Trust in Government" (2022) 175 *Tax Notes Federal* 1440.
[99] See "Remarks by Assistant Secretary for Tax Policy Lily Batchelder for the D.C. Bar Association" (5 May 2022). *https://home.treasury.gov/news/press-releases/jy0767* [Accessed 15 October 2022].

multinationals that can shift profits on paper to low-tax jurisdictions, while small companies are required to pay the full US rate and that large companies would benefit because the US would not be the only country with a global minimum tax. Administration officials have described the OECD deal as important for ensuring a progressive tax system and a free economy as democracies are being challenged around the world. President Biden emphasised these points in his remarks to the UN General Assembly in September 2022.

Other administration officials have suggested that the OECD deal is needed to bring about a "stable international tax architecture". At a conference hosted by the Saïd Business School, University of Oxford, in April 2022, Itai Grinberg, Treasury Deputy Assistant Secretary (Multilateral Negotiations), Office of Tax Policy, US Department of the Treasury, described the administration's reasons for supporting the plan, noting that the administration was working to address what he called "inequitable economic conditions".[100] Grinberg said that the pandemic had exacerbated those conditions, because large multinationals appeared to fare better than smaller ones, and promised that the OECD proposals would establish an "international tax architecture under which countries can cooperate to ensure equitable growth, innovation, and prosperity". Consistent with the administration's emphasis on the intangible benefits of international tax reforms, Grinberg highlighted the importance of the corporate income tax as a "critical political symbol" of distributive outcomes in a market economy and reforms to this system as crucial to "strengthening the world's democratic institutions". He characterised the proposed changes to GILTI as a necessary means of addressing the public's concerns that multinational companies pay a fair share of tax, important for a free economy "because public support for limiting economic populism and for growth-stimulating policies partly depend on that belief".

There is a logical disconnect between the problems highlighted by the administration, which mostly relate to problems identified with the pre-2017 regime, and the benefits touted as resulting from the global deal, which mostly address larger but intangible goals such as equity and fairness and are difficult to tie in any concrete way to the specifics of the changes being proposed. As discussed below, it is not clear that Congress—either Democrats or Republicans—has bought into the lofty goals being articulated by members of the administration. Whether any of the specific objectives that the administration officials highlight as resulting from the OECD deal might be met is highly uncertain.

(c) Congressional perspective

Notwithstanding the administration's rhetoric, it is likely that members of Congress will use different criteria when analysing whether or not to support the multilateral agreement proposed by the OECD.[101] The first question is the revenue impact of the proposals—and most importantly, that the US fisc not lose revenues as a result of signing on to the deal. Signing on to the changes is problematic from this perspective because, to date, there has been little attempt to quantify the revenue impacts for the US. The preliminary OECD analysis, which has not been updated

[100] Stephanie Soong Johnston, "Global Tax Deal Has Implications for Democracy, Grinberg Says", 2022 TNTI 65-3.
[101] See remarks by Elizabeth Bell, House Ways and Means Committee senior staff, 12 January 2021 at the National Foreign Trade Council, as quoted in Mindy Herzfeld, "Resetting Expectations for a Digital Deal Under the Biden Administration" (2021) 101 Tax Notes Int'L 543.

since the terms of the deal were released, showed little additional revenue from Pillar 2. The preliminary scores set out in US budget proposals that included a shift to a country-by-country GILTI scored it as revenue positive, with the international tax increases projected to raise almost $300 billion over the 10-year budget window.[102] US revenue analyses do not, however, take into account possible foreign law changes, such as the likelihood that other countries might increase their tax rates to 15 per cent or adopt qualified domestic minimum taxes. Enactment of a new corporate alternative minimum tax on book income as part of the Inflation Reduction Act of 2022 may increase the likelihood that adoption of the OECD proposals would be scored as revenue losers.[103]

A second consideration likely to be taken into account by members of Congress in evaluating the deal is what the US in general and US businesses in particular stand to gain from the rule changes. Lawmakers are unlikely to support a measure unless it is viewed as helping the country, whether measured by improving the domestic economy or advancing other policy goals such as foreign policy or national security interests, or strengthening the position of US businesses relative to foreign competitors. That means that any agreement must demonstrate positive benefits for, if not the fisc, then businesses, citizens, or trade. A proposal targeted at extracting more taxes primarily from US companies probably would not be characterised as beneficial under these types of metrics. Finally, members are likely to ask if the pain of the agreement is worth the gain.

Such an evaluation is consistent with how potential international tax law changes have been considered ever since the US corporate income tax was adopted. As the above demonstrates, there has not been a convincing case made that the changes significantly advance any tangible US economic policy goals, and congressional support has been mostly lukewarm.

(d) An alternative minimum tax as an alternative

The Build Back Better Act which passed the House of Representatives at the end of 2021 included changes to GILTI to adopt it on a country-by-country basis consistent with changes advocated by the administration.[104] But those changes were not included in the iteration of that Bill that finally passed the Senate in August 2022 as the Inflation Reduction Act, and there is no clear and immediate path for legislation that incorporates further international tax changes.[105]

Instead of a country-by-country minimum tax, the Inflation Reduction Act included a minimum tax on book earnings of large corporations (the book minimum tax or BMT).[106] The new corporate alternative minimum tax incorporates some aspects of the OECD proposal by imposing a global minimum tax calculated on the basis of financial statement profits. But it fails to adopt what has

[102] See Joint Committee on Taxation, Estimated Budget Effects of the Revenue Provisions of Title XIII—Committee on Ways and Means, of Fiscal Years 2022–2031 h.r. 5376, the "Build Back Better Act," as Passed by the House of Representatives (19 November 2021), JCX-46-21.
[103] Pub. L. No.117-169. Revenue scoring is a complex and somewhat mysterious exercise, but to the extent that the book minimum tax already functions as a catch-all global minimum tax, if other countries adopt Pillar 2 along with qualified domestic minimum taxes, changes to either GILTI or the new book minimum tax would likely lose revenue because of higher foreign tax rates.
[104] H.R.5376, Build Back Better Act, 117th Cong. 1st Sess. (2021-2022).
[105] Alexander Rifaat, "Manchin Pours Cold Water on Biden's Global Minimum Tax Plan", 2022 TNTF 136-4.
[106] IRC § 55(b).

been emphasised as a key plank of the proposal: a minimum tax computed on a jurisdictional basis. Although administration officials continue to emphasise the need for a country-by-country minimum tax, the lack of a legislative path forward and the fact that enactment of the BMT will make it harder to score additional revenues from a country-by-country GILTI make enactment of changes to GILTI even more uncertain.

How was a corporate alternative minimum tax on book earnings able to make it through Congress when international tax reforms could not? The answer lies partly in the substance, partly in optics, and partly in process. The BMT was able to achieve the support of key senators who had announced their opposition to tax increases because it is not an overall tax rate hike. Substantively, the BMT only affects a narrow group of companies that are viewed as highly profitable while not paying sufficient corporate taxes. The revenues from the new rules all go to the US Treasury and not to other countries. Adjustments to the book tax base to allow for tax depreciation mean that the tax is not viewed as adversely affecting companies that are investing in the US. From a messaging perspective, the tax is targeted only at highly profitable companies that do not pay enough tax without the need to explain complex international tax rules (notwithstanding that the BMT introduces its own new complicated rules). The combination of results promised from the BMT fits better within the historical narrative than the enactment of Pillar 2.

(e) What about Pillar 1?

The benefits articulated by the administration have mostly focused on the advantages of Pillar 2, and the need to reform GILTI on a country-by-country basis. The administration has been more muted in its enthusiasm about the supposed benefits from Pillar 1. All along, there was an awareness that the US was signing up to Pillar 1 mostly to prevent other countries from assessing digital services taxes against US tech companies, and that it saw more benefits from Pillar 2. Speaking at Davos in January 2022, Secretary Yellen said that Pillar 1 would

> "replace a chaotic array of unilateral tax measures that countries enacted in response to growing dissatisfaction with the status quo, but that burdened an increasing scope of U.S. businesses with multiple layers of taxation, discriminated against them, and created trade tensions that threatened economic growth and investment".

She promised that Pillar 1's rules would provide "tax certainty and clarity," which would also benefit workers.[107]

Administration officials have indicated that there would be no net revenue lost to the US fisc as a result of the adoption of Pillar 1, but there has been no data released on that so far.[108] Given the lack of concrete benefits to the fisc and the lack of any other concrete data as to how Pillar 1's reallocation rules and requirements that some jurisdictions cede taxing rights might impact US companies, there is little for Congress to evaluate in determining whether or not to sign up

[107] "Remarks by Secretary of the Treasury Janet L. Yellen at the 2022 'Virtual Davos Agenda' Hosted by the World Economic Forum" (21 January 2022), available at 2022 TNTI 15-13.

[108] In testimony before the Senate Finance Committee on 7 June, Yellen said that the effects of Pillar 1 "could be positive or negative, depending on details that have not yet been worked out": Doug Sword, "Yellen Nixes Foreign Tax Credit Reg Delay, Defends OECD Talks", 2022 TNTI 110-1.

to Pillar 1. At the same time, it is not clear that Congress would view protecting large US tech companies from digital services taxes as a high priority, especially if doing so came with other detrimental impacts either on US companies or on the US fisc.[109] If the case for Pillar 2 is lukewarm, at least there has not been overwhelming evidence presented that it may be harmful to US businesses or to the US fisc. The same cannot be said about Pillar 1, the primary objective of which has consistently been to allow other countries to tax more heavily the profits of US parented highly profitable tech companies.[110] Speaking at IFA USA's annual meeting in June 2022,[111] Rebecca Kysar, senior counselor at the US Treasury, asserted that taxpayers and practitioners should trust her on the significant benefits that would result from the deal.

Such types of assurances are unlikely to appease members of Congress. Meanwhile, the path toward enactment is significantly more difficult than it is for Pillar 2, as most agree that Pillar 1 reforms would require ratification of a multilateral tax convention. The US Senate has struggled to ratify even bilateral tax agreements in recent years, and there is even less likelihood of ratification of a multilateral agreement with uncertain benefits for the US fisc and potentially detrimental impact on US benefits. The administration has been determined to pursue workarounds to the requirement of Senate ratification, but even such workarounds would require at least congressional passage, which also is not a given, especially considering possible changes to the control of the House of Representatives. And even if the stars align and a multilateral tax agreement that does not require Senate ratification passes both Houses of Congress, there remains a question of whether such a legislative process would be upheld by the courts. The odds of such an agreement holding up become even slimmer once the judiciary is taken into account.

(4) Conclusion

The history of changes to US international tax rules over the past century illustrates how closely intertwined international tax rules have been with larger foreign policy goals and a focus on strengthening the US economy, and how international tax rules have straddled the ongoing tensions between the desire to encourage overseas investment and promoting US domestic investment. The current OECD proposals—notwithstanding the fact that they have been signed off by Biden administration Treasury negotiators—are likely to be evaluated by members of Congress consistently with metrics that consider the extent to which they advance US foreign policy and economic interests.

Given the lack of concrete data to support the notion that these multilateral proposals enhance US interests and policy objectives, it is difficult to see strong support for the terms of the agreement reached by the Biden administration within Congress. The high-minded rhetoric advanced by members of the administration may not strike a chord with members of Congress who are more closely tied to local constituents more vocal about negative impacts from tax law changes than grateful for the fact that multilateral agreements shore up international institutions.

[109] Mindy Herzfeld, "Who Killed Pillar 1?", Tax Notes Int'l, 25 July 2022.
[110] For details of the reallocation rules and the requirements for ceding taxing rights, see OECD, *Progress Report on Amount A of Pillar One, Two-Pillar Solution to the Tax Challenges of the Digitalisation of the Economy, OECD/G20 Base Erosion and Profit Shifting Project* (Paris: OECD Publishing, 2022), *https://www.oecd.org/tax/beps/progress-report-on-amount-aof-pillar-one-july-2022.pdf*.
[111] 50th Annual Conference of the USA Branch of the International Fiscal Association, 2–3 June 2022.

At the end of the day, Congress makes changes to international tax rules if it views them as advancing US interests, and so far there has been no robust support for the notion that either Pillar 1 or Pillar 2 does so.