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# Uniform International Tax Collection and Distribution for Global Development, a *(**)topian BEPS Alternative

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## INTRODUCTION

International tax reform projects, including the OECD's[2] Base Erosion and Profit Shifting ("BEPS") iterations,[3] seek to collect additional tax from multi-national enterprises ("MNEs") under rubrics of fairer taxation. The reform projects propose various methods of reallocating income that taxpayers have sourced to low and no tax jurisdictions to affluent developed economies for those economies to tax under their own taxing rules. The reallocations would concentrate the bulk of incremental tax revenue into the treasuries of affluent developed economies.

This article maintains that the need to prevent taxpayers from avoiding payment of a fair tax amount should not result in additional tax revenue primarily for the economically developed economies. Arguments that the right to tax belongs to the developed economies are largely political, not moral. The arguments lack persuasive force in a world of unequal distribution of wealth and resources with which to generate wealth.[4] Rather fairer tax collection should yield incremental revenue to eliminate poverty and improve living conditions for all people worldwide. Current international tax reform projects fail to address world poverty adequately.

The article proposes as an alternative to other international projects the creation of an international taxing agency to substitute for national taxing agencies worldwide. The international taxing agency would target elimination of world poverty. The new agency would have full authority to collect income taxes from entities and individuals under uniform international, rather than disparate national, taxing rules and procedures and to distribute the revenue worldwide. This international taxing agency would render obsolete most or all

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[2] The Organisation for Economic Co-operation and Development is a member organization with 37 developed countries as members, with Colombia joining in April 2020. OECD, *List of OECD Member countries - Ratification of the Convention on the OECD*, https://www.oecd.org/about/document/list-oecd-member-countries.htm (last visited May 21, 2020).

[3] Discussion *infra* part III.

[4] Discussion *infra* part IV.

international tax reform projects and eliminate the need for most or all tax treaties and tax information exchange agreements.

Uniform rules and rates applicable to all income worldwide without regard to the source, residence or market from or in which the income is produced will facilitate the collection of an aggregate worldwide tax greater in amount than that currently collected by all the fragmented, national tax collection. Unlike existing national tax systems, the tax, owing to its uniformity, does not favor some taxpayers over others.

Since the global tax will increase tax revenue collection materially, distribution initially might follow a two-step formula. The first step would hold each country harmless from tax revenue loss so that following transition to the global tax, each country receives a share of tax revenue equal to its revenue from income tax in the preceding year, or an average of several years collections, possibly adjusted for inflation, and enable each country to maintain its infra- and superstructure. The second step would follow a needs-based assessment under which the nutrition, housing, education, healthcare and infrastructure needs of less developed countries would be evaluated and a plan developed to ameliorate deficits in all categories worldwide. The agency would distribute incremental tax revenue pursuant to that plan. The second step would devote incremental revenue to the gradual elimination of those deficits -- perhaps addressing life-threatening deficits first followed by improvement of living standards everywhere. Tax revenue thus transferred to non-affluent, developing economies initially would be small relative to the amount of revenue distributed under the first step to enable developed economies to maintain their existing infra- and superstructures but poverty amelioration costs would be moderated as a function of relative local cost of goods and labor. Nevertheless, the amount of tax revenue devoted to international poverty relief would be far greater than the minimal amounts developed economies currently contribute to world poverty eradication.[5]

The paper proceeds as follows. Part I contextualizes the problem of base erosion against revenue collection and distribution and provides an overview of the international taxing issues this article addresses. Part II considers a US regional context as a microcosm in which multiple and often overlapping taxing jurisdictions compete for revenue and investment. Some seek to capture additional revenue by annexing high tax yield property, and others with extra-tax and, at times, predatory revenue collection. Many exchange tax concessions for development and highlight the problems of tax competition and proliferating taxing jurisdictions even in the face of centralized tax collection. This part presents a relatively complex proxy for the revenue-raising problems confronting multiple taxing jurisdictions that fail to coordinate their efforts despite the umbrella of a larger governmental unit to which they belong. Part III reviews a variety of proposals and related commentary – BEPS, GLoBE, CCCTB – highlighting the difficulty of harmonization in the face of tax competition and relentless industry pressure for tax-favored treatment. Part IV

[5] *Infra* note 43 and accompanying text and part IV.

introduces the factor of relative and absolute poverty and regional development needs that contribute to the proliferation of taxing concessions in exchange for international investment, even where the benefit from the inbound investment is compromised by the loss of potential tax revenue and the corrupt reallocation of the potential revenue into private hands. Part V envisions relinquishment of national tax sovereignty in favor of an international taxing agency with the power to assess and collect tax at a uniform rate or rates under uniform international taxing rules without regard to source, residence or sales. It would base the authority to tax on multiple independent factors so that virtually all income is included and taxed in the worldwide base the international agency administers. Part VI recommends negotiation of revenue shares to dissuade regions from tax competition. It also suggests constructing a framework for formulaic revenue distribution based on relative economic need, including the maintenance of existing infrastructures. Part VII concludes and acknowledges that the project proposes the construction of a "topia" for taxation of MNEs, with the"u" or "dys" depending on individual perspectives.

## PART I: CONTEXTUALIZING THE GLOBAL TAXING PROBLEM

As corporations grew and increased their cross-border reach through the twentieth century, they adapted to doing business in multiple jurisdictions under a single enterprise umbrella. Such MNEs centralized their management, notwithstanding national borders. Many were sufficiently flexible to disperse management functions by operation or geography to maximize profitability although all functions remained answerable to central management.[6] The MNE's international business models enabled them to situate operations where costs were lowest or regional features most favorable for specific business functions. MNEs flexed their economic muscle to encourage robust, inter-jurisdictional and international competition for their investment. From time to time, the competition became destructive to the host jurisdiction as fervor to meet such competition sometimes caused the host jurisdiction to relinquish resources exceeding the benefits received from the investment. Taxation became a mainstay of that competition. MNEs demanded and received tax concessions from a jurisdiction before making or increasing their investments in the jurisdiction.

Governments have not been nearly so nimble in adjusting their tax systems to capture revenue from the MNEs. Neither have governments adopted a unified or harmonized approach to taxation, even though compromising their taxing sovereignty with harmonized tax rules and procedures might yield better tax revenue production. Instead, tax competition has trended both on project-specific items as a substitute for direct subsidies and, on the broader scale, to

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[6] OECD, *Multinational Enterprises in The Global Economy, Heavily Debated but Hardly Measured*, (May 2018) https://www.oecd.org/industry/ind/MNEs-in-the-global-economy-policy-note.pdf (activities undertaken by foreign affiliated MNEs grew by 13 trillion USD between 2000 and 2014); Mark J. Perry, *Large US Firms Sell, Hire and Invest More Overseas Than in US and They Have to Think Globally to Survive*, AEI (Dec. 4, 2016) https://www.aei.org/wp-content/uploads/2016/12/unctad-2.png (US Based companies in the World's top 100 multinational companies have foreign assets accounting for 23.8 to 82.4% of their total assets, and foreign employment accounting for 23.8 to 87.9% of their total employment).

encourage relocation of some or all of the MNE's activities from higher tax jurisdictions to jurisdictions that would offer substantially lower or even zero tax rates in exchange for investment. And it is not only MNEs to which nations have offered tax-based investment incentives. Jurisdictions commonly offer immigrant or resident visas to investors[7] and have begun to include temporary tax holidays as additional immigration incentives.[8]

Higher tax jurisdictions have not conceded their right to tax the MNEs, but they have found resourceful tax planners and competitive taxing jurisdictions to be formidable foes. Efforts to overcome tax competition and planning have enjoyed limited success. Regarding the income tax, combatting tax planning and tax competition (with some exceptions)[9] has been largely national. Some tools that legislatures and tax administrators deploy to staunch loss of revenue from competition, general anti-avoidance rules, for example, have been enacted into law in similar forms in numerous jurisdictions,[10] reflecting legislative willingness to borrow tax concepts from other jurisdictions and adapt them to address challenging problems.[11]

The OECD has assumed the lead in the international tax arena and, for the past several decades, has supplemented tax treaties[12] with other multinational tools for tax collectors to share tax information in the form of similar, but more limited, international agreements.[13] As in the case of treaties,[14] exchange of information through tax agency cooperation may facilitate prosecuting tax offenders. More recently, the OECD introduced and developed several projects designed to

[7] Leila Adim, *Between Benefit and Abuse: Immigrant Investment Programs*, 62 ST. LOUIS U. L.J. 121 (2017); Allison Christians, *Buying In: Residence and Citizenship by Investment*, 62 ST. LOUIS U. L.J. 51 (2017) (both articles discussing "golden visas" for investors).

[8] Italy, for example. Raul-Angelo Papotti and Lorenzo Ferro, *Italy's Attractive New Tax Regime for Wealthy Pensioners*, 94 TAX NOTES INT'L 443 (Apr. 29, 2019); Marco Q. Rossi, *Italy's Special Tax Regime for High-Net-Worth Individuals, Three Years In,* 98 TAX NOTES INT'L 1145 (June 8, 2020).

[9] See discussion in part III *infra*.

[10] General Anti-avoidance Rules ("GAARS") have become commonplace although effective use of them has been limited. Rebecca Prebble and John Prebble, *Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study*, 55 ST. LOUIS U. L.J. 21 (2010) (discussing various GAARs). The US does not have a GAAR but the statutory economic substance rule in I.R.C. §7701(o) operates similarly to other countries' GAARs and requires that a transaction have economic substance independent of its tax benefits. Similarly, controlled foreign corporation ("CFC") anti-avoidance rules similar to those in section 951 of the Internal Revenue Code of 1986, as amended (the "Code," 26 USC § or "I.R.C." followed by § and a number) have been enacted in several jurisdictions.

[11] Anthony Infanti, *The Ethics of Tax Cloning*, 6 FLA. TAX REV. 251 (2003) (identify risks of transferring tax rules from developed to less developed economies).

[12] For example, Convention with Respect to Taxes on Income and Capital, U.S.-Can., Sep. 26, 1980, 1469 U.N.T.S. 189, as amended Sep. 26, 1980, 2121 U.N.T.S. 364 available at https://www.irs.gov/pub/irs-trty/canada.pdf (last visited July 10, 2020).

[13] OECD, *Tax Information Exchange Agreements ("TIEA")*, https://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm (last visited June 17, 2020) (providing a model agreement and a listing of TIEAs through May 2012); OECD, *Global Forum for Transparency and Exchange of Information for Tax Purposes, Automatic Exchange Portal*, http://www.oecd.org/tax/automatic-exchange/ (last visited June 17, 2020) (portal for automatic exchange of tax information under the common reporting standard ("CRS") for obtaining information from financial institutions and exchanging it with other jurisdictions).

[14] E.g., Art. XXVII of U.S.-Can. Tax Treaty, *supra* note 12, enables exchange of criminal tax information.

identify and capture individuals' and MNEs' income that they have assigned artificially to low tax jurisdictions.[15] In one project, the OECD sought to coerce low tax jurisdictions to step back from encouraging taxpayers to move investment from high tax jurisdictions to low tax ones and to cooperate in exchanging tax information so that jurisdictions could tax their resident taxpayers on income received in other jurisdictions where appropriate.[16] The OECD developed a list of un-cooperative tax havens and gradually removed jurisdictions from the list as they agreed to respect OECD standards of transparency and exchange of information.[17] It removed the last three countries, Andorra, Monaco and Liechtenstein, from the list in May 2009.[18] The European Union ("EU") maintains its own active list of uncooperative tax jurisdictions that currently includes eleven island jurisdictions and Oman.[19]

More recent projects focus on MNE revenue and seek to reallocate the revenue from the source to which the taxpayer has assigned it to a higher tax jurisdiction under sourcing rules designed to diminish the ability of taxpayers to shift profit artificially from high to low tax jurisdictions.[20] A working group under the European Commission introduced a voluntary proposal for a common consolidated corporate tax basis ("CCCTB") that, if adopted, would apportion the income of MNEs formulaically and predictably among the EU states in which it is operating.[21] After tabling the proposal earlier, the EC renewed the proposal in 2015 as a mandatory base with a gradual introduction.[22] The EU also has become more attentive to the state aid issues prohibited by the

[15] Part III, *infra*.

[16] OECD, *Harmful Tax Competition An Emerging Global Issue*, (1998), https://www.oecd.org/tax/harmful/1904176.pdf (identifying harmful tax practices and tax havens to encourage developed countries to abandon the practices and impose sanctions on tax haven jurisdictions facilitating secret investment from residents of developed economies using tax havens to avoid home country taxes).

[17] OECD, *List of Unco-operative Tax Havens*, https://www.oecd.org/countries/monaco/list-of-unco-operative-tax-havens.htm (last visited June 17, 2020); but see Michael J. McIntyre, How to End the Charade of Information Exchange, Tax Notes International (Oct, 26,, 2009) 255, https://www.taxnotes.com/tax-notes-today-international/treaties/how-end-charade-information-exchange/2009/10/26/7918966 (debunking the effectiveness of the Model Tax Information Exchange Agreement as a basis on which to remove jurisdictions from the list of tax havens, characterizing the U.S. – Switzerland agreement as changing little of the Swiss bank secrecy-based assistance to international tax cheats, and proposing an alternative TIEA).

[18] *Id.*

[19] EUROPEAN COMMISSION ("EC"), *Taxation: EU list of non-cooperative jurisdictions*, available at https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/ (Feb. 27, 2020 update), https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52020XG0227(01) (last visited July 10, 2020).

[20] OECD, *Base Erosion and Profit Shifting ("BEPS")*, https://www.oecd.org/tax/beps/ (last visited July 10, 2020), discussed *infra* part III; Devereux, Michael P. et al., *The OECD Global Anti-Base Erosion Proposal*, 1-2, Oxford Centre for Business Taxation (Jan. 2020) (digital commerce but emphasizing the OECD commitment to distribute a larger share of the tax base to developing economies).

[21] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121 final (Oct. 6, 2011), available at https://ec.europa.eu/transparency/regdoc/rep/1/2011/EN/1-2011-121-EN-F2-1.Pdf.

[22] EC, *Questions and Answers on the CCCTB re-launch*, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5174 (last visited June 17, 2020).

Treaty[23] when its member states grant non-uniform tax concessions to enterprises to provide a welcoming tax environment for them.[24]

Whether the target of legislation or multinational (OECD) project is the individual,[25] the MNE,[26] or both,[27] the legislative or project objective almost invariably is to measure income and source in a manner that disregards artificial or manipulative sourcing. A frequent indicium of such artificiality or manipulation is a related party transaction where the parties are in different taxing jurisdictions[28] and the pricing shifts profit to low or no-tax jurisdictions. While reallocation of income by the tax collector under existing transfer pricing regulations and guidelines currently is possible,[29] the members of the OECD view transfer pricing to be inadequate to the task of restraining erosion of the tax base and its accompanying profit shifting. Underlying the reallocation process is the perception that the individual or MNE is manipulating income source and underpaying tax rather than simply paying tax to the wrong jurisdiction. However, with the possible exception of the CCCTB which would apportion the income tax base among the EU countries in which the MNE operates under a uniform set of rules in an endeavor to prevent double taxation and no taxation of income,[30] an objective shared with most tax treaties,[31] the international projects developed by the OECD and national anti-avoidance rules[32] reallocate income to the developed economies with relatively high corporate tax rates[33] rather than to less

[23] Consolidated Version of the Treaty of the Functioning of the European Union art. 107, May 9, 2008, 2008 O.J. (C 115) 47.
[24] EC, *Competition, State Aid Control*, https://ec.europa.eu/competition/state_aid/overview/index_en.html (last visited July 10, 2020).
[25] The Foreign Accounts Tax Compliance Act ("FATCA"), Pub L 111-147, 124 Stat 97 (March 22, 2010) (imposing penalties for failure to report foreign accounts and income and imposing sanctions on foreign financial institutions for failing to report accounts of US persons); I.R.C. § 877A (expatriation tax on US persons who relinquish citizenship or permanent residence in the US), for example.
[26] I.R.C. § 7874 (2018) (taxing inverting entities that cease to be US entities); CCCTB, *supra* note 21, BEPS, *supra* note 17, for example.
[27] Controlled Foreign Corporation ("CFC") provisions under I.R.C. § 951 *et seq*. in the US and similar provisions in other countries (taxing some or all corporate income to the corporation's shareholders), GAARs, *supra* note 10, for example.
[28] Compare reallocation of income and deduction under I.R.C. § 482, for example, and the base erosion minimum tax under I.R.C. § 59A in the US. And similarly the disallowance of deductions in hybrid transactions when not matched with an inclusion. I.R.C. §267A.
[29] I.R.C. § 482 and the treasury regulations to I.R.C. § 482 (transfer price reallocation of tax items).
[30] *Supra* note 21.
[31] Tax treaties include prevention of double taxation among other functions in their title. Reuven S. Avi-Yonah, *Double Tax Treaties: An Introduction*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES AND INVESTMENT FLOWS 99-106 (K. P. Sauvant and L. E. Sachs eds., 2009).
[32] CFC provisions, *supra* note 27, for example.
33 High rates of tax is a relative term. The US reduced its corporate income tax rate from a maximum of 35% to 21% in 2018 and imposed a maximum rate of 50% as recently as 1985. Tax Cuts and Jobs Act (TCJA) Pub. L. No. 115-97 (2017); 26 U.S.C. § 5 (1982); Tax Foundation, *Federal Corporate Income Tax Rates, Income Years 1909-2012* (July 6, 2012), https://taxfoundation.org/federal-corporate-income-tax-rates-income-years-1909-2012/.

developed or developing economies. While the OECD projects purport to be neutral in identifying correct income source, reallocation favors the developed economy jurisdictions. From the OECD approach, one concludes that the underpayment of tax is significant because it deprives the treasury of a developed economy of tax revenue owed to it. If the projects increase the tax revenue of developed economies, however, they are likely to decrease investment that less developed economies may have captured with low taxes and tax incentives.

For all taxpayers, including MNEs, the level of taxation may be a key but not the only economic factor in the analysis of where to earn income. Choosing where to locate income-producing activity is a bundle of factors, some economic and some non-economic. Tax rules often are ambiguous and economically favor certain jurisdictions, but the ambiguity also might lead to multiple tax impositions. Tax rules are not alone in their ambiguity. The location of income-producing activity is also ambiguous, even more so today, when intangible, digital property produces income without any clear link to a specific and identifiable source, even with a single factor of destination of consumption as determinative. Destination is an inadequate proxy for taxing all income insofar as it concentrates income in the high consuming destinations.[34] Similarly, residence of the income producer often is uncertain and residence of the owners of an income producing entity may not be more certain as one must unpeel possible layers of ownership.[35] While taxpayers may complain that the tax rules are uncertain, they exploit the ambiguity of income source to locate income where the level of taxation is lowest rather than where income-producing activity takes place. Splitting genuine economic activity source from tax source enables taxpayers to minimize taxation artificially without there being certainty as to a single genuine source. Competing, legitimate claims of source may belong to multiple jurisdictions. Undoubtedly the income should be taxable somewhere. Ideally, if all income everywhere were subject to identical tax rules and rates, the taxpayer would be indifferent as to income source and would make location decisions based on non-tax factors.

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[34] Reuven S. Avi-Yonah, *Destination Based Corporate Tax: An Alternative Approach*, (December 11, 2016). U of Michigan Law & Econ Research Paper No. 16-028; U of Michigan Public Law Research Paper No. 529. Available at SSRN: https://ssrn.com/abstract=2883835 or http://dx.doi.org/10.2139/ssrn.2883835 (last visited July 10, 2020); Reuven S. Avi-Yonah, and Kimberly A. Clausing, *Problems with Destination-Based Corporate Taxes and the Ryan Blueprint*, (February 5, 2017). U of Michigan Law & Econ Research Paper No. 16-029. Available at SSRN: https://ssrn.com/abstract=2884903 (last visited July 10, 2020); SALES FACTOR, S*ales Factor Formulary Apportionment of Global Profits as an Alternative System of Taxation of to the Current U.S. Federal Corporate Income Tax (memorandum to the Senate Finance Committee)*, (April 13, 2015); , https://www.finance.senate.gov/imo/media/doc/Sales%20Factor_Redacted3.pdf; but see, Wei Cui, *Destination-Based Cash-Flow Taxation: A Critical Appraisal,* 63 U. Toronoto. L.J 301 (2017) (critical analysis of destination-based cash flow taxation confirming concentration of income in developed economies to exclusion of developing economies).

[35] Robert J Peroni, J. Clifton Fleming, Jr. & Stephen Shay, *Defending Worldwide Taxation with a Shareholder-Based Definition of Corporate Residence,* 2016 BYU L. REV. 1681 (2016)..

Commentators have expressed concern that enhanced tax capture from MNEs favors the advanced economies unduly.[36] Those commentators who critique the income shift for taxing purposes to developed economy jurisdictions argue that the BEPS projects fail to allocate a sufficiently large share of the income tax base to less-developed jurisdictions. This literature suggests other "fairer" methods for allocating or apportioning the tax base. One approach recommends a modified view of value creation and suggests allocating more of the base to where value is created.[37] Another offers a method of formulary apportionment of the income tax base that includes a labor factor in the formula, not as a function of wages, but rather as a function of person-hours of work to prevent wage differentials from distorting apportionment formulas in favor of high wage countries.[38] A third would allocate tax base by the benefit received by investment destination rather than benefit received from the destination by the investor.[39]

The goal for the OECD and the governments in developed economies has been one primarily of sourcing income to the developed economy so that it may be taxed there under that jurisdiction's taxing rules. The more general proposition that each MNE (and each individual, as well) should pay an identifiable and specific portion of their income in tax without regard to which nation receives the tax has not been prominent. If worldwide agreement on an ideal amount of tax and uniform tax rules were possible, as this article will recommend, rather than the sourcing or missourcing of income, the next step would be allocation of the tax revenue among jurisdictions. Artificial sourcing would not alter the amount of tax payable by any taxpayer or related group of taxpayers.

While fairness certainly underlies the OECD's BEPS projects, fairness there has been primarily an income source concept, maintaining that if income is attributable to a source, the source has priority in imposing its tax. Even under the US's worldwide taxation of its citizens and residents,[40] the US has ceded taxing authority to the income source country through the foreign tax credit.[41] Existing concepts of source favor developed economies. Unless some innovative source concept might compensate for imbalances in opportunities and resources worldwide by imputing more level distribution of opportunities and resources and taxing income according to that imputed source, a different manner of allocating worldwide taxing opportunity is critical to enable non-affluent nations and regions to develop and provide a reasonable standard of living to all people free from need.

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[36] Devereaux, et al., *supra* note 20 and notes 37-39 infra and accompanying text.
[37] Allison Christians & Laurens van Apeldoorn, *Taxing Income Where Value is Created*, 22 FLA. TAX. REV. 1 (2018).
[38] Henry Ordower, *Utopian Visions toward a Grand Unified Global Income*, Tax, 14 FLA. TAX. REV. 361, 387 (2013) (labor factor in the income apportionment formula based on person hours of work rather than payroll amounts).
[39] Vasiliki Koukoulioti, *The Benefit Principle Revisited - Avoiding the Repercussions of Digitalization on the Tax Base Sustainability* (Ph.D. dissertation in process, draft manuscript of June 1, 2020 on file with the author).
[40] Treas. Reg. § 1.1-1(b) (taxing US citizens and residents on their income from all sources worldwide).
[41] I.R.C. § 901 (credit for income taxes properly paid in another jurisdiction).

It would be a significant conceptual shift to jettison the competitive concept of source as the primary basis for international income taxation and adopt the more nuanced and collaborative needs-based system this article proposes. Despite the developed economies' income productivity, such a tax system would emphasize non-geographic fairness in the distribution of resources. The international community would unite on tax principles to prevent tax base erosion independent of source taxation so that the principles would not overwhelmingly favor the advanced economies. Instead, the objective of the tax system would be to generate adequate governmental resources to meet worldwide revenue demands.[42] Currently, developed economies devote less than one percent of their tax revenue to development for less developed economies.[43] International uniformity would require MNEs (and other taxpayers) to pay some reasonable amount of tax on their income and facilitate devotion of a larger amount of tax revenue to international development.

The focus of the tax principles would be on the question of whether a definable, correct set of tax rules might exist under which each taxpayer pays a "fair" amount of tax without regard to the jurisdictions in which the taxpayer operates. This paper emphasizes the question of whether, assuming a "fair" measure of tax exists, distribution of that "fair" amount among jurisdictions ought to follow determinations of need with the elimination of suffering – starvation, disease, homelessness – at the forefront rather than the place of production of income. The imposition of tax can be along ability to pay principles, while distribution would follow contextualized need. This paper recommends abandoning the premise that income and accompanying tax revenue, however it is measured, be allocated to where the income is produced, in favor of allocating tax revenue based on a broad, inclusive view of revenue that is need-determined to accommodate the systemic transition. Developed economies would continue to have the greatest needs to meet their existing commitments and maintain existing infra- and superstructures. Yet, the shift in distribution principles would help address the uneven worldwide distribution of resources and level disparities between affluent and non-affluent taxpayers and communities, especially those disparities resulting in the absolute poverty prevalent in some parts of the world that generate

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[42] Modern monetary theory postulates that some countries, the US included, simply could print money as needed without collecting tax at all. Scott Fullwiler , Modern Monetary Theory—A Primer on the Operational Realities of the Monetary System, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723198 (visited July 25, 2020); Bell, Stephanie A., Can Taxes and Bonds Finance Government Spending?. Levy Economics Institute Working Paper No. 244, Available at SSRN: https://ssrn.com/abstract=115128 or http://dx.doi.org/10.2139/ssrn.115128. The coronavirus known as Covid19, Cucinotta D, Vanelli M, *WHO Declares COVID-19 a Pandemic*, 91 Acta Bio. Med. 157 (Mar, 19, 2020), is testing this modern monetary theory proposition insofar as the US Congress already has allocated over $2 trillion of funds and increased the national debt substantially to meet the national revenue needs from the contraction of the economy. Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), PUB. L. 116-138 (March 27, 2020).

[43] Alexis Brassey & Henry Ordower, *The Village of Billionaires: Fair Taxation and Redistribution Amid Relative and Absolute Poverty*, 99 TAX NOTES INT'L 97 (July 6, 2020) (debunking the issue of fair taxation as politics rather than concern with fair taxation).

little income.[44] The revised system would preclude MNE's from using their economic bargaining power to negotiate tax relief from developing economies that cannot replace the lost revenue easily.

Consistent with uniform tax rules and a fair rate of tax is the frequent assertion by representatives of MNEs that MNEs do not seek to reduce their taxes artificially,[45] but plan the placement of their income to avoid becoming subject to tax on the same unit[46] of income in multiple jurisdictions. Source planning also may protect MNEs from suffering a tax-based, competitive disadvantage. As long as the MNE does not pay tax while its competitors avoid tax leaving the MNE at a competitive disadvantage, the MNEs are indifferent to reasonable levels of taxation. Transparent and uniform tax rules would enable the MNEs to determine their tax liability to each jurisdiction correctly. Uniform rules would require the MNE's competitors similarly to pay a correct amount of tax to each jurisdiction. Taxpayers must not be subject to non-uniform tax rules in any taxing jurisdiction.[47] Yet, even if tax rules and rates are uniform within a taxing jurisdiction, they are not currently uniform across jurisdictions, and MNEs deploy considerable resources to minimizing their taxes whether as a competitive defense or as profit-centered activity.[48]

Harmonization of taxation internationally under the rubric of a universally correct level of tax is elusive. Efforts to achieve consensus on combatting tax avoidance may lead to some multi-national agreements, but if each signatory gets to apply its own tax rules and interpretations to the agreement, the force of the agreement diminishes. National sovereignty remains a formidable, albeit primarily rhetorical,[49] barrier to the best resolution of many issues common to

[44] *Id.*
[45] Ryan Finley, *Uber Accepts Need for New International Tax System,* TAXNOTES (June 26, 2020), https://www.taxnotes.com/tax-notes-today-international/digital-economy/uber-accepts-need-new-international-tax-system/2020/06/26/2cnmn?highlight=Pillar%201 (Uber acknowledges that international tax principles are necessary and simply hopes for less arbitrary measures); Adrian Weckler & Michael Cogley, *'No one did anything wrong here and Ireland is being picked on... It is total political crap' - Apple chief Tim Cook*, INDEPENDENT.IE (Sep. 1, 2016), https://www.independent.ie/business/irish/no-one-did-anything-wrong-here-and-ireland-is-being-picked-on-it-is-total-political-crap-apple-chief-tim-cook-35012145.html (Apple CEO stating that the tax system should be reformed and simplified, and that the EU ruling against the company was simply a political tactic as they were tax compliant and paid $400 million in 2014). In a recent ruling by the General Court of the European Union, the Court overruled the EC's decision as it found that it had not met the legal standard necessary to show that there was an economic advantage (state aid) as required by Article 107(1) TFEU. Case T-778/16 and T-892/16, Ireland v. Comm'n, 2020.
[46] Except when referring to specific US tax provisions for which the US dollar will be used, "unit" of income is the income measured in the functional currency of the income producing entity.
[47] When taxing rules do not treat all taxpayers the same, the taxing state is discriminating among taxpayers, a possible violation of the state aid prohibition in the EU if the taxpayers are residents or nationals of different states. Treaty on the Functioning of the European Union *supra* note 20. Likewise, residents of different states in the U.S. Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) (residence-based discrimination impermissible).
[48] Henry Ordower, *The Culture of Tax Avoidance*, 55 ST. LOUIS U. L.J. 47 (2010) (analyzes the development of tax planning and sheltering comparatively as tax avoidance became an independent culture, general anti-avoidance rules, and proposes a broad-based approach to combating tax avoidance).
[49] Rhetorical insofar as the World Trade Organization ("WTO") and other international bodies cannot function successfully without relinquishment of national sovereignty. Compare discussion *infra* in part V.

most nations. The recent pandemic[50] illustrates the difficulty of attaining international consensus on any matter as little consensus exists even on a common authority to combat a health threat to the entire world population. The pandemic did not elicit an international call to deputize an existing World Health Organization to design a method to contain the spread of the virus. Rather, each nation and often each governmental sub-unit took its own politically determined approach with considerable but limited harmonization of methods. On the tax side, the EU, despite being a remarkable, voluntary union of sovereign and historically often warring nations, has failed to harmonize taxes except in setting a minimum value-added tax rate with incompletely harmonized operating rules.[51] The EU itself as a governmental unit lacks the power to tax, although a nascent movement to grant limited taxing authority to a central EU government along with a US-type federalist model of overlapping state and central taxing authority has begun to gather support among leading tax academics.[52] The task of broad-based harmonization is formidable.

Like an earlier paper recommending the creation of an international taxing agency to apportion a global income base,[53] this paper argues that national sovereignty and national self-interest remain impediments to fair taxation and must yield to the international need for predictable taxation at a level fair to all. The paper recommends modified international tax rules administered by a single international agency that collects and distributes income tax revenue among sovereign states based on the contextualized revenue needs of each state under international fairness-based principles.[54] This paper inquires whether the developed economies might deploy fairer tax revenue distribution to persuade less developed economies to abandon tax competition and suggests possible coercive devices to nudge voluntary abandonment of tax competition.[55]

## PART II. REGIONALISM AND TAXING JURISDICTIONS.

With an estimated population of just under one million,[56] St. Louis County, Missouri, has eighty-nine independent municipalities with taxing authority, and the county itself also may tax. Taxing

[50] *Supra* note 42.
[51] Council Directive 2006/112, of Nov. 28, 2006, The Common System of Value Added Tax 2006 O.J. (L 347) 1 (EC). Consolidated text available at http://data.europa.eu/eli/dir/2006/112/2020-01-01 (last visited July 10, 2020). There also has been some harmonization on a few customs matters.
[52] Op-Ed: *European Solidarity Requires EU Taxes*, EU LAW LIVE (April 21, 2020), https://eulawlive.com/op-ed-european-solidarity-requires-eu-taxes/. Frans Vanistendael, *Apple*: Why the EU Needs a Common Corporate Income Tax, Tax Notes International (July 27, 2020) 451 (addressing the Apple state aid decision of the GCEU, supra note 45, and arguing that apportionment of corporate income within the EU is essential).
[53] Ordower, *Utopian Visions*, *supra* note 38.
[54] Brassey & Ordower, *supra* note 43.
[55] Alongside this paper's proposal stands another somewhat more limited impingement on national sovereignty in the form of a recent proposal for a uniform global excess profits tax to complement national taxation of MNEs. Tarcisio Diniz Magalhaes & Allison Christians, *Rethinking Tax for the Digital Economy After COVID-19* (June 26, 2020). Available at SSRN: https://ssrn.com/abstract=3635907 or http://dx.doi.org/10.2139/ssrn.3635907
[56] UNITED STATES CENSUS, *St. Louis County, Missouri*, (July 1, 2019) https://www.census.gov/quickfacts/stlouiscountymissouri.

authority is derivative of the state of Missouri's taxing power[57] guaranteed by the US constitution.[58] The St. Louis County Collector of Revenue is responsible for billing and collecting *ad valorem* real and personal property taxes for over two hundred taxing districts in St. Louis County.[59] The number of taxing districts is more than twice the number of municipalities because the school, fire protection, sewer, and municipal taxing districts are not co-extensive with municipalities but overlap in somewhat mysterious and often historically determined ways, such that multiple school-taxing districts, for example, may overlap the borders of a single municipality. Some districts are funded better than others because real estate is more valuable in some parts of the county and yields greater sums of real property tax revenue[60] than in other parts, and some municipalities have more retail space generating more sales tax revenue than do others. The state administers sales tax collection and distribution.

An owner of real property in St. Louis County examining their real estate tax bill finds a confusing array of taxing districts imposing a portion of the total tax consolidated into a single invoice. That array often differs from one property to another as district borders for differing types of taxing districts do not coincide. Rates of tax also differ among similar types of districts. The tax base, however, is uniform. Each property has a value attributed to it, and each taxing district within which that property lies applies its tax rate to that uniform value in determining the tax to impose. There is occasionally some ambiguity when a multiple-use property is involved in determining what portion of the property ought to be assessed at the commercial rather than the residential percentage, and the appraised value of any property may be contested and suffer from inaccuracies and errors in determining value except in limited instances where a sale has occurred simultaneously with the fixing of value between parties dealing at arms' length that established the fair market value[61] of the property with reasonable certainty. The rules are uniform for assessing, collecting, and distributing tax among taxing jurisdictions. The County administers the tax, collects the tax payment, and is responsible for sanctions for non-payment including seizure and sale of the property to collect unpaid taxes. Taxing districts neither

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[57] MO. CONST. art. X, § 1.
[58] U.S. Const. amend. X.
[59] St. Louis County, Mo., *Collector of Revenue*, https://www.stlouisco.com/YourGovernment/CountyDepartments/Revenue/CollectorOfRevenue (last visited July 10, 2020).
[60] Real property taxes generally are a percentage of the value of the property taxed under rules that base the tax on an assessed value lower than the fair value of the property. For example, the assessment formula in Missouri for residential property uses 19% of the appraised value of the property as the base for real property tax. Commercial property would use 32% and farm property 12%. Mo. State Tax Commission, *Property Reassessment and Taxation Pamphlet 4* (2017), https://stc.mo.gov/wp-content/uploads/sites/5/2017/01/Property-Reassessment-Pamphlet-1-18-16.pdf. (last visited July 10, 2020).
[61] Merriam-Webster Dictionary online defines "fair market value" as "a price at which buyers and sellers with a reasonable knowledge of pertinent facts and not acting under any compulsion are willing to do business" available at https://www.merriam-webster.com/dictionary/fair%20market%20value (last visited July 10, 2020). Likewise, 26 C.F.R. § 20.2031-1(b) (fair market value for estate tax purposes).

administer the tax, determine the value of the taxed property nor control sanctions for non-payment.

Uniformity in administration and collection is not unusual worldwide. The US is exceptional in the range of governmental units that have their own administrative infrastructures devoted to tax collection.[62] Most countries administer and collect income, value-added taxes, and often property taxes, centrally.[63] Rates of tax and property values may vary regionally, but the central authority distributes the tax collected among the regional governmental units providing services and often has responsibility for the enforcement of taxes, even if local governments determine the expenditure of the tax collected.

While the taxing district may set the rate applicable to the taxed property in St. Louis County, state constitutional tax limitations require a favorable public vote before a taxing district may increase a tax rate,[64] and initiatives to increase a tax might succeed in one district but fail in another partially overlapping district. The multiplicity of rates and county-determined property values means that the governmental services in one location may differ significantly from the services in another geographically proximate area within the County. Similarly, with respect to the state-administered sales tax, purchases of identical items at identical prices in two stores near one another often incur different sales tax amounts because the sales tax rates in proximate jurisdictions may differ. Rates of tax are not harmonized, but the state constitution limits the rates municipalities and other taxing districts may impose.[65] The legislature may impose other limitations on permissible rates separate from the constitutional limitations.[66]

The result of multiple taxing jurisdictions in a relatively small geographic area[67] is visible in the levels of school funding that impact the educational services for children in St. Louis County

[62] Each state of the US has its own taxing agency responsible for state income and consumption taxes and municipalities and other taxing districts with their own agencies are not unusual. For example, the city of St. Louis is not part of St. Louis County and has its own collector of revenue responsible for the city earnings tax as well as ad valorem property taxes. Gregory F.X. Daly, *Collector of Revenue*, *City of St. Louis*, https://www.stlouis-mo.gov/collector/ (last visited July 10, 2020).

[63] The EU member states collect most or all taxes centrally even where sub-jurisdictions impose differing rates in addition to the national rate. HM Revenue and Customs, *About us*, https://www.gov.uk/government/organisations/hm-revenue-customs/about (last visited June 26, 2020) (UK's central tax, payments and customs authority); Agencia Tributaria, T*he Tax Agency, Institutional Information*, https://www.agenciatributaria.es/AEAT.internet/en_gb/Inicio/La_Agencia_Tributaria/Informacion_institucional/Informacion_institucional.shtml (last visited June 26, 2020) (Spain's Tax Agency is responsible for the collection of Personal Income Tax, Corporation Income Tax, Value Added Tac, etc.); The Revenue Commissioners, *Irish Tax and Customs*, https://www.revenue.ie/en/corporate/information-about-revenue/role-of-revenue/core-business.aspx (last visited June 26, 2020).

[64] MO. CONST. art. X, § 22. Ariel Jurow Kleiman, *Tax Limits and the Future of Local Democracy*, 133 HARV. L. REV. 1884 (2020) (cataloguing and analyzing state tax limitations).

[65] MO. CONST. art. X, §§ 8, 11 (limiting rates of tax on personal and real property, respectively).

[66] MO. CONST. art. X, § 10(c) (power of the legislature to limit tax).

[67] 523 square miles, less than one percent of the land area of Missouri, about half the size of Luxembourg. St. Louis County has nearly 20 percent of the Missouri state population and more than three percent of the state's 6000 special

receive.[68] Some public-school districts become desirable places to live because they offer well-funded, high-quality public education while others are lacking in quality and even may fail to meet state educational standards.[69] Educational disparities across St. Louis County are significant. In several municipalities, children living on opposite sides of a street go to schools in different school districts and may have quite different educational experiences from one another because one school district has greater resources from tax revenue than the other. The school district disparities are somewhat self-perpetuating in that the perceived school district quality affects property values, causing prices of single-family residences in better school districts to be greater than in lower quality districts. Since real estate taxes are based on property value, higher value yields more revenue, sometimes even if the tax rate is lower than in the lower quality school district.

Where resource disparities exist among school districts, disparities in educational quality tend to follow, often along racial lines.[70] In *Brown v. Board of Education of Topeka*,[71] the U.S. Supreme Court rejected the notion that segregated education could provide equal education and prohibited purportedly "separate but equal" schools.[72] Remedies to level opportunities for children have proved elusive. In some states, federal courts have intervened to address some educational disparities by ordering busing of students across districts to remedy imbalances in the racial composition of student bodies and afford lower-income people – often people of color – better educational opportunities in districts that historically had little or no racial diversity.[73] To settle a lawsuit, St. Louis County school districts beginning in 1982 initiated a voluntary program busing black students from overwhelmingly black St. Louis City schools to predominately white schools

taxing districts. MO DEP'T OF REV., *Sales Tax Jurisdiction Maps*, https://mogov.maps.arcgis.com/apps/MapSeries/index.html?appid=22cc45ec926e4f94a1f41027b1bedb0e (last visited July 10, 2020).

[68] Quality of education of course is not solely a function of funding but better funding generally contributes to a better educational product.

[69] In 2019, the County school districts of Brentwood and Jennings represent the extremes. Measured by dollars per average daily attendance, Brentwood with $18,801 had nearly twice the funding of the Jennings district with $10,371. MO. DEP'T OF ELEMENTARY & SECONDARY EDUC., *Building Level Per Pupil Expenditures 2019 Report*, https://stateofmissouri.app.box.com/s/1nvymfovyruscbmcte1b8dn838mpndlh/file/573737767611(last visited June 17, 2020). Brentwood is a mid-county district with a predominantly white enrollment. Jennings is a north county district with a predominantly black enrollment. Public School Review, *Brentwood School District*, https://www.publicschoolreview.com/missouri/brentwood-school-district/2905880-school-district (63% white enrollment as of 2020) (last visited June 26, 2020); Great Schools, *Jennings School District*, (98% Black enrollment) (last visited June 26, 2020).

[70] *Id.*

[71] 347 U.S. 483 (1954).

[72] Plessy v. Ferguson, 163 U.S. 537 (1896) (establishing the prevailing doctrine that racially "separate but equal" public facilities were consistent with the equal protection clause of U.S. CONST. amend. XIV.)

[73] Swann *v.* Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) (establishing authority of courts to order busing to remediate educational segregation).

in St. Louis County.[74] Revenue sharing among districts or consolidation of districts so that all pupils, even in a small county like St. Louis, are covered by identical amounts of tax revenue per student has not gained sufficient political support, even though uniform tax rules and centralized revenue collection would facilitate level revenue distribution. The state of Missouri supplements school funding based on funding need but it has not sought to level funding among districts.[75]

School district boundaries are not an immutable characteristic of each pupil. People may move from one school district to another. While economic barriers to relocation may exist and, accordingly, relocation may be difficult, better-paying employment could open the door to relocation. The better-funded school district may not prevent the family from the less funded district from moving across the street to the better-funded district, [76] a right that is not available across national borders.[77] If, however, too many lower-income individuals move to the more affluent school district, the existing residents may choose to limit tax revenue and reject any tax increase, diminishing the quality of the public schools. Those longer-term, affluent residents who do not relocate may establish private schools for their children that exclude the new residents through high costs that often serve as a proxy for prohibited racial discrimination in public education.[78]

No active discussion is underway in St. Louis County to level tax revenue distribution countywide to eliminate the disparities in school quality and other governmental services. Instead of generous cooperation among taxing districts, there is tax-based competition among governmental units. In St. Louis County, municipal governments seek to annex unincorporated areas of the county along major thoroughfares where commercial development and concomitantly sales tax revenue is projected to grow.[79] Negotiation between private developers and governmental units for investment in new or renovated facilities that might bring employment and future tax revenue occurs on the level of temporary, sometimes long-term, tax concessions. Tax concessions, however, undermine the ability of state and local governmental units to generate revenue to support necessary government services when state constitutional tax limitations already make necessary tax increases troublesome. Concessions to new and existing business interests require additional taxes on non-affluent residents or a diminution of services.

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[74] Ryan Delaney, *St. Louis school desegregation program begins its long wind down*, ST. LOUIS PUBLIC RADIO (Nov 1, 2018) https://news.stlpublicradio.org/post/st-louis-school-desegregation-program-begins-its-long-wind-down#stream/0.
[75] *Supra* note 69.
[76] Constitutional right to travel and reside without restriction in the U.S. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) (prohibiting restrictions on travel); Shapiro v. Thompson, 394 U.S. 618, 629–31, 638 (1969) (welfare benefits may not be conditioned on duration of residency); Dunn v. Blumstein, 405 U.S. 330, 338–42 (1972) (durational residency requirements for voting).
[77] Despite their proximity, relocation from Ciudad Juarez, Mexico to El Paso, Texas requires a US visa to enter and reside unless one is a US citizen or permanent resident. Brassey & Ordower, *supra* note 43.
[78] Brown v. Bd of Education, *supra* note 71.
[79] Boundary Commission of St. Louis County reviews proposal for annexation and consolidation, https://www.boundarycommission.com/ (last visited July 10, 2020).

Governmental units have utilized extra-taxing power, revenue-raising to supplement limited tax revenue. User fees have substituted for government services historically funded with general revenue.[80] In St Louis County, several municipal governments have resorted to predatory, revenue-based policing by aggressively enforcing municipal ordinances, especially traffic rules, to collect fines and court fees from non-affluent violators to supplement tax revenue.[81]

While tax concession competition has played an investment role in the US for many years,[82] it has become particularly robust during recent decades. MNEs actively solicit bids from governments when they are evaluating where to locate a new or expanded facility.[83] Governmental units offer tax concessions as all or a portion of their proposal to entice the business decision-makers to invest in the geographic area and bring jobs and collateral businesses to the governmental unit. Tax concession competition sometimes even becomes destructive as the commercial development consumes governmental resources without contributing adequately to tax revenue. Occasionally, the business attracted with special tax concessions relocates again when the period of the tax concession expires and leaves the governmental unit with facilities it cannot adequately utilize.[84] Business demand for tax-based government contributions has become an important -- possibly indispensable -- feature of major developments throughout the US. When governmental offers are insufficient, the businesses go elsewhere.[85] More egalitarian tax revenue distribution across borders might render tax concession competition obsolescent as unnecessary.

The US has substantial competition across taxing districts and a confusing profusion of taxing units and tax bases, so that items included in one tax base frequently become subject to tax under another base as well. Income may be subject to a federal income tax, a wage income tax (social security), a state income tax, and a local (wage-based) income tax, and the income remaining after the income taxes may become subject again to a consumption tax when the taxpayer deploys it for purchases and an annual property tax following purchase. Each tax competes for its

[80] Kleiman, *supra* 64; Jasper L. Cummings, Jr., *User Fees Versus Taxes*, TAX ANALYSTS (Nov. 4, 2011), http://www.taxhistory.org/www/features.nsf/Articles/27F622B404B089F68525793E00536946?OpenDocument (last visited July 10, 2020).

[81] Henry Ordower, J.S. Sandoval, & Kenneth Warren, *Out of Ferguson: Misdemeanors, Municipal Courts, Tax Distribution and Constitutional Limitations*, 61 HOWARD L.J. 113 (2017) (arguing that fines for some violations are taxes imposed in violation of the state constitution rather than punishments for violations of ordinances).

[82] Henry Ordower, Les Impôts Relatifs aux Investissements Étrangers aux États-Unis d'Amérique (observations générales), 1996-2 Revue Internationale de Droit Economique 185-201 (1996) (includes discussion of negotiated state or local tax concessions).

[83] Nick Wingfield, *Amazon Chooses 20 Finalists for Second Headquarters*, THE NEW YORK TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/technology/amazon-finalists-headquarters.html.

[84] Robin Respaut, W*ith NFL Rams gone, St. Louis still stuck with stadium debt*, REUTERS (Feb. 3, 2016), https://www.reuters.com/article/us-sports-nfl-stadiums-insight/with-nfl-rams-gone-st-louis-still-stuck-with-stadium-debt-idUSKCN0VC0EP.

[85] Scott Cohn, *Amazon reveals the truth on why it nixed New York and chose Virginia for its HQ2*, CNBC (Jul 10 2019) https://www.cnbc.com/2019/07/10/amazon-reveals-the-truth-on-why-it-nixed-ny-and-chose-virginia-for-hq2.html (Amazon withdrew from New York City when city council members balked at size of the tax concessions).

share of overall tax revenue. Part of the competition among jurisdictions may be the absence of one of the taxes. Florida and Texas, for example, impose no individual state income tax.[86] Alaska, Delaware, Montana, New Hampshire, and Oregon impose no sales tax. Tax competition allows private parties to allocate a portion of what should be tax revenue to themselves as general provisions, like the charitable contribution deduction,[87] enable taxpayers to allocate a portion of a taxing unit's revenue to other private interests rather than leaving the revenue distribution to the government officials charged with distributing the public purse. In the case of charitable contributions, the private interests are charities of the donor's choice[88] rather than governmentally selected functions.

Tax concessions often mean that those best able to pay taxes are not required to pay. Tax concessions do not necessarily reduce tax revenues for the taxing unit granting the concessions. If the new business activity did not exist in the taxing unit previously, it was not generating tax revenue. Nevertheless, business development frequently increases demand for governmental services and concomitantly the need for tax revenue to pay for the services. Funding the services may require property owners, other than those receiving concessions, to pay increased property taxes. Alternatively, and probably more often, funding requirements result in increased consumption taxes to carry the increased tax burden at the expense of those less able to pay. In locales subject to statutory or constitutional tax limitations requiring voter approval for tax increases, voters approve rate increases for sales taxes, for example, more readily than increased property taxes,[89] even though those consumption taxes tend to be regressive relative to income or wealth. Moreover, increased consumption tax revenue may not flow from the increased business activity, as the dedication of consumption tax revenue from the new business activity to the business' facilities or debt servicing may be among the concessions.[90] Facilities for product distribution produce relatively little incremental consumption tax revenue locally as the

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[86] Julie Roin (Chicago), Changing Places, Changing Taxes: Exploiting Tax Discontinuities, Symposium on Legal Discontinuities (Cegla Center for Interdisciplinary Research, Tel Aviv University), 22 THEORETICAL INQUIRIES IN LAW ___ (2020).
[87] I.R.C. § 170.
[88] Henry Ordower, Charitable Contributions of Services: Charitable Gift Planning for Non-Itemizers, 67 THE TAX LAW. 517 (2014).
[89] Legislative Analysts Office, A Look at Voter-Approval Requirements for Local Taxes, (Mar. 20, 2014) https://lao.ca.gov/reports/2014/finance/local-taxes/voter-approval-032014.pdf (greater approval rate for taxes that don't require a special majority); BallotPedia, Taxes on The Ballot (Missouri), https://ballotpedia.org/Taxes_on_the_ballot (last visited July 3, 2020) (listing various tax provision ballots, including general and property tax increases, and whether they were approved or defeated).
[90] This is a common concession for servicing indebtedness on professional entertainment facilities, including stadiums. The Dallas Morning News, Arlington's Records Sales-Tax Revenue Will Pay Off Cowboys Stadium Debt Years Early, (Nov. 21, 2012), https://www.dallasnews.com/news/2012/11/22/arlington-s-record-sales-tax-revenue-will-pay-off-cowboys-stadium-debt-years-early/ (record sales tax revenue rise allows city leaders to pay off the stadium debt early); Alicia Robinson, Stadium Maintenance, Debt Eat into Anaheim's Revenue From Hosting Angels Baseball, THE ORANGE COUNTY REGISTER (Sep. 25, 2019), https://www.ocregister.com/2019/09/25/stadium-maintenance-debt-eat-into-anaheims-revenue-from-hosting-angels-baseball/.

consumption taxes are collected and paid to the taxing authority where the purchaser receives and uses the product, if at all.[91] Jurisdictions that collect income or payroll taxes may derive additional revenue from the workers at the new facility, but in many instances those workers are not new but have changed employment. Where the workers are new taxpayers in the jurisdiction, they generally are moderate to low income workers. Taxes applicable to them are flat or regressive[92] rather than progressive,[93] and do not impact the high income or wealth business owners.

The growing disparity in wealth between affluent and non-affluent residents of the U.S.[94] has been attributed in part to taxation.[95] Proposals to introduce or expand progressivity in taxation to impose a greater tax burden on affluent taxpayers or to impose a tax on wealth have found proponents among candidates for public office who would deploy the revenue to improve services and living conditions for the less affluent members of the society, that is redistributing that increased burden to level wealth disparity.[96] Those candidates have not garnered adequate political support for their positions to enact the changes. Recent analysis by a group of economists addressing recovery from the economic impact of the 2020 pandemic instills new

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[91] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (expanding the authority of states to require vendors with no physical presence in the state to collect and pay over the sales or use tax on items sold to state residents). Sales taxes are add-on taxes imposed when personal property is purchased for consumption rather than resale. The vendor generally collects the tax and pays it over to the state in which the sale occurs. If the vendor sells to a purchaser in another state, the purchaser becomes liable to the other state for complementary use tax. Collection of use tax is difficult unless the vendor collects and pays over the tax. Until the Wayfair decision, states could not require a vendor to collect use tax on sales into the state unless the vendor had a direct or indirect presence there. The Wayfair decision removed the physical presence requirement for vendors with substantial sales into a state so that a state may require out of state vendors to collect their use tax and pay it over less a fee for their collection services. The state of Missouri has not yet enacted legislation implementing the Wayfair decision for sales into Missouri. Hannah Meehan, Comment, *Sales Tax for Remote Sellers: Missouri's Response in A Post-Wayfair World*, 65 ST. LOUIS U. L.J. (forthcoming 2021, draft manuscript of July 7, 2020 on file with the author).

[92] Compare the regressive social security tax in the US that is imposed at a flat rate on wages (not income from investment or business ownership) up to a ceiling amount of $137,700 in 2020 and then zero for wages in excess of that ceiling. IRS, *Social Security and Medicare Withholding Taxes*, https://www.irs.gov/taxtopics/tc751#:~:text=Social%20Security%20and%20Medicare%20Withholding%20Rates,employee%2C%20or%202.9%25%20total. (last visited July 10, 2020).

[93] St. Louis City Earnings Tax is imposed on income from services only at a flat rate of 1 percent. St. Louis, Gregory F.X. Daly, Collector of Revenue, *Earnings Tax*, https://www.stlouis-mo.gov/collector/earnings-tax-home.cfm (last visited July 10, 2020).

[94] Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States*, University of California, (updated March 2, 2019), https://eml.berkeley.edu/~saez/saez-UStopincomes-2017.pdf (last visited July 10, 2020); CONGRESSIONAL BUDGET OFFICE, *The Distribution of Household Income*, 2016, (July 9, 2019), https://www.cbo.gov/publication/55413.

[95] Saez, *supra* note 94, and Henry Ordower, *Taxation and Inequality*, *in* KIMBERLEY L. KINSLEY & ROBERT S. RYCROFT, INEQUALITY IN AMERICA: CAUSES AND CONSEQUENCES OF THE RICH POOR DIVIDE (Santa Barbara, forthcoming 2020).

[96] Neil Irwin, *Elizabeth Warren Wants a Wealth Tax. How Would That Even Work?*, THE NEW YORK TIMES (Feb. 18, 2019) https://www.nytimes.com/2019/02/18/upshot/warren-wealth-tax.html; Huaqun Li and Karl Smith, *Analysis of Sen. Warren and Sen. Sanders' Wealth Tax Plans*, TAX FOUNDATION (January 27, 2020), https://taxfoundation.org/wealth-tax/.

force into the wealth tax and withdrawal or freezing of tax benefits for successful businesses.[97] Even if enacted, however, no one is proposing distribution of increased tax revenue beyond the borders of the relevant taxing unit -- whether that unit is a specialized, municipal, state, or national unit. A school taxing district in St. Louis County is not sharing revenue with another school taxing district, nor a state like Missouri sharing revenue with a neighboring state like Arkansas, nor the US sharing revenue with Mexico. While residents may move freely between St. Louis County school districts or across state lines, if the better-funded school district is in El Paso, Texas, U.S.A. and the lesser funded district in Ciudad Juarez, Mexico, moving to the better-funded district is problematic even if the distance from one to the other is short.[98]

The concept of sovereignty supports respecting a taxing unit's choice to spend the tax revenue it manages to collect, even where the tax base is produced by activities in other places. A product manufactured in Illinois but sold to Missouri consumers is subject to Missouri consumption tax, as a product manufactured in Mexico but transported to and then sold to US consumers is subject to consumption taxes in the US, not Mexico. Illinois or Mexico in the examples derives no benefit from the consumption tax on sale. Illinois and Mexico might encourage their local vendors to assist purchasers in Missouri or the US, respectively, to avoid Missouri or other US consumption taxes by shipping items directly to consumers in the other jurisdiction free from the consumption tax.[99] Any benefit Illinois or Mexico derives from increased business activity locally, even if minimal, is nevertheless more than it would have received from the consumption tax imposed by a neighboring jurisdiction. Sovereignty is a political shield that fails to take unequal distribution of wealth and resources into account.

Despite central collection and administration in St. Louis County or, with respect to consumption taxes, the state of Missouri, sharing revenue across taxing unit borders remains bewilderingly difficult no matter how geographically close or closely connected the communities may be, how similar the residents are to one another, and how unequal the revenue distribution may be. Leveling revenue distribution to provide comparable services and opportunities throughout St. Louis County seems a desirable fairness objective. Even within St. Louis County's narrow governmental overlay of central collection and administration under uniform taxing rules and with a uniform tax base, taking this next step toward fairer distribution of tax revenue remains elusive.

For businesses within St. Louis County where taxing rules, structures and measurement of the tax object are uniform, differentials in local property tax rates remain a factor in evaluating where to locate or expand a business facility. Active tax competition and disparities in tax

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[97] Amanda Athanasiou, *Economists Launch Global Tax Plan for Pandemic Recovery*, TAX NOTES TODAY INT'L (June 16, 2020), https://www.taxnotes.com/tax-notes-today-international/corporate-taxation/economists-launch-global-tax-plan-pandemic-recovery/2020/06/16/2cmhr.
[98] Compare discussion, *supra*, note 76 - 77 and accompanying text.
[99] Subject to possible use tax collection obligations, see *Wayfair*, *supra*, note 91.

revenue among taxing jurisdictions in St. Louis County help to make some business locations more desirable than others. Taxing jurisdictions within St. Louis County have not unified to distribute revenue to promote development for the entire region, but that step would be administratively feasible because the infrastructure for it is already in place. Only rates of tax and the distribution formula would require revision to make fairer shares of resources available to all districts.

If distribution of tax revenue to achieve greater uniformity in governmental services is a desirable goal, as this article argues it is, uniform tax rules, uniform tax rates, and a distribution formula meeting community needs is critical to achieve that goal. Disparities in revenue distribution in St. Louis County are easy to level with the fundamental tax base uniformity already in place, even though leveling is not occurring or even under discussion. Globally, the OECD is promoting increased uniformity, not to level tax resource distribution, but to combat tax competition that diminishes tax revenue for developed economies. While frequently couched in terms of MNEs and other taxpayers ceasing to engage in tax avoidance and paying their "fair share" of tax, a primarily political objective,[100] generating increased tax revenue to ameliorate relative poverty locally has not been matched with worldwide tax revenue distribution to eliminate absolute poverty internationally.[101]

If assistance and cooperation from less developed economies in combatting tax competition and tax avoidance is necessary to advance the developed economies' efforts, fairer worldwide tax revenue distribution is critical, and less developed economies must be given a reason not to use their tax systems to compete. Globally, distribution is of first importance but uniformity remains a close second in significance because without uniformity, as is present in the St. Louis County administered property value tax base, it is difficult to compare tax levies to ascertain whether one country is collecting an appropriate tax on its share of the worldwide tax base. The tax base in international projects is income, but not all tax systems measure income in an identical manner. The next section considers whether international projects facilitate any movement toward uniform rules to facilitate fairer tax revenue distribution. No international project has selected tax revenue, as opposed to tax base, distribution as its objective except as an incidental effect of tax base allocation.

## PART III. INTERNATIONAL TAX COMPETITION AND REALLOCATING THE TAX BASE.

### *A. BEPS and Other Projects.*

In response to aggressive tax planning and "harmful" tax competition,[102] various proposals have been crafted to prevent base erosion and profit shifting — a practice that has come to a peak in

[100] Brassey & Ordower, *supra* note 43.
[101] *Id.* and Part IV, *infra*.
[102] Speculative costs of revenue loss show that profit shifting has a more harmful effect on developing countries, with the implied long run revenue loss for advanced economies totaling 0.6% of the GDP, and close to 2% of the

light of the digital economy and a surge in intangible, digital assets. As the current leader in international tax, the OECD has spearheaded most projects, such as the Base Erosion and Profit Shifting ("BEPS") action reports and the Global Anti-Base Erosion ("GLoBE") proposal. In parallel with the OECD projects, the EU also has relaunched the CCCTB[103] to harmonize the taxing rules and standards of Member States and to better incorporate the BEPS actions through cohesive legislation. The CCCTB more simply tries to apportion the corporate income tax base consistently and predictably among the EU jurisdictions in which the company operates so that each may tax its share of an MNE's income under its own income tax rules but with no part of the income subject to tax in more than one jurisdiction or not subject to tax in any jurisdiction.[104] While the CCCTB project does not seek complete uniformity in computational rules for tax purposes beyond what is necessary to facilitate apportionment, its adoption should result in considerable convergence of tax rules to create a consistent base to apportion.

Requested and endorsed by the G20[105] leaders, the OECD aggregated 15 Actions intended to combat the abuse of profit shifting as exasperated by the digital economy. The Actions cover the unique challenges of the digital economy;[106] aim to neutralize hybrid mismatch arrangements;[107] strengthen CFC rules;[108] reduce base erosion via interest deductions and other financial payments;[109] recognize and counter harmful tax practices;[110] prevent treaty abuse;[111] prevent the artificial avoidance of permanent establishment;[112] ensure transfer pricing outcomes are in line with value creation;[113] collect and analyze data on BEPS;[114] require the disclosure of aggressive

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GDP for developing countries. Ernesto Crivelli, et al, *Base Erosion, Profit Shifting and Developing Countries*, 20 IMF Working Paper (May 2015) https://www.imf.org/external/pubs/ft/wp/2015/wp15118.pdf.

[103] *Supra* note 22.

[104] Edward D. Kleinbard , *Stateless Income*, 11 FLA. TAX REV. 699 (2011) (introducing the concept of stateless income as income not taxable anywhere).

[105] Michael Crowley, *What Is the G20?,* NEW YORK TIMES (June 27, 2019), available at https://www.nytimes.com/2019/06/27/world/asia/what-is-the-g20.html (visited July 26, 2020).

[106] OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015).

[107] OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015). Compare, I.R.C. §267A (denying deductions or exclusions for related party and hybrid transactions resulting in a mismatch of inclusion and exclusion or deduction).

[108] OECD, *Designing Effective Controlled Foreign Company Rules, Action 3 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015).

[109] OECD, *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2015 Final Report*, *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015).

[110] OECD, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015).

[111] OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015).

[112] OECD, *Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015).

[113] OECD, *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 - 2015 Final Reports, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2105).

tax planning arrangements;[115] re-examine transfer pricing;[116] improve dispute resolution mechanisms;[117] and create a multilateral instrument.[118] Only four of the actions, however, were agreed upon as part of the minimum standards discussed in the BEPS Inclusive Framework, and committed to by the member countries.[119]

Despite such ambitious and all-encompassing objectives, the action plans have fallen short of some critics' expectations.[120] A repeated criticism of the BEPS project is that it does not address the underlining fatalities of the existing international tax system, and instead rehashes and strengthens existing rules and principles.[121] Some commentators state that the foundational tax base allocation rules that pre-exist and are enforced by BEPS ensure that higher income countries are consistently assigned a greater share of revenue than lower income countries.[122] The OECD

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[114] OECD, *Measuring and Monitoring BEPS, Action 11 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015).
[115] OECD, *Mandatory Disclosure Rules, Action 12 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015).
[116] OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015).
[117] OECD, *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015).
[118] OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris (2015).
[119] The minimum standards: fighting harmful tax practices (Action 5), preventing tax treaty abuse (Action 6), improving transparency with Country-by-Country reporting (Action 13), and enhancing the effectiveness of mechanisms for dispute resolution. OECD, *Inclusive Framework on BEPS: Progress Report July 2016-June 2017*, OECD Publishing, Paris (2017). To date, 137 countries are members of the OECD/G20 Inclusive Framework on BEPS. OECD (December, 2019) https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf.
[120] Adam Rosenzweig, *Defining a Country's Fair Share of Taxes*, 42 FLA. ST. U. L. REV. 373, 426 (2015); Steven Dean, *Neither Rules Nor Standards*, 87 NOTRE DAME L. REV. 538 (2011); Nancy H. Kaufman, *Fairness and the Taxation of International Income*, 29 LAW & POL'Y INT'L BUS. 145 (1998).
[121] Reuven S. Avi-Yonah, Haiyan Xu, *Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight*, 60 HARV. BUS. L. REV.186, 208 (2016); Mindy Herzfeld, *The Case Against BEPS: Lessons for Tax Coordination*, 21 FLA. TAX. REV. (2017) (the project's lack of coordinated rules instead results in vague standards that everyone could agree on because they mean different things to each country. Further, the OECD missed the opportunity to truly examine the underlying causes of the issues and meaningfully discuss the reasons for tax competition and the tension between emerging economies and OECD members); Michael P. Devereux and John Vella, *Are We Heading Towards a Corporate System Fit for the 21st Century?*, Oxford University Centre for Business Taxation (Nov. 2014) (it is not a fundamental reform because the OECD does not set out to change the framework or even question the desirability or logic of the existing regime). *See also* Jakib A. Bartoszewski & Andew P. Morris, *An Archipelago of Contrasts: Blacklists, Caribbean Autonomy and the New Tax Colonialism*, IFC (June 17, 2020) https://www.ifcreview.com/articles/2020/june/an-archipelago-of-contrasts-blacklists-caribbean-autonomy-and-the-new-tax-colonialism/ (arguing that the blacklisting of Caribbean tax havens by the EU is a new form of colonialism and the EU should instead focus on designing its own efficient tax regime to protect its tax revenue). Similarly, Steven A. Dean, *FATCA, the U.S. Congressional Black Caucus, and the OECD Blacklist*, 99 TAX NOTES INT'L 83 (July 6, 2020) (discussing the role of the Congressional Black Caucus in the US withdrawal from the OECD project on harmful tax competition because of its adverse effect on low wealth, predominantly black jurisdictions).
[122] Christians & van Apeldoorn, *supra* note 37.

has recognized and committed itself to being more inclusive of developing countries,[123] although some believe that the only way to achieve this is by overhauling the foundational principles of the existing system, which inherently favors higher income countries, and which BEPS fails to do.[124] Others believe that the Actions allow for greater source-country taxation, which could be beneficial for developing countries that generally are considered source countries, although this may be dependent on multinational consensus on the allocation of taxing rights.[125]

There is some praise for Action 13, which re-examines transfer pricing documentation, including the requirement that MNEs provide relevant governments with the information necessary to correct and fair allocation of income among states,[126] as well as Action 15 for the multilateral instrument.[127] Brauner considers the country-by-country reporting recommendation innovative and collaborative, as it enhances transparency and allows informed discussion.[128] Further, Brauner considers the multilateral instrument almost revolutionary given the predominantly bilateral tax regimes, and states that success of this action should be interpreted as success of the BEPS project, regardless of the other actions.[129] And Grinberg provides a quantitative approach for practical limitations on application of Pillar I.[130]

### *B. GLoBE – Minimum Tax and Base Erosion.*

Following concern and criticism that the BEPS final actions do not go far enough in addressing the issues of profit shifting, the OECD responded with the GLoBE proposal. Pillar one of GLoBE concerns the allocation of tax rights among jurisdictions, and Pillar Two imposes two new taxes: a global minimum tax on corporate profits and a tax on base eroding payments.[131] Encompassed within the global minimum tax is the income inclusion rule, implementing a top-up tax for foreign entities where the income was subject to a tax below the effective minimum rate, as well as the switch-over rule, allowing residence jurisdictions to switch from an exemption to a credit method when profits attributable to a permanent establishment are subject

[123] OECD, *Public Consultation Document Secretariat Proposal for a "Unified Approach" under Pillar One 9 October 2019 – 12 November 2019*, Item 15, p. 5, https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf (last visited July 10, 2020).
[124] Mindy Herzfeld, *The Case Against BEPS: Lessons for Tax Coordination*, 21 FLA. TAX. REV. 1 (2017).
[125] Spencer, David, *BEPS and Allocation of Taxing Rights*, 29 J. INT'L TAX'N 34 (2018).
[126] *Supra* note 116, at 23.
[127] *Supra* note 118.
[128] Brauner, Yarviv, *What the BEPS?* 16 FLA. TAX REV. 55 (2014). *But supra* note *121*, *Devereux & Vella* (noting that the information is only to be disclosed to tax authorities and not the public, therefore reducing its transparency).
[129] *Id. See also* Rasmus Corlin Christensen & Martin Hearson, *The New Politics of Global Tax Governance: Taking Stock a Decade after the Financial Crisis*, 26 REV. OF INT'L POL. ECON. 1068, 1077 (2019) (noting that the multilateral instrument is the result of deeper and broader sovereignty-constraining effects than ever before).
[130] Itai Grinberg, *Design of Scope Limitations for OECD Pillar 1 Work*, 167 TAX NOTES FED. 1843 (June 15, 2020).
[131] OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, OECD/G20 Inclusive Framework on BEPS*, Paris (2019).

to an effective rate below the minimum.[132] Functionally, the minimum tax would resemble the US worldwide taxation system under which US persons are taxable on their worldwide income in the US[133] but reduced through a tax credit by the tax properly payable to the source jurisdiction.[134] The GLoBE tax on base eroding payments includes the undertaxed payments rule, which denies deductions or imposes source-based taxation for payments to related parties that are not subject to the specified minimum tax rate, and the subject to tax rule, which only grants certain treaty benefits if the item of income was subject to the specified minimum tax rate.[135]

The GLoBE project[136] suggests a means to remove tax from the international mix of business development incentives. Although GLoBE focuses on the digital economy, its principles apply to a much broader range of problems. GLoBE's two fundamental principles resemble approaches the US and other jurisdictions already have taken with respect to their own resident MNEs. One principle includes the income of foreign branches and controlled entities in the income of the parent or principal entity based in the higher tax jurisdiction if the branch or controlled entity is resident in a low tax jurisdiction.[137] Unlike most countries that have territorial income tax systems under which branch income is only taxable where earned, the US already includes the income of foreign branches under the rubric of worldwide taxation of its citizens, residents and domestic entities.[138] Unless the US taxpayers interpose a foreign corporation,[139] they are taxable on foreign source income immediately and capture no benefit from operating or investing directly in a low tax jurisdiction.[140]

The GLoBE proposal as applied to controlled entities resembles existing CFC[141] regimes common to the US and other jurisdictions.[142] In the US, subpart F income[143] of a CFC is taxable

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[132] OECD, *Public Consultation Document Global Anti-Base Erosion Proposal ("GLoBE") (Pillar Two): Tax Challenges Arising from the Digitalization of the Economy*, 6, OECD Publishing, Paris (2019).
[133] Treas. reg. § 1.1-1(b), *supra* note 40.
[134] I.R.C. § 901, *supra* note 41 and accompanying text.
[135] GLoBE Proposal, *supra*, note 132.
[136] *Id.*
[137] *Id.*; Devereux, et al., supra note 20, at 1-2; Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT'L L. ___ (2020).
[138] Treas. reg. § 1.1-1(b) *supra* note 40 and accompanying text.
[139] The US may not tax the income of a foreign corporation from non-US sources and not effectively connected with the conduct of a US trade or business. I.R.C. §§ 11(d), 882 (tax on foreign corporations).
[140] New but limited territoriality in US tax law under I.R.C. § 245A, added by the TCJA , now provides a 100 percent dividends received deduction for distributions from foreign corporations to US corporate shareholders owning at least 10 percent of the foreign corporation enables US corporations to operate outside the US through non-US subsidiaries and, subject to CFC and base erosion minimum tax limitations, avoid the US income tax.
[141] A CFC is a foreign corporation in which United States shareholders ("US shareholders") own more than 50 percent of the voting shares and share value. I.R.C. § 957(a). I.R.C. § 951(b) defines US shareholder as a US person owning, directly or indirectly, 10 percent or more of the voting shares or the share value of the foreign corporation.
[142] *Supra* note 137.
[143] I.R.C. § 952.

to its US shareholders.[144] Like the GLoBE minimum tax treatment of rates at least equal to the minimum tax rate, if the foreign base company income[145] portion of the subpart F income is taxed in the CFC residence country at a rate greater than 90 percent of the US corporate tax rate,[146] that portion of the subpart F income is not subject to CFC inclusion in the US shareholders' incomes.[147] Foreign base company income includes income from sales and services attributable to the CFC if there is little or no business reason, other than tax, for sourcing the income in that corporation.[148] US shareholders of CFCs also must include annually their pro rata shares of the CFCs global low-taxed income from intangible property, a connection which would include the digital economy on which GLoBE focuses.[149]

The second pillar of the GLoBE proposals, the "base erosion" proposal, disallows deductions and treaty benefits for base erosion payments. A base erosion payment but for the GLoBE proposal rule would yield a deduction or enjoy a treaty benefit without the payment becoming subject to tax in the recipient's jurisdiction at or above a designated minimum rate. Tax rate arbitrage with related party payments is commonplace where no anti-avoidance rule or minimum tax discourages it. Where the parties to the transaction have a community of economic interests as related parties do or have some other opportunity to return part of the low tax jurisdiction's profit to other party free from a tax in the higher tax jurisdiction, the parties may share the tax savings from the structure without any non-tax economic cost to either party.[150] The base erosion proposal addresses this longstanding problem of tax rate arbitrage. Examples of rate arbitrage and tax law provisions to limit them are ubiquitous. A simple example in the US is the "kiddie tax" under which investment income of minor children is taxed at their parents' marginal rate rather than the rate that would apply if the children's income were permitted to advance through customary marginal rate brackets.[151] Where the payments are between related parties, transfer pricing limitations long have enabled the tax administrator to attribute the income to a different

[144] I.R.C. § 951(a) includes the US shareholder's prorata share of the CFC's subpart F income, as defined in I.R.C. § 952, in the shareholder's US income subject to tax currently without distribution from the CFC.
[145] I.R.C. § 954.
[146] I.R.C. § 11 (corporate rate is 21 percent and 90 percent of that rate is 18.9 percent).
[147] I.R.C. § 954(b)(4) (income subject to an effective foreign rate of tax greater than 90 percent of the US rate (currently 21 percent, so more than 18.9 percent) not included under I.R.C. §952.
[148] For example, I.R.C. § 954(d) (defining foreign base company sales income where neither production nor use of the property sold is in the CFC's home country).
[149] I.R.C. § 951A (added by an unnamed tax act commonly referred to as the Tax Cuts and Jobs Act of 2017, Pub. L. 115–97 (Dec. 22, 2017) ("TCJA")).
[150] Compare I.R.C. § 7701(o) requiring economic substance independent of tax benefits for an arrangement to yield the tax outcomes that the parties have structured into the transaction.
[151] I.R.C. § 1(g) (taxing children's investment income at parents' rate of tax). The partnership substantial economic effect requirement for allocations, I.R.C. § 704(b), and the unrelated business income tax provisions for tax exempt organizations, I.R.C. § 511, are further examples.

taxpayer than the taxpayer receiving it.[152] The US now also has a separate base erosion minimum tax for certain related party payments.[153]

The minimum tax and the denial of the deduction or treaty benefit would compel the low tax jurisdiction to enact a rate at least equal to the minimum rate lest it relinquish the potential tax revenue without having a benefit to offer to the investor because the high tax jurisdiction will capture the difference between the low tax jurisdiction's actual tax and the minimum tax or all the revenue in the case of the base erosion payment.[154] While the objectives of the proposal are to target profit shifting and reduce tax competition, some critics consider the second objective to be much more difficult to achieve, and in fact a severe departure from the policy consensus of the BEPS project - that no or low taxation is not a *per se* cause of concern, but rather practices that artificially segregate taxable income are.[155] Now it seems that this is in fact the concern, and there is speculation that this could impact countries' ability to attract real investment and activity, as well as prevent countries from taxing profits generated through real activity taking place within their borders at any rate they choose, thereby diminishing their sovereignty.[156] Other commentators appreciate that the minimum tax could significantly reduce the distortions of international capital allocation, and therefore reduce the incentive to profit shift, though it does not fully equalize the tax burden of domestic and foreign investment.[157] Similarly, the view that a minimum tax infringes on sovereignty is considered by some as a questionable premise, as unfettered sovereignty can only be claimed in purely internal situations, whereas in the international context, there are other external interests to consider.[158]

The GLoBE proposal does acknowledge that there is a capital imbalance across borders disfavoring less developed relative to more developed economies. The OECD views this proposal as a way to remedy that imbalance. The proposal would allocate a somewhat greater share of the base to less developed jurisdictions. The project also considers that the minimum tax under the guise of tax fairness will inhibit jurisdictions from engaging in tax-based competition for inbound investment by offering tax concessions to international investors. Less developed jurisdictions will collect more tax on their larger shares of the tax base than they might have collected with robust tax competition because they will impose a tax at a rate no less than the minimum tax.

Like the other OECD projects, the GLoBE project respects most tax sovereignty. It restructures the manner in which the income tax base is shared among countries to allocate a bit more to less

[152] I.R.C. § 482 and related regulations.
[153] I.R.C. § 59A, added by TCJA, imposing a minimum tax at 10 percent, increasing to 12.5 percent in 2025.
[154] Devereaux et al., *supra* note 20, and discussion *infra* part V.
[155] *Id.*
[156] *Id.* at 2.
[157] Johannes Becker & Joachim Englisch, *International Effective Minimum Taxation – The GLoBE Proposal*, SSRN Electronic Journal (Jan. 2019).
[158] *Id.*

developed countries and intrudes upon taxing sovereignty with effective economic compulsion to enact a minimum rate of tax.[159] Except for the minimum rate, the project does not promote broad taxing uniformity. Neither does the project recommend uniform rules of taxation across jurisdictions. It leaves the administration and collection of tax on the jurisdiction's share of the tax base to each taxing jurisdiction. Accordingly, a jurisdiction interested in offering a tax-based subsidy might adjust its tax rules to benefit the subsidized taxpayer while maintaining a nominal tax rate equal to the minimum. The complexity of addressing all possible tax subsidization permutations will be challenging to police. Each developed economy could impose its own rules indirectly on other economies by applying its own taxing rules in determining whether or not an MNE was subject to tax at a rate equal to or greater than the minimum tax rate. Results would differ depending on the rules in the taxpayer's home jurisdiction as opposed to another major economy's rules. Where the MNE is operating in multiple jurisdictions and each or many jurisdictions apply their own taxing rules to determine whether the MNE is paying the minimum tax amount, a cacophony of outcomes might result offering little improvement over what exists now.

Ultimately, it seems that the success of the proposal depends on the near-unanimous adoption of the minimum tax and the tax on base eroding payments. Otherwise, the problems could be exacerbated, as other countries who refrain from implementing the measures could manipulate this to their tax advantage, enticing MNEs to move their parent company to their jurisdiction.[160] Similarly, however, there must be harmonization of the tax base and applicable thresholds, as countries could simply continue to compete by adjusting rules of inclusion and thresholds.[161] Finally, some of the remaining intricacies that need to be determined could significantly impact the implementation by countries as variables of the approaches decrease incentives to do so, such as whether carve-outs for non-harmful tax benefits will be implemented and whether the minimum tax will be implemented following the "blended" approach.[162]

### C. *Tax Competition, Avoidance and Evasion.*

While the OECD pushes on with its project to overhaul taxation of MNEs and has 140 countries scheduled to participate in meetings on a revised international tax framework,[163] the framework is unlikely to eliminate international tax competition. Even among the 140 participants, a variety of competing concerns may manifest themselves among the participants. The U.S. and China

[159] Compare the VAT directive in the EU, *supra* note 51.
[160] *Supra* note 132 at 14.
[161] *Id.*
[162] Noked, Noam, *From Tax Competition to Subsidy Competition*, U. PA. J. INT'L L. (2020) (forthcoming).
[163] Stephanie Soong Johnston, *OECD Postpones Key Meeting of Global Tax Overhaul Project*, TAXNOTES (May 4, 2020), https://www.taxnotes.com/featured-news/oecd-postpones-key-meeting-global-tax-overhaul-project/2020/05/04/2ch38.

continue to reserve with respect to digital services,[164] and 53 U.N. member states[165] are not even included in the OECD deliberations. Moreover, while the base erosion projects address a variety of methods taxpayers use to shift income source to low tax jurisdictions, they do not unify all computational rules and tax rates.

Internationally, tax competition manifests itself through tax structures and concessions. A country might compete internationally by choosing to enact low tax rates generally or reduced tax rates and taxpayer favorable tax rules only for non-resident investors or specific types of businesses. Alternatively, a jurisdiction might negotiate tax concessions to encourage targeted development by offering packages of tax benefits to new or expanding business investment on either a temporary or permanent basis. In its harmful tax competition project,[166] the OECD sought to limit these competitive practices in developed economies by encouraging them to abandon certain harmful tax practices.

The OECD also publicly identified tax havens that engaged in harmful tax competition to shame or coerce them to cooperate with the major market jurisdictions and share information. Information sharing would assist the developed economy countries to identify investors subject to their general taxing jurisdiction when those investors secrete assets in low tax jurisdictions to avoid home country taxes.[167] The harmful tax competition project has encouraged rapid growth of agreements on information sharing.[168] The US also coerced international cooperation by enacting legislation denying favorable US tax status to foreign entities that did not provide information on their US direct and indirect investors who were investing outside the US and not reporting their income from those investments.[169] Perhaps the most interesting action in information gathering was when Germany purchased a stolen list of German investors in Liechtenstein Stiftungen to discover those investors' evasion of German tax liability.[170]

The US approach to tax competition differs somewhat from that of other OECD countries. Since the US taxes its citizens, residents, and domestic entities on their income from all sources

[164] *Id.* William Hoke, *U.S. Says OECD Talks on Digital Economy Have Hit an Impasse,* TAXNOTES (June 22, 2020) https://www.taxnotes.com/tax-notes-federal/digital-economy/us-says-oecd-talks-digital-economy-have-hit-impasse/2020/06/22/2cmvw; Stephanie Soong Johnston, *Business Groups Rally Around OECD Global Tax Deal Work*, TAXNOTES (June 29, 2020) https://www.taxnotes.com/tax-notes-today-international/digital-economy/business-groups-rally-around-oecd-global-tax-deal-work/2020/06/29/2cnr7?highlight=OECD; Stephanie Soong Johnston, *Global Tax Revamp Talks 'Not on Life Support,' Saint-Amans Says*, TAXNOTES (June 29, 2020), https://www.taxnotes.com/tax-notes-international/politics-taxation/global-tax-revamp-talks-not-life-support-saint-amans-says/2020/06/29/2cnj3?highlight=BEPS.

[165] The U.N. has 193 member states. UN, *About the UN - Member States*, https://www.un.org/en/about-un/index.html (last visited June 22, 2020).

[166] OECD, *Harmful Tax Competition*, *supra* note 16.

[167] *Id.*

[168] OECD, *Tax Information Exchange Agreements, supra* note 13 (showing increasing numbers of agreements from 2001 – 2012).

[169] FATCA, *supra* note 25.

[170] Ordower, *Culture of Tax Avoidance*, *supra* note 48, at 124.

worldwide,[171] operating or investing directly in low tax jurisdictions provides US persons no tax benefit provided that the US taxpayer reports completely and honestly. Secreting assets and failing to report offshore income is tax fraud which may subject the taxpayer to civil and criminal penalties.[172] The tax on worldwide income in the US similarly eliminates the benefit of negotiated tax concessions insofar as the US applies a credit rather than exemption[173] to all foreign source income and generally cedes primary taxing authority to the source country through the foreign tax credit[174] but continues to claim the difference between the US tax on the income and the tax imposed by the source jurisdiction.[175]

US taxpayers may avoid a current tax in the US by operating or investing outside the US through a tax opaque, non-US entity.[176] The US, however, has enacted an array of mechanisms to protect its claim to a share of the foreign source income in which US persons have an indirect interest through a non-US corporation.[177] The CFC provisions even permit the US to reach across national borders to tax part of the income of CFCs to their US shareholders without any actual or constructive distribution from the CFCs to the US shareholders as a necessary requirement for the tax imposition. With respect to secreted investment capital of US persons, the US also has

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[171] I.R.C. § 61 (gross income includes all income from whatever source derived); treas. reg. § 1.1-1(b) (worldwide income taxed).

[172] I.R.C. § 7201 (willful attempt to evade tax). Recent legislation in the UK imposes penalties on corporations and possibly professionals for aiding corporate tax evasion. Nana Ama Sarfo, A*fter Quiet Start, U.K. Tax Evasion Facilitation Law Starting to Make Noise*, 98 TAX NOTES INT'L 1208 (June 15, 2020) https://www.taxnotes.com/tax-notes-today-international/tax-avoidance-and-evasion/after-quiet-start-uk-tax-evasion-facilitation-law-starting-make-noise/2020/06/15/2cm1c.

[173] Compare the exclusion to credit shift under Pillar II of the OECD GLoBE Proposal, *supra*, note 132 and accompanying text.

[174] I.R.C. § 901 (foreign tax credit).

[175] I.R.C. § 904 (tax credit limitation). For example, A invests in country X and earns $100. Country X imposes a $10 tax on A's income in X. The US would impose a $30 tax on the $100 income from X but allows A a tax credit of $10 (the X tax) and imposes a net tax on the X source income of $20. If the X tax were $40, the US tax credit for A would be limited to $30, the amount of the US tax on the income.

[176] Tax opacity is characteristic of corporations under subchapter C of the Code and contrasts with tax transparency of partnerships and other entities under subchapter K of the Code. A tax opaque entity is itself subject to the income tax on its income while a tax transparent entity is not but its owners are taxable on their proportional shares of the entity's income, as if the owners received the income from the source and in the manner that the entity received it. I.R.C. § 702(b). Non-US business entities that are included in the foreign entities list in treas. reg. §301.7701-2(b)(8) are tax opaque and the default classification of other foreign entities in which the entity's owners have limited liability is also tax opaque, but the owners of the latter group may elect tax transparency. Treas. reg. § 301.7701-3(b)(2) (referred to as the check-the-box regulation). Both domestic and foreign tax transparent entities may elect to be tax opaque. Treas. reg. § 301.7701-3(a). There also are various hybrid entities such as regulated investment companies that are tax opaque entities but allowed a deduction for distributions to their shareholders so that they do not pay tax at entity level. I.R.C. § 852.

[177] CFCs under I.R.C. § 951; passive foreign investment companies ("PFICs") indirectly at the time of sale of shares or receipt of distributions through an interest charge unless their US investors elect to be taxed currently on their shares of the PFIC's income (I.R.C. § 1293 – qualified electing fund election – or I.R.C. § 1296 – mark to market election); tax on inverted entities under I.R.C. § 7874; foreign personal holding companies ("FPHC") under I.R.C. § 551 before repeal in 2004 which imputed a distribution for tax purposes from the corporation to its shareholders annually.

sought to enlist the assistance of non-US financial institutions in its quest to tax the income that capital generates.[178]

### *D. Tax Base Allocation and Apportionment.*

Underlying any allocation or apportionment of an income tax base is an implicit assumption that a base exists to allocate and apportion. While definitions of income for tax purposes exist,[179] the elements of any income tax base enjoy commonalities with all income tax bases but the details of inclusion, exclusion and deduction differ across jurisdictions. For example, most US states that impose an income tax use federal adjusted gross income[180] as their point of departure for determining the base for the tax.[181] Nevertheless, state income tax rules are not uniform. Each state modifies the amount of adjusted gross income to arrive at the income base upon which it imposes its income tax.[182]

Internationally, the components of income tax bases vary. While the US includes gain from the sale or exchange of property in the income tax base,[183] with a partial exception for gain from the sale of one's primary residence[184] and a full exemption for a decedent's gain not taxed before their death,[185] Germany does not tax gain on tangible personal property held more than a year or real property held more than ten years.[186] Thus, a US citizen who is resident in Germany and sells property in Germany might have no inclusion of gain from the sale of property in Germany but have the gain included in their US income for tax purposes without there being any difference in the taxpayer's economic income in Germany and the US. Certainly, tax systems have tended to copy elements from other tax systems,[187] and tax rules have converged considerably over the years so that computational differences between jurisdictions may be

[178] FATCA under which non-cooperating foreign financial institutions lose the benefit of withholding reductions on US investments. I.R.C. § 1471.

[179] For example, an oft-cited definition for a comprehensive income tax base is the Schanz-Haig-Simons' definition where income is the algebraic sum of consumption plus or minus the change in the taxpayer's net worth from the beginning to the end of the tax measuring period. HENRY SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 49 (1938).

[180] I.R.C. § 62.

[181] For example, in Missouri, MO. REV. STAT. § 143.121 (2017) (Missouri adjusted gross income is federal adjusted gross income with adjustments).

[182] *Id.* (Missouri modifications to federal adjusted gross income).

[183] I.R.C. §§ 61(a)(3), 1001.

[184] I.R.C. § 121.

[185] I.R.C. § 1014 (new tax basis for property received from a decedent's estate).

[186] PWC, *Worldwide Tax Summaries, Germany*, https://taxsummaries.pwc.com/germany/individual/taxes-on-personal-income
German Income Tax Act (EStG) (Einkommensteuergesetz in der Fassung der Bekanntmachung vom 8. Oktober 2009 (BGBl. I S. 3366, 3862), https://www.gesetze-im-internet.de/estg/BJNR010050934.html#BJNR010050934BJNG000208140.

[187] Infanti, *Ethics of Tax Cloning*, *supra* note 11.

smaller today than in earlier decades.[188] Yet, differences endure so that a single common definition of taxable income remains elusive and leaves the possibility that even if an OECD project succeeds, its success may be incomplete.

Turning to the EU, in the hope of strengthening the single market, the relaunched CCCTB proposal[189] aims to build upon the BEPS actions and effectively integrate the reforms by harmonizing the approach of member states.[190] This would be achieved through the two-step plan: first, the Common Corporate Tax Base ("CCTB") contains extensive measures to implement a cohesive, mandatory corporate tax base definition and calculation system throughout the EU, and second, the CCCTB proposal builds upon the CCTB with additional measures for tax base consolidation and apportionment.[191] The relaunch is praised for its focus on tax fairness and commitment to combating base erosion, as compared to the 2011 CCCTB which was solely pro-market and pro-business.[192]

Significant issues remain, however. Although harmonization envisions the resolution of tax competition due to transparent tax rate competition, there is some speculation that the proposal could in fact incentivize "factor-manipulation," which would allow artificial tax base shifting to continue.[193] There is also concern that in leaving out tax rate coordination, Member States are not sufficiently constrained from engaging in competition through corporate income tax rates to attract economic activity,[194] and similarly, countries may circumvent the common tax base by moving from allowances to tax credits as incentives.[195]

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[188] Luis C. Calderon Gomez, Transcending Tax Sovereignty and Tax Standardization: Three Questions, 45 Yale J. Int'l L. 191 (2020) (arguing that there is a movement toward standardization internationally).

189 The original CCCTB proposal was in 2011. Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121 final (Oct. 6, 2011), available at https://ec.europa.eu/transparency/regdoc/rep/1/2011/EN/1-2011-121-EN-F2-1.Pdf.

190 European Commission, Communication from the Commission to the European Parliament and the Council, A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final (SWD(2015) 121 final), Brussels, 17 June 2015.

[191] *See* European Commission, Proposal for a Council Directive on a Common Corporate Tax Base (CCTB), COM (2016); European Commission, Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), 25 October 2016.

[192] Christian Valenduc, *Corporate Income Tax in The EU, The Common Consolidated Corporate Tax Base (CCCTB) and Beyond: Is it The Right Way to Go?* ETUI Research Paper – Working Paper (2018).

[193] Maarten F. de Wilde, *Tax Competition Within the European Union Revisited – is the Relaunched CCCTB a Solution?* 1 ERASMUS L. REV. 24 (2014) (de Wilde believes that as drafted, presuming that the factors for formula apportionment are the same as in US tax law, they themselves could be manipulated to continue profit shifting – such as labor factor manipulation through payroll group members; sales factor manipulation through beneficiary group members; and sales factor inflation through shareholding-revenues-carousels. He recognizes, however, that this is a risk that could be remedied by judicial interpretations, the application of anti-abuse approaches, or legislative prevention of factor manipulation.).

[194] Ireland has a 12.5 percent corporate rate and Estonia a 0 percent rate for Estonian companies on their foreign source income.

[195] *Supra* note 192 at 23; *see also* Boer, Martin, *A Few Comments on the CCCTB Directive*, (February 28, 2012). Available at SSRN: https://ssrn.com/abstract=2012276 or http://dx.doi.org/10.2139/ssrn.2012276.

The CCCTB project had a less ambitious objective but presumably required uniform income computation rules to develop an income apportionment formula. If its proposal were applied to MNEs, its application would have undercut the argument that MNEs are at risk of multiple impositions of tax on the same income. The CCCTB apportionment formula would provide predictable outcomes and assure that each unit of income is taxable only in a single jurisdiction. The proposed CCCTB apportionment formula removed the most fluid source factor of income apportionment by eliminating intangible property from the formula.[196] Only to the extent that the MNE had physical property, employees or sales in a low tax jurisdiction would the formula apportion any of the MNE's income to the low tax jurisdiction.[197]

The CCCTB proposal is consistent with the assertion that representatives of MNEs frequently make that a reasonable level of taxation under unambiguous tax rules is acceptable insofar as all MNEs are subject to identical, predictable rules so that none gain a competitive advantage through the tax system. The GLoBE project similarly aligns well with assertions that there exists a concept of fair share or fair taxation. That concept underlies recent discussions of a minimum tax. The reasonableness of a specific level of taxation should remain separate from the application of any nation's tax rules and the correct location for the imposition of the tax, that is, the question of which nation may collect that correct amount of tax. Against that backdrop is the premise of all BEPS' iterations that MNEs ought to pay more tax than they do currently. While a general notion of a universally correct level of taxation may exist and each MNE and possibly each individual should be subject to that level, some (or many) MNEs and individuals are not paying that correct level. Yet, the BEPS projects are not geographically neutral in their approach to collecting the fair amount of tax but conflate the fair tax concept with geographic determinations that the MNEs are avoiding taxes imposed by the developed economies.[198] That approach politicizes the concept of fairness rather than seeking consensus concerning the correct level of taxation free from the political issue of which nation gets the revenue.[199]

The next part addresses the issue of poverty and the role fair taxation should play in ameliorating radical income inequality and poverty.

## PART IV. THE RELATIVE AND ABSOLUTE POVERTY CONUNDRUM.

Once OECD participants agree to an anti-profit shifting structure, MNEs in the aggregate will pay additional tax. Whether residence, consumption or another metric becomes the measuring instrument to prevent profit shifting, income will be allocated so that MNE's no longer may

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[196] CCCTB, *supra* note 21, at 51, Art. 92 Composition of the asset factor.
[197] *Id.* at 49, Art. 86 General Principles. Compare, Ordower, *Utopian Visions*, *supra* note 38.
[198] Sarah Paez, *Groups Urge U.N. Tax Committee to Reconsider OECD Unified Approach*, TAX NOTES INT'L (Jun. 17, 2020), https://www.taxnotes.com/tax-notes-today-international/base-erosion-and-profit-shifting-beps/groups-urge-un-tax-committee-reconsider-oecd-unified-approach/2020/06/17/2cmnh (criticizing the Inclusive Framework for its adverse impact on revenue in developing economies).
[199] Brassey & Ordower, *supra* note 43.

concentrate revenue in low tax jurisdictions that are not, or only minimally are, contributing to the production of the income. Allocation factors such as labor measured by person hours rather than wages,[200] international market sale value of resources rather than extraction value or some other value-added measurement[201] may direct a somewhat greater share of worldwide profit to less developed economies. A minimum tax will limit the ability of less developed economies to trade their power to collect taxes for investment. Under all structures under discussion internationally, the developed economies are likely to enjoy the bulk of the reallocated or increased tax bases and gain additional tax revenue.

History suggests that some developed countries will deploy the additional revenue for the good of all residents while others will follow a course of concentrating benefits through reduced tax impositions into the hands of the affluent under the premise that the affluent create jobs for the less affluent members of society.[202] However the incremental revenue is utilized, it is reasonably certain that little of it will find its way to international development,[203] and the disparity between rich and poor nations and their citizenries seems likely to increase. Just as leveling of revenue among St. Louis County taxing districts to smooth wealth disparities among districts on even such an essential resource as public education rarely if ever captures the center of attention in public debate,[204] international revenue distribution to level resource allocation internationally rarely if ever becomes the center of tax reform debate internationally despite the absence of a moral, rather than political, justification for such resource disparities. Many resource and wealth disparities are functions of the happenstance of serendipitous geographic location for some populations but not others.

The 2020 pandemic will augment the numbers of homeless individuals in the US as unemployment renders large numbers of Americans unable to meet their residential rent or mortgage obligations. School closings have left many children without adequate nutrition because they no longer receive the daily meals at school on which they relied for basic nutrition. The need for food, shelter, clothing and healthcare in the US is great[205] but the need is primarily a distribution issue. Food resources in the US are adequate to the population. Even the welfare states of Europe have residents in need of support for basic needs. Poverty exists in all the OECD member states but in all OECD states it is inexcusable. On a global scale, poverty in developed economies rarely compares with the absolute poverty that plagues many undeveloped or

[200] Ordower, *Utopian Visions*, *supra* note 38, at 387 (labor factor in the income apportionment formula based on person hours of work rather than payroll amounts).
[201] Christians & van Apeldoorn, *supra* note 37.
[202] Tax Cuts and Jobs Act ("TCJA"), for example.
[203] Brassey & Ordower, *supra* note 43 (discussing international development budgets).
[204] *Supra* part II.
[205] Feeding America, *Facts about Poverty and Hunger in America*, https://www.feedingamerica.org/hunger-in-america/facts#:~:text=More%20than%2037%20million%20people,to%20support%20a%20healthy%20life (last visited July 10, 2020) (37 million in the US suffer from food insecurity).

developing economies.[206] In some countries, people, often children, die from starvation.[207] Diseases like malaria that disable and kill many in less developed countries could be controlled or eradicated given sufficient economic resources and commitment. Although substantially absent in the economically developed countries, hunger is ubiquitous in some less developed countries, and homelessness, shortages of clothing, limited educational opportunities all are prevalent. Poverty in the OECD countries is relative. Relative to many in the developed countries' societies or the OECD states in general, some people have little and suffer by comparison with those who are affluent. The poverty is not absolute. Each of the OECD countries has adequate resources without receiving additional tax revenue from MNEs to eliminate the relative poverty in that OECD country by redeploying existing resources. Many less developed countries could not address the poverty they have without substantial assistance from the affluent countries, but the affluent countries have offered only nominal aid relative to their gross national incomes[208] and national budgets. Most devote less than one percent of their gross national income to international development to provide relief from poverty.[209]

Under such circumstances, private, altruistic actors such as Bill and Melinda Gates through their foundation[210] and business interests wanting natural resources or inexpensive labor drive development in nations suffering much absolute poverty.[211] A non-affluent country might seize the opportunity for private, inbound investment by supplementing the competitive advantage of local low-cost labor with an agreement not to tax the investment capital or the earnings from that investment. No tax, perhaps accompanied by other investment incentives, may be sufficient to give the non-affluent jurisdiction the necessary competitive edge to gain the inbound capital investment. Despite their exploitation with low wages, employment even at low wages for

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[206] UN, *Global Issues, Food*, https://www.un.org/en/sections/issues-depth/food/index.html (last visited July 10, 2020) (estimating 821 million people suffering from hunger in 2018).

[207] The World Counts estimates that 9 million people die each year from starvation. The World Counts Global Challenges, https://www.theworldcounts.com/challenges/people-and-poverty/hunger-and-obesity/how-many-people-die-from-hunger-each-year (last visited July 10, 2020). In 2015 it was estimated that 10% of the worldwide population were living in conditions of extreme poverty. The World Bank, D*ecline of Global Extreme Poverty Continues but has Slowed: World Bank*, (Sep. 19, 2018) https://www.worldbank.org/en/news/press-release/2018/09/19/decline-of-global-extreme-poverty-continues-but-has-slowed-world-bank.

[208] OECD, *Data, Gross National Income*, https://data.oecd.org/natincome/gross-national-income.htm (last visited July 10, 2020) ("Gross national income (GNI) is defined as gross domestic product, plus net receipts from abroad of compensation of employees, property income and net taxes less subsidies on production.").

[209] OECD (2019), Official development assistance as a percentage of gross national income (GNI): Net disbursement, all donors, *in OECD International Development Statistics, Volume 2018 Issue 1*, OECD Publishing, Paris, https://doi.org/10.1787/dev-v2018-1-table3-en (visited 6/16/20).

[210] Bill & Melinda Gates Foundation, *Foundation Fact Sheet*, https://www.gatesfoundation.org/Who-We-Are/General-Information/Foundation-Factsheet (last visited July 10, 2020).

[211] WAR ON WANT, *Fashion Victims- The Facts*, https://waronwant.org/fashion-victims-facts (last visited July 10, 2020) (clothing factories in Bangladesh and India); John Vidal, *How Developing Countries are Paying a High Price for the Global Mineral Boom*, THE GUARDIAN (Aug. 15, 2015) https://www.theguardian.com/global-development/2015/aug/15/developing-countries-high-price-global-mineral-boom.

residents alleviates the absolute poverty[212] from which those newly employed residents previously may have suffered. If child labor best meets the international concern's labor requirements, children work to assist their impoverished families. If taxing the MNE might cause the MNE to take its investment capital to another non-affluent country offering lower taxes or no tax, relinquishing the potential tax revenue seems an easy choice.

The OECD projects,[213] like US worldwide taxation, might deprive the non-affluent country of the opportunity to capture the investment with the assistance of tax concessions. Even if the non-affluent country manages to secure the investment and, under notions of value creation,[214] the tax base distribution formula which allocates a significant share of the income of the MNE to the non-affluent jurisdiction, that jurisdiction might not have the necessary infrastructure to measure the MNE's income, impose and collect the tax. The non-affluent country historically may have relied on VATs or targeted taxes, like natural resource extraction taxes, for example, rather than more complex tax bases like an income tax. The jurisdictions may have an inadequate administrative infrastructure for such a tax. The newly tax-base-enriched jurisdiction, in some instances, might relinquish some of its sovereignty and simply rely on or piggyback onto the computations that the affluent home country might perform. Even there the additional tax collection administration may prove inefficient or open the door to additional corruption which may have been a general problem for the non-affluent country.

The non-affluent country could choose not to collect the minimum tax leaving the revenue on the table for the MNE's home country to take but that would seem foolish. Persuading some non-affluent countries to collect tax which MNEs' home countries otherwise would collect may drive those countries to create unofficial and perhaps corrupt schemes to aid the MNEs to avoid their home country taxes.[215] MNEs might accede to such schemes to meet competitors who already participate in such tax avoidance or even evasion and were drawn to the schemes by the promise of enhanced profitability. The result of imposition of the GLoBE pillars in the end might mimic historical iterations of tightened tax regulation being met with sophisticated tax planning that remains one step ahead of the tax legislators and administrators and devises strategies of varying legality to avoid new tax regulation.[216]

If the developed OECD economies wish to enrich affluent state coffers by seizing additional tax revenue from MNEs, the OECD projects may begin to accomplish that goal. If the OECD membership is offended by the success of MNE's in avoiding the relatively high taxes of the developed economies and has identified a "fair tax" amount or relative amount that each MNE

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[212] *Id.* In some instances, the populace of a low wage country may suffer such exploitation from MNEs in low wages, long hours and poor working conditions that it may have been better off before the investment with subsistence farming or even such occupations as trash picking.
[213] *Supra* part III.
[214] Christians & van Apeldoorn, *supra* note 37.
[215] OECD, *Harmful Tax Competition*, *supra* note 16; FATCA (addressing financial institution secrecy).
[216] Ordower, *Culture of Tax Avoidance*, *supra* note 48, at 48.

should pay in tax, without regard to which country receives the revenue, the OECD projects may begin to accomplish that goal. If, however, distribution of the "fair tax" revenue in aid of international development to eliminate absolute poverty and level resources globally is the goal of enhanced tax collections, as it should be, fairer allocation of the tax base itself might do little toward that end. Instead, uniform tax collection and tax revenue distribution would seem a better choice. The next section imagines an international taxing agency applying uniform tax rules to collect revenue and eliminate tax rule and rate arbitrage available through multiple taxing jurisdictions.

## PART V. AN INTERNATIONAL TAXING AGENCY FOR AN ECONOMICALLY GLOBALIZED WORLD: ABANDONING MYTHICAL TAX SOVEREIGNTY

All base erosion projects require some compromise of tax sovereignty, a topic overdue for more serious consideration insofar as sovereignty in taxing well may be a false flag in the world of tax treaties, tax information exchange agreements and tax blacklists of non-cooperative jurisdictions.[217] The business world long has accustomed itself to operating across international borders and within the framework of multiple sovereign states. Income tax systems of nations participating in the OECD Inclusive Framework[218] addressing base erosion and profit shifting must converge to smooth and eliminate systemic disparities so that base erosion in one state is not simply a structural element of another. Lack of uniformity may facilitate new base erosion.[219] A minimum rate of tax assumes uniformity of the base for the tax and the uniform administration of the tax. Each step toward such uniformity requires nations to compromise their tax sovereignty and accept a compromise position that may accommodate or follow another nation's tax rules. The ideal way to guarantee that uniformity of rules and administration would be a single international agency to administer the common rules with powers to operate independently of national borders. Measurement of income under uniform substantive and procedural rules is essential but determination of income source or taxpayer residence would become matters of revenue distribution not tax collection. The international agency may collect the taxes and distribute them among nations under an internationally determined formula that is not dependent on determination of income source or residence.[220]

Much sovereignty is at stake in the BEPS and GLoBE projects but voluntary relinquishment of sovereignty is not novel. Neither does it represent a radical change from historic practices during the 20th century. Following World War I, the League of Nations emerged as a mechanism for international cooperation and resolution of disputes that would avert future wars. It failed, of course, but the United Nations ("UN") followed the next world war. UN peacekeeping

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[217] *Supra* part III.
[218] *Supra* note 119 (inclusive framework).
[219] *Supra* note 193 (discussing the potential manipulation of factors in a formulary apportionment method).
[220] Part VI. *infra*, addresses the development of an international tax revenue, distribution formula.

interventions have prevented some wars[221] but the UN has not spoken with sufficient authority to supplant sovereign decision-making that threatens peaceful intercourse among nations.

Common economic interests have been somewhat more successful in securing international cooperation. The World Trade Organization,[222] for example, promotes international trade and provides a forum for resolution of trade disputes.[223] Even the US has acquiesced in adverse decisions of the WTO concerning anti-competitive practices and impermissible subsidies: Boeing, for example.[224] Both the EU, which began as an economic community to regulate and promote trade for the benefit of its members,[225] and the Union of Soviet Socialist Republics ("USSR")[226] were created during the twentieth century. Each required ethnically and linguistically discrete countries to cede more or less voluntarily considerable economic independence to secure improved economic and trade relations beneficial for all member states. Central planning in the USSR, government control over many aspects of daily life, slow economic growth, and restrictions on individual liberties contributed to the eventual failure of the USSR model[227] while limited central government control, protections of individual liberties and national, as opposed to union, independence in many non-trade related functions has worked with considerable success in the EU model. The UK's withdrawal from the EU[228] and dissention with respect to several primarily non-economic or trade issues including immigration[229] indicates

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[221] UN Peacekeeping, *Our Successes*, https://peacekeeping.un.org/en/our-successes (last visited June 18, 2020); UN Peacekeeping, *Mano River Basin, 25 Years of Peacekeeping*, https://peacekeeping.un.org/en/mano-river-basin-25-years-of-peacekeeping (last visited June 18, 2020).

[222] World Trade Organization, *What is the WTO?*, https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited July 10, 2020).

[223] Martin Vallespinos, *Can the WTO Stop the Race to the Bottom? Tax Competition and the WTO*, 40 VA. TAX REV. (2020) (forthcoming) (arguing that the WTO should police tax concessions because they impact trade).

[224] European Commission, *WTO Boeing dispute: EU issues preliminary list of U.S. products considered for countermeasures*, (April 17, 2019) https://ec.europa.eu/commission/presscorner/detail/en/ip_19_2162; Office of the United States Trade Representative, *U.S. Notifies Full Compliance in WTO Aircraft Dispute*, (May 6, 2020) https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/may/us-notifies-full-compliance-wto-aircraft-dispute. *See also* World Trade Organization, *Dispute Settlement DS108: United States - Tax Treatment for "Foreign Sales Corporations"*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds108_e.htm (last visited June 22, 2020) (the U.S. repealed the grandfather provisions of the American Jobs Creation Act and the ETI Act that were subject to compliance proceedings); World Trade Organization, *Dispute Settlement DS58: United States – Import Prohibition of Certain Shrimp and Shrimp Products*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm (last visited June 22, 2020).

[225] EUROPEAN UNION, *The History of the European Union*, https://europa.eu/european-union/about-eu/history_en (last visited June 18, 2020) (the Treaty of Rome established the European Economic Community in 1957).

[226] Generally, Encyclopædia Brittanica, Soviet Union, https://www.britannica.com/place/Soviet-Union (visited July 27, 2020).

[227] Numa Mazat, *Structural Analysis of the Economic Decline and Collapse of the Soviet Union*, ANPEC (2016) https://www.anpec.org.br/encontro/2015/submissao/files_I/i3-186e370d13d34b7043cb737da8d75390.pdf.

[228] EUR-Lex, *Brexit – UK's Withdrawal from the EU*, https://eur-lex.europa.eu/content/news/Brexit-UK-withdrawal-from-the-eu.html (last visited June 18, 2020).

[229] Court of Justice of the European Union, *Press Release No 60/20*, (May 14, 2020) Lexumbourg https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200060en.pdf (The placing of asylum seekers or third-country nationals who are the subject of a return decision in the Röszke transit zone at the Serbian-

that the EU model may require adjustments for it to endure permanently without loss of additional member states. Nevertheless, the willingness of nations to acquiesce in the authority of an international and voluntary administrative body to promote common economic interests exists. On a small scale, five economic powers have joined in a combined effort to reduce tax evasion.[230]

In many countries, business interests, politicians, and the populace generally regularly malign the taxing agencies while simultaneously looking to the taxing agency to subsidize the activities and interests they favor. In the US, even members of Congress refer to the tax laws as the "IRS code,"[231] implicitly assigning responsibility for taxation to the administrative agency as if it, and not the legislature, were responsible for the tax laws that the agency must enforce. Congress and other national legislatures have grown accustomed to delivering indirect subsidies through the tax law rather than directly subsidizing activities and interests.[232] While the international taxing agency enforcing internationally uniform tax rules under uniform administrative procedures and standards might continue to be a subject of derision, it would remove taxation from the domestic political sphere to allow it to serve its primary function of raising the revenue necessary to operate governments, rather than as an indirect source of funding for private activities.[233] By separating taxation from domestic politics, international uniformity diminishes the opportunism of targeted tax subsidies and requires discussion of budgeting for a subsidy with a direct expenditure rather than the current indirect delivery through decreased tax liability. Many tax subsidies currently are opportunistic. They result from exertion of influence by limited interests and appear in statutory language that is deceptively general despite being targeted to the influential interests.[234] Changing tax rules under an internationalized system to subsidize specific

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Hungarian border must be classified as 'detention'); Pablo Gorondi, *Hungary's Orban Critical of EU Leaders on Migration, Economy*, AP NEWS (July 27, 2019), https://apnews.com/b89e682583014c7e8a1bf1cbb46e5dcf.

230 IRS, Joint Chiefs of Global Tax Enforcement, available at https://www.irs.gov/compliance/joint-chiefs-of-global-tax-enforcement (last visited July 14, 2020).

231 Michelle Ye Hee Lee, *Who wrote the 'IRS code'? Hint: It wasn't the Internal Revenue Service*, THE WASHINGTON POST (April 13, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/04/13/who-wrote-the-irs-code-hint-it-wasnt-the-internal-revenue-service/ (politicized, anti-tax use of the IRS Code terminology).

232 U.S. DEP'T OF THE TREAS., *Tax Expenditures*, https://home.treasury.gov/policy-issues/tax-policy/tax-expenditures#:~:text=Tax%20expenditures%20are%20defined%20by,exceptions%20may%20be%20viewed%20as (last visited July 10, 2020) (defining and identifying tax, as opposed to direct expenditures, includes tables).

233 *Id.*

234 I.R.C. § § 1400Z-1, 1400Z-2 (2018) (Opportunity Zones); TAXNOTES, *Lawmakers Question Mnuchin on Possible Opportunity Zone Abuse*, (June 24, 2020) https://www.taxnotes.com/tax-notes-today-federal/opportunity-zones/lawmakers-question-mnuchin-possible-opportunity-zone-abuse/2020/06/25/2cnd8?highlight=opportunity%20zones (Subcommittee on Economic and Consumer Policy raising concern that developers were receiving tax breaks due to designation as low-income communities despite not seemingly meeting the statutory requirements, and that the Treasury may have simply acted as a rubber stamp); Brett Theodos, Jorge Gonzalez, Brady Meixwell, *The Opportunity Zone Incentive Isn't Living Up to Its Equitable Development Goals. Here Are Four Ways to Improve It,* URBAN WIRE (June 17, 2020) https://www.urban.org/urban-wire/opportunity-zone-incentive-isnt-living-its-equitable-development-goals-here-are-four-ways-improve-it.

business interests would require international agreement and is likely to be far less common that such subsidies are now.[235]

Uniform taxation of income without regard to source and divorced from the distribution of the centrally collected tax revenue among nations eliminates the need for bilateral or multilateral tax treaties and TIEAs except for the general agreement to be part of the unified tax system and to acquiesce in the distribution formula. Where a taxpayer earns income will no longer determine to which government the income is attributable and may tax the income. Income from intangible property that currently is so abstract and challenging to source ceases to be so. If there is income, it is taxable under the uniform rules of taxation. If sourcing continues to be problematic because outlier jurisdictions do not join in the centralized taxing regime, sourcing rules would broaden to include a range of connections – property, labor, revenue (direct or indirect) and residence of owners or beneficiaries. A taxpayer would be free from the agency's taxing jurisdiction only if they did nothing directly or indirectly outside the residence jurisdiction that has not joined the centralized tax regime, and the outlier country would receive no part of the centrally collected tax revenue. An investment in any country that is part of the unified taxing agency collection by an entity based in a non-cooperating jurisdiction would be a sufficient connection with the unified taxing jurisdiction to render the income from the investment taxable by the unified agency.

Constructing uniform rules and assembling agreement will be a formidable task but the project would have the virtue of binding uniformity that current international projects lack.[236] When a country signs on to the agreement, it has little room to manipulate the rules since it will delegate tax administration and collection to the independent international agency in which all countries are represented.[237] Robust related party rules will limit the ability of taxpayers to arbitrage progressive rates with multiple entities.[238] Universal tax transparency so that a single tax would be imposed at ultimate ownership level might be most sensible but perhaps too difficult to administer.[239] Mechanisms for broad-based information reporting by financial institutions, vendors and business consumers are critical to enforcement and a more extensive withholding system than currently in place in most countries certainly would facilitate accurate reporting. Perhaps most important would be an international, public education effort so that taxpayers

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[235] The tax expenditure list for 2020 has 172 items. Treasury, Tax Expenditures, *supra* note 232 at 2020 pdf link.
[236] *Supra* part III.
[237] Compare the international agency structure in Ordower, *Utopian Visions*, *supra* note 35 at 375 -378.
[238] Compare I.R.C. §318 (constructive ownership rules); I.R.C. §267(b) (related parties for loss denial); and many other such provisions using a variety of thresholds for treating otherwise separate individuals or entities as having common interests that limit tax separation.
[239] Extensive tax transparency exists in the U.S. as the income of partnerships and limited liability companies under I.R.C. §701, electing S corporations under I.R.C. §1361, and various non-US entities that elect under treas. reg. §301.7701-3 is taxable only to the underlying owners. Commentators, including the author of this article, Henry Ordower, *Preserving the Corporate Tax Base through Tax Transparency*, 71 TAX NOTES INTERNATIONAL 993 – 97 (9/9/2013), have recommended full tax transparency for corporations. Modified transparency also exists for regulated investment companies, I.R.C. §851 *et seq*., and real estate investment trusts, I.R.C. §857 *et seq*.

worldwide receive identical and accurate messages concerning the benefits of the global system, its uniformity, and its system for currency translation to achieve economic uniformity to address hyper-inflationary currencies. Supplemental to the global system and beneficial to worldwide economic stabilization that should follow from the distribution formula would be currency exchange rate stabilization and possible transition to a single international currency.

For MNEs a single tax collector and single computation would be likely as well to facilitate transition to a uniform international accounting and reporting system to replace the awkward reporting split between the generally accepted accounting principles[240] that the US uses and the international financial accounting standards in use in much of the remainder of the world.[241] The US finally might transition to IFRS as the Securities and Exchange Commission proposed[242] only to step back from finalizing a plan in 2015.[243]

## PART VI. REVENUE SHARES

One virtue of global tax administration under uniform tax rules is that taxpayers are left with no place to hide from paying taxes. Taxation under this system is borderless. Tax planners undoubtedly will continue to seek, and perhaps occasionally discover, opportunities to diminish their clients' tax liability, but borderless uniformity ideally eliminates all opportunity to reduce taxes by redirecting income or income producing activity to other jurisdictions. Globally centralized determination and collection of tax likewise precludes local political decision-making from impacting tax liability and delivering benefits through the tax system.

The premise that a fundamental concept of fair taxation exists free from political determinants underlies common global tax collection under uniform rules. "Fair share" becomes a global rather than domestic concept. Each taxpayer should pay their "fair share" relative to global, not relative to national, revenue needs. A global "fair share" concept recognizes that even economic activity that may seem local is not. Rather, global economic and social interdependency emerges as the ultimate marker of the 21st century. The 2020 pandemic,[244] worldwide commercial branding and manufacturing,[245] international terrorism[246] and cross-border intrusion into

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[240] ACCOUNTING.COM, *What is GAAP?*, https://www.accounting.com/resources/gaap/#:~:text=Generally%20accepted%20accounting%20principles%2C%20or,approved%20accounting%20methods%20and%20practices (last visited July 10, 2020).

[241] Lisa Weaver, *The Wider Implications of Transitioning to IFRS—10 Things to Consider*, IFAC (December 3, 2014), https://www.ifac.org/knowledge-gateway/supporting-international-standards/discussion/wider-implications-transitioning-ifrs-10-things-consider#:~:text=The%20transition%20to%20International%20Financial,reporting%20in%20the%20last%20decade

[242] AICPA, *SEC Unanimously Approves Exposing Proposed IFRS Roadmap for Public Comment*, (August 27, 2008), https://www.ifrs.com/updates/sec/SEC_approves.html.

[243] Michael Cohn, *SEC Commissioner Rejects IFRS*, ACCOUNTINGTODAY (Mar. 30, 2015), https://www.accountingtoday.com/news/sec-commissioner-rejects-ifrs

[244] *Supra* note 50.

[245] Claire Matthews, *What is the Secret to McDonald's Global Branding Success,* Masitro (Nov. 5, 2014) https://www.maistro.com/procurement/secret-mcdonalds-global-branding-success/ (McDonalds ranked the 6th most

elections and the political process[247] are only a few of the many elements that demonstrate how inextricably intertwined nations have become.

The impetus to the OECD Action plans,[248] the EU's list of tax haven jurisdictions,[249] and FATCA in the US[250] is, however, a more limited and domestic thesis. The thesis is that MNEs and other taxpayers misdirect some of their income to low tax jurisdictions to avoid paying the amount of income tax they should pay into the treasuries of major developed economies. Under that thesis, the notion of fair taxation is relative and location specific. It is valid only insofar as it defines the amount a taxpayer should pay to a specific developed nation's treasury. The OECD framework purports to be more global[251] but it emphasizes capturing additional revenue for the treasuries of the developed economies. Failing enhancement of tax revenue for those developed economies, the OECD's leading member nations might lose interest in collecting additional tax from the MNEs targeted by the BEPS Actions.

Rule uniformity and central global tax collection postulates an alternative to the location specific thesis expressed in the preceding paragraph. The alternative thesis is more abstract and independent of location. It detects the existence of a common view of a global responsibility to provide each individual with sufficient resources to secure a decent standard of living. Whether that view arises from a universal human value system that demands a just world without poverty or from a sense of self-preservation that foresees physical and economic risks to those with wealth from those who are impoverished,[252] the thesis requires that each taxpayer pay a correct amount of tax that depends on the taxpayer's characteristics. Those characteristics might include the taxpayer's ability to pay measured under the common standard of the taxpayer's income from

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important brand); Sean Galea-Pace, I*nside Adisas' Supply Chain, Supply Chain*, https://www.supplychaindigital.com/supply-chain/inside-adidas-supply-chain (last visited June 29, 2020) (adidas works with 700 independent manufacturers in over 50 countries).

[246] Pamela Engel and Ellen Loanes, *What Happened on 9/11, 18 Years Ago*, BUSINESS INSIDER (Sep. 10, 2019), https://www.businessinsider.com/what-happened-on-911-why-2016-9; FBI, *History, Famous Cases & Criminals, Pan Am 103 Bombing*, https://www.fbi.gov/history/famous-cases/pan-am-103-bombing (last visited June 23, 2020); Simon Burton, *50 Stunning Olympic Moments No 26: The Terrorist Outrage in Munich in 1972*, THE GUARDIAN (May 2, 2010), https://www.theguardian.com/sport/blog/2012/may/02/50-stunning-olympic-moments-munich-72.

[247] Intelligence Community Assessment, *Assessing Russian Activities and Intentions in Recent US Elections*, (Jan. 6, 2017), https://assets.documentcloud.org/documents/3719492/Read-the-declassified-report-on-Russian.pdf (Russia influenced the 2016 Presidential campaign to undermine public faith in the US democratic process, with a preference to elect President Trump); Joshua Kurlantzick, *How China is Interfering in Taiwan's Election*, CFR (Nov. 7, 2019) https://www.cfr.org/in-brief/how-china-interfering-taiwans-election.

[248] Part III *supra*.

[249] *Supra* note 19.

[250] *Supra* note 25.

[251] *Supra* note 131 at 28-29 (tax incentives may be redundant in developing countries and the GLoBE proposal could instead enable them to effectively tax returns on investment made in their countries).

[252] United Nations General Assembly 86th Meeting, Links between Extreme Poverty, Violent Extremism Can Be Broken by Creating Jobs, Reducing Inequalities, General Assembly Hears as Debate Concludes, (Feb. 16, 2016), https://www.un.org/press/en/2015/ga11761.doc.htm; Ian Black, Poverty driving Syrian men and boys into the arms of Isis, THE GUARDIAN (May 4, 2016), https://www.theguardian.com/global-development/2016/may/04/poverty-driving-syrian-men-and-boys-into-the-arms-of-isis.

all sources worldwide as compared with all other taxpayers. Under such a thesis, the major developed economies might support collection of that fair share even if the additional tax does not augment their governmental coffers.

Both the OECD Actions and FATCA are designed to generate additional tax revenue by redirecting income from its artificial location in a low tax jurisdiction to its correct location in a higher taxed, major developed economy. Neither the OECD Actions nor FATCA favors one higher tax jurisdiction over another insofar as neither redirects the incidence of taxation as long as the rate imposed is sufficiently high. For example, the BEPS actions would not redirect income from the Netherlands to Germany because both countries impose a sufficiently high rate of tax, but BEPS might redirect income from Ireland to Germany because the Irish corporate rate is only 12.5 percent. Similarly, FATCA might include income from offshore investments in a US taxpayer's income but, except under unusual circumstances where the tax is payable to a diplomatically restricted country,[253] would allow the US taxpayer a credit for the tax paid to the other jurisdiction.[254] A common international taxing system with uniform rules and administration similarly will produce more income tax revenue than is generated worldwide if current developed economy rates apply. Estimates of the amount of additional revenue vary both with rates and assumptions.[255] The amount of additional tax revenue from preventing profit shifting[256] or reducing the tax gap[257] is not trivial even if speculative.[258] While developed economies do use their tax systems politically to deliver a considerable array of incentives, it nevertheless would seem to be in their interests to join a borderless tax consortium to promote fair and even-handed taxation of all participants in the economy and to augment global tax revenue production. Political quibbling among advanced economies, of course, might stymie agreement as it has on adopting even a simple measure like the CCCTB.[259]

With limited exceptions for a few developed economies like Ireland[260] that use their tax rates and structures to attract foreign investment, the countries that rely most heavily on tax rates and

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[253] I.R.C. § 901(j).
[254] I.R.C. § 901 (foreign tax credit).
[255] OECD, *Tax Challenges*, *supra* note 106.
[256] Devereaux, et al., *supra* note 20 (providing very incomplete estimates of revenue lost to base erosion and profit shifting from the digital economy in the $10 billion plus range).
[257] IRS, *The Tax Gap*, https://www.irs.gov/newsroom/the-tax-gap (last visited July 10, 2020) (estimating a broad non-compliance measure for 2010-11 of nearly $500 billion); Frank J. Bevvino & Robert A. Page, *The Tax Gap: A Competing Values Model*, 167 TAX NOTES FEDERAL 997 (2020).
[258] Clausing, Kimberly A., *The Effect of Profit Shifting on the Corporate Tax Base in the United States and Beyond* (June 17, 2016). Available at SSRN: https://ssrn.com/abstract=2685442 or http://dx.doi.org/10.2139/ssrn.2685442; and for the GLoBE Project, Devereaux, et al., *supra* note 20.
[259] *Supra* note 21.
[260] Ireland's 12.5 percent corporate tax rate has enabled it to capture international headquarters of companies interested in minimal taxes on their European income from intangibles, including Starbucks and Apple. Ireland Revenue, *Corporation Tax*, https://www.revenue.ie/en/companies-and-charities/corporation-tax-for-companies/corporation-tax/index.aspx (last visited July 10, 2020). Tom Bergin, *Special Report: How Starbucks avoids UK Taxes*, REUTERS (Oct. 15, 2012), https://uk.reuters.com/article/us-britain-starbucks-tax/special-report-

concessions to attract investment fall into two broad groups. One group consists of countries with many poor, often absolutely poor, residents. Those countries look to international investment for basic development of infrastructure and provision of human essentials and jobs.[261] They tend to lack strong bargaining power for international investment and readily offer privileges, including freedom from taxation, to international investors. A second group of countries are the more traditional tax haven countries, frequently island jurisdictions, with developed business or investment servicing infrastructures but without substantial tax revenue needs to carry their infrastructures. Some of the group have significant tourist industries and raise revenue through consumption taxes like hotel and meal taxes targeted at tourists. The issue for a borderless uniform income tax is how to attract those countries to join the tax consortium.

For countries that rely on their low tax structure to capture international investment, the revenue distribution formula under a borderless uniform tax has to make them better situated than they are relying on tax incentives to attract investment. An initial offer of all incremental revenue from the change to the borderless tax under an international tax administrator would be a good place to begin. Developed economies before the economic downturn from the 2020 pandemic have been able to maintain and perhaps even expand their own infrastructures, including welfare benefit networks that address relative poverty in developed countries. While no nation admits it can maintain the best that it ever had without a steady increase in tax revenue, such revenue increases have been difficult to find. Anti-tax sentiment in many places has contributed to the political unwillingness of legislatures to increase rates of tax. Decreased rates to meet international tax competition and political pressure to deliver subsidies through the tax system have been more common. As much as developed economies may hope for additional revenue from successful international agreements to reign in base erosion and profit shifting, those economies have not budgeted for increased revenue from BEPS or any other international project. Thus, the incremental revenue from borderless taxation is uncommitted and could be devoted to international development, elimination of absolute poverty and improved control of worldwide health threats.

The plan might suffice to persuade those non-affluent nations to cease trading low taxes for international investment and to join the universal tax consortium. The commitment from centralized taxation could make many nations less desperate for revenue than they are today and place them in an improved bargaining position with international investors. Relatively low wages and natural resources would leave many attractive for international investment and those that are not would have greater revenue needs and would get a larger share of the international tax revenue pool. Private, short-term selfish interests might stop being the primary driver of development, enabling those countries to identify and remedy their most acute needs.

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how-starbucks-avoids-uk-taxes-idUKBRE89E0EX20121015; Foo Yun Chee, A*pple Spars with EU as $14 Billion Irish Tax Dispute Drags on*, REUTERS (Sep. 18, 2019), https://www.reuters.com/article/us-eu-apple-stateaid/apple-spars-with-eu-as-14-billion-irish-tax-dispute-drags-on-idUSKBN1W31FE.

[261] *Supra* notes 210 - 212 and accompanying text.

Improvement of living conditions worldwide might likewise increase consumption and income that would yield even more tax revenue. Rather than devoting that revenue to bulking up the treasuries of the developed economies, the international consortium should be willing to commit that revenue to international development, thereby enhancing the resources of the less developed and developing world countries and broadening the consumer base in the more distant future.[262]

Other traditionally low tax jurisdictions like tax havens might be more difficult to enlist if they customarily offer low tax rates to enhance international investment servicing business and do not have governmental revenue needs. For those countries, coercion may be essential. Since the borderless system would be independent of income sourcing, those jurisdictions no longer would be able to offer international investors freedom from taxation on their investment assets. Most investors would have a sufficient connection with one or more of the consortium countries to provide a basis upon which to tax their income under the borderless system. Historical tax haven economies simply would lose the benefit of offering low taxes.[263]

Since the global tax will increase tax revenue, distribution initially should follow a two-step formula. The first step would hold each country harmless from tax revenue loss so that each country following transition receives a share of tax revenue equal to its revenue from income tax in the preceding year or over a rolling average of years, possibly adjusted for inflation. The second step would require a needs assessment under which nutrition, housing, education, healthcare and infrastructure needs of less developed countries would be evaluated and a plan developed to ameliorate deficits in all categories worldwide. The UN has projects on some aspects of need already, including hunger.[264] Remaining revenue would be devoted to the gradual elimination of those deficits -- perhaps addressing life-threatening deficits first followed by improvement of living standards everywhere. Amelioration costs would vary widely since they will remain a function of relative local cost of goods and labor.

The method of distributing the incremental revenue may prove more challenging than determining the amount to distribute to each country. Significant regional variations of need contribute to determination of the amount but distribution through national or regional governments and agencies requires a national or local commitment to deploy the funds as intended. Local corruption is likely to remain an impediment to the intended development and

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[262] Nathaniel Hendren and Ben Sprung-Keyser, *A Unified Welfare Analysis of Government Policies*., 135 QUARTERLY JOURNAL OF ECONOMICS 1209 (2020) (empirical analysis demonstrating that in the US government programs to assist low income children and less so adults yield more revenue in the long term than they cost).

[263] Some retreat in tax haven investment management business followed a change in U.S. tax law in 1997 that eased the need for actual management activity in the tax haven to avoid the incidence of the U.S. income tax on foreign investors. I.R.C. § 864(b)(2)(B)(ii), as amended in 1997 (permitting investment discretion to be exercised in the U.S.).

[264] UN, *Sustainable Development Programs, Goal 2: Zero Hunger*, https://www.un.org/sustainabledevelopment/hunger/ (last visited July 10, 2020), For all 17 development goals, including health, education, clean water, and climate actions, see UN, *Sustainable Development Programs*, http://www.undp.org/content/undp/en/home/sustainable-development-goals.html (last visited June 23, 2020).

retard progress toward elimination of absolute poverty. Direct international control of deployment of funds might be the best solution but would require further relinquishment of national sovereignty and quite possibly endanger international willingness to engage in the borderless tax project. Such control goes well beyond the economically beneficial strategy of a uniform, borderless tax. It would prove even more difficult to persuade nations to yield control over national revenue deployment than to persuade them to become part of the borderless collection system. International control over resource distribution intrudes further upon national self-determination. The global pressure to join a worldwide tax consortium and subscribe to a fair tax and distribution formula might serve to moderate corruption where it becomes clear that corruption is impeding intended distribution to diminish the incidence of local poverty.

The borderless system affords an opportunity to deploy a portion of the tax revenue to fund a universal basic income ("UBI"). One country, several non-governmental agencies and various governmental units have experimented with differing permutations of a UBI.[265] Some UBIs are means tested while others simply distribute a basic sum to each individual. The means-tested, recovery rebates under the CARES[266] in the US are a limited form of UBI.[267] US Democratic presidential primary candidate Andrew Yang included a UBI in his platform.[268] Commentators have recommended a universal basic income within national borders to eliminate poverty and distribute welfare while respecting the dignity and autonomy of the individual.[269] Some opponents of a UBI worry that free money will disincentivize work but evidence from existing experiments with UBI does not support that conclusion.[270]

Insofar as the uniform global tax requires taxpayers to report directly to the international taxing agency without the intermediation of any national government, the agency has the direct contact necessary to distribute funds to individuals. If the borderless tax system includes everyone, without regard to income, in its database, it would be a relatively simple matter for the agency to distribute funds directly to those whose incomes fall below a geographically determined minimum amount. Such a system might be less intrusive on national sovereignty than other types of control over funds, as the distributions would be independent of national borders and tied only

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[265] Sigal Samuel, *Everywhere basic income has been tried, in one map*, VOX (Feb. 19, 2020), https://www.vox.com/future-perfect/2020/2/19/21112570/universal-basic-income-ubi-map.
[266] *Supra*, note 42.
[267] The payments of $1200 per individual plus $500 per qualifying child were uniform to all residents with income of $75,000 or less in either of the two preceding tax years. Section 2201 of the CARES Act adding I.R.C. § 6428.
[268] Matt Stevens and Isabella Grullón Paz, A*ndrew Yang's $1,000-a-Month Idea May Have Seemed Absurd Before. Not Now.*, NEW YORK TIMES (March 18, 2020), https://www.nytimes.com/2020/03/18/us/politics/universal-basic-income-andrew-yang.html.
[269] Ari Glogower and Clint Wallace, *Shades of Basic Income*, available at https://ssrn.com/abstract=3122146 (2017); Usman Chohan, *Universal Basic Income*: A Review, Discussion Paper Series, (Aug. 2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013634; Isabel Ortiz, et al., B*asic Income Proposals in Light of ILO Standards: Key Issues and Global Costing*, Extension of Social Security Working Paper No. 62, (2018) https://ssrn.com/abstract=3208737.
[270] Samuel, *supra* note 265.

to the local cost of living and having little to do with any characteristic that might be specific to any country. It is likely, for example, that in many instances, especially those that may be historically arbitrary, two individuals living a short distance apart on opposite sides of a border will have more similar costs of living than two individuals living at a great distance from one another in the same country.[271] The UBI could supplement direct distribution to national governments yet remain substantially free from the risk of loss through governmental corruption.

## PART VII: CONCLUSION

This article proposes an international tax agency to administer a uniform borderless income tax under uniform tax rules. It complements an earlier international tax agency proposal that would have apportioned the income tax base, also determined under substantially uniform rules, among nations to give a more meaningful share of the base to less developed producing economies.[272] This proposal expands the basic concept to collect tax revenue centrally and distribute it among nations as it is needed. Needs for developed economies would include the maintenance of their existing infrastructures including welfare, while needs for less developed economies would include basic needs of the populace – food, shelter, clothing, healthcare and education. The proposal is aspirational of course but designed to induce readers to think more globally about basic needs and ask questions like: what should my serendipitously wealthy nation be willing to renounce so that my poor nation neighbor may provide essential services to its populace? The concept of borderless taxation for many is utopian, for others, who maintain, for example, that competition and sovereignty are essential to economic advancement and to prevent sloth, dystopian.

[271] Compare the commonality of culture example of Ciudad Juarez, Mexico and El Paso, Texas in Brassey & Ordower, *supra* note 43.
[272] Ordower, *Utopian Visions*, *supra* note 38.