Why Data Giants Don't Pay Enough Tax

Allison Christians & Tarcísio Diniz Magalhães*

Abstract

Data giants are often in the headlines for failing to pay enough taxes, both in the United States and around the world. Since most of the world's data giants originate in the United States but earn profits by operating across borders, are there legal constraints on when and how much the United States and other countries can tax them? This paper examines a large-scale cross-country tax reform initiative that is testing the limits.

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* Allison Christians, Stikeman Chair in Tax Law, McGill University, and Visiting Professor of Law, University of Virginia; Tarcísio Diniz Magalhães, Professor of International Tax Law, University of Antwerp, and Research Professor, DigiTax Centre of Excellence and Antwerp Tax Academy. We appreciate the feedback from and exchanges, including on social media platforms, with Ricardo García Antón, Karen B. Brown, Neil H. Buchanan, Tomaso Ferrando, Sjepan Gadžo, Robert Goulder, Andrew Hayashi, Roland Ismer, Jeffrey Kadet, Yvette Lind, Omri Marian, Ruth Mason, Aitor Navarro, Christiana HJI Panayi, Victoria Perry, Sophia Piotrowski, Mariana Pargendler, Tom Vos, Sérgio André Rocha, Emily Satterthwaite, John Setear, Pedro Schoueri, Thalia Kruger, and participants of workshops and paper presentations at the Georgetown University Law Center, the University of Erlangen-Nuremberg, the Ludwig Maximilian University of Munich, the Max Planck Institute for Tax Law and Public Finance, and the Institute of Economics and Management, Kyrgyz State University of Construction, Transportation and Architecture.

Introduction

Data giants are often in the headlines for failing to pay enough taxes, both in the United States and around the world. Since most of the world's data giants originate in the United States but earn profits by operating across borders, are there legal constraints on when and how much the United States and other countries can tax their profits? This Article examines a large-scale cross-country tax reform initiative that is testing the limits.

The goal of this initiative is to revisit some long-standing practices surrounding when and how countries impose taxes on each other's companies. In the past, U.S.-based companies could often escape taxation both at home and abroad by shifting profits to low-tax locations. But the cost of this equilibrium has been a race to the bottom in corporate taxes across jurisdictions, including in the United States itself, with severe fiscal consequences. Over the last decade, the United States and other countries have demonstrated a desire to change course with both domestic and multilateral reforms. The most ambitious plan to date has been to institute a globally coordinated tax reform plan to make sure the world's data giants pay at least a modest amount of tax no matter where they book their profits.

The contours of this tax reform involve challenging a set of working assumptions many experts have about when and how much each country should be permitted to tax a company whose profits come about through operations that span the globe. Legal practitioners, academics, and other observers have argued that some aspects of this proposed reform would either violate or would be prohibited in implementation by state sovereignty, customary international law, or international norms of various kinds.[1] Upon inspection, however, the concrete legal impact of each of these sources is either completely absent or tenuous at best.

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[1] Letter from Am. Chamber of Com. in the Netherlands to Mr. M.L.A. (Marnix) van Rij, St. Sec'y for Tax Aff. & the Tax Adm., Drs. J.K. (Jasper) Wesseling, Dir.-Gen. Tax Matters at Ministry of Fin., and Mr. M (Mohamed) Maâtoug, Tax Pol'y Advisor at Ministry of Fin. (Dec. 2, 2022) [https://perma.cc/NB9A-FKK4]; Stephanie Soong, *Netherlands and OECD Should Revisit UTPR's Legality, Firms Say*, 108 Tax Notes Int'l 1456, 1456–57 (2022) (reporting on the AmCham Netherlands letter to the Dutch government); Letter from Cong. Members to Janet Yellen, Sec'y of the Treas. (Dec. 14, 2022) [hereinafter Cong. Letter] [https://perma.cc/ZJC6-7FGM]; Robert Goulder, *Old Man Yells at Clouds and Other Responses to the UTPR*, 109 Tax Notes Int'l 157, 160 (2023) (restating his skepticism about the legality of one of the global minimum tax rules but ultimately conceding that "the pragmatic move [for the United States] is to join the program."); Letter from Jason Smith, Chairman of the Comm. on Ways and Means, U.S. House of Representatives, to Mathias Cormann, Sec'y-Gen. of the Org. for Econ. Co-op. & Dev. [OECD] (Feb. 10, 2023) [https://perma.cc/3QZB-MNH6] [hereinafter Ways & Means Letter]; Rep. Ron Estes, R.-Kan, Letter to the Editor, *OECD Pillar 2 is a Bad Deal for America*, 110 Tax Notes Int'l 697, 697 (2023) (claiming the global minimum tax initiative will allow "other countries to impose an extraterritorial tax on U.S. companies . . . ."). *But see* Adam N. Michel, *Extraterritorial Taxation: Is It All Our Fault?*, 111 Tax Notes Int'l 719, 722 (2023) ("In the pursuit of additional tax revenue, the United States is often the first mover in weakening international tax norms."). See *infra* Part II for all legal claims against global minimum tax rules.

The purpose of this Article is accordingly to examine the question: what legal barriers, if any, exist to regulate when and how countries tax the data giants? Our thesis is that there are no hard law barriers in domestic or international law; rather, any barriers that exist are purely geo-political in nature. As such, the United States, as the headquarter jurisdiction of the main data giants, is faced with a political decision of either cooperating with or contesting the reform initiative as it continues forward. We believe the national interest is best served through cooperation rather than resistance.

The Article proceeds as follows. Part I introduces the proposed tax reform aimed at catching data giants, examines its objectives and parameters, and explains the core content and rationales for its mechanical design. Part II analyzes the specific model rule provisions that commentators have suggested either violate or would be prohibited by international law. Part III then analyzes each of the purported legal prohibitions. Finding virtually no clear law-based case against implementation, we conclude that the real challenge for taxing the data giants will be a policy battle rather than a legal one: U.S. lawmakers have engaged in this battle in various ways, and will likely continue to do so.[2] We therefore conclude the Article with a call for those presenting indeterminate legal barriers to reform to provide persuasive support for these claims, and for those presenting political objections to demonstrate how the national interest is furthered by such objections.

I. Designing a Tax to Catch the Data Giants

Data giants are hard to tax and regulate because they operate through innovative business models that do not match historical ways of doing business. A key feature that has confounded lawmakers is the increasing ability of the data giants to have few or no employees as well as few or no physical assets in a given place yet reach hundreds of thousands or millions of consumers. Meanwhile, the sheer size of many data giants ensures there are no competi-

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[2] Cong. Letter, *supra* note 1 ("Congress's hand will not be forced. Nor will Congress sit idly by as U.S. companies and profits are taxed . . . ."); Ways & Means Letter, *supra* note 1 ("The OECD [Organisation for Economic Co-operation and Development] should reject all proposals that would allow other countries to attack American jobs and tax revenues."). *See also* Off. of the U.S Trade Rep. Ambassador Robert E. Lighthizer, Report on France's Digital Services Tax Prepared in the Investigation Under Section 301 of the Trade Act of 1974 at 62 (2019), https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf [https://perma.cc/PH5P-A5NV] (criticizing France's digital services tax because "international tax principles require a significant territorial nexus for companies to fall within a country's corporate tax jurisdiction."); Letter from Steven T. Mnuchin, U.S. Sec'y of the Treas., Dept. of the Treas., to Ministers of Fin. of the French Republic, Spain, and the Italian Republic and the Chancellor of the Exchequer of the United Kingdom (June 12, 2020) [https://perma.cc/GQ4G-3NCK] ("[The OECD/G20's] Pillar 1 would change the most fundamental principles of international taxation, including the taxable nexus threshold of physical presence and the arm's-length principle."); Donald J. Trump (@RealDonaldTrump), Twitter (July 26, 2019, 6:32 PM), https://twitter.com/realDonaldTrump/status/1154791664625606657 [https://perma.cc/ZQ6Z-BGMZ] ("France just put a digital tax on our great American technology companies. If anybody taxes them, it should be their home Country, the USA.").

tors. Alphabet (formerly Google), Meta (formerly Facebook), Apple, Netflix, Amazon, and Microsoft exemplify the phenomenon in different ways. Being everywhere yet elusive from a regulatory perspective, the data giants have drawn increasing scrutiny from the public, prompting lawmakers to resolve to do better in catching them in the tax net that applies to everyone else. In this Part, we introduce the tax reform initiative that is currently being developed to catch the data giants, briefly review its origins, summarize its core design elements, and examine its policy rationales.

A. *How did we get here?*

At least since the 1990s, the issue of corporate tax competition—which arguably leads to a global race to the bottom in public revenues[3]—has preoc-

[3] The law, economics, and philosophy literature are still split on the exact extent to which international tax competition should be limited, but there seems to be consensus that the phenomenon is detrimental to societies. *See* Philipp Genschel & Peter Schwarz, *Tax Competition: A Literature Review*, 9 Socio-Econ. Rev. 339, 341–42, 345–47, 349–51 (2011) (examining the baseline model of tax competition that suggests a race to the bottom and the supporting evidence, and concluding that "international tax arbitrage is a major factor in corporate taxation and presumably also in capital income taxation."); Michael Keen & Kai A. Konrad, *The Theory of International Tax Competition and Coordination*, *in* 5 Handbook of Public Economics 257, 317 (Alan J. Auerbach et al. eds., 2012) (reviewing economic models on tax competition and stating that, from a welfare perspective, "[i]n the workhorse model, tax competition is (almost) certainly bad . . . ."); Peter Dietsch, Catching Capital: The Ethics of Tax Competition 31–63 (2015) (arguing that tax competition has a corrosive impact on states' fiscal autonomy); Winning the Tax Wars: Tax Competition and Cooperation 1 (Brigitte Alepin, Blanca Moreno-Dodson, & Louise Otis eds., 2017) (discussing the various contributions to this volume that "present the impacts of tax competition and the possible solutions that can be explored."); Tsilly Dagan, International Tax Policy: Between Competition and Cooperation 31–42 (2018) (arguing that tax competition reshapes national tax policy, with implications for efficiency, distributive justice, and personal and collective identities); Igor Semenenko, Junwook Yoo & Parporn Akathaporn, *Implicit Taxes Amid Race to the Bottom in a Global Tax Game*, 27 J. Acc. Bus. & Mgmt. 42, 50 (2020) (providing empirical evidence to support the race-to-the-bottom hypothesis); Tarcísio Diniz Magalhães, *International Tax Law Between Loyalty, Exit, and Voice*, 44 Dalhousie L.J. 49, 55–63 (2021) (reviewing positions among legal scholars in favor and against tax competition); Lukas Hakelberg & Thomas Rixen, *Is Neoliberalism Still Spreading? The Impact of International Cooperation on Capital Taxation*, 28 Rev. Int'l Pol. Econ. 1142, 1161–62 (2021) (arguing that "international tax cooperation and new policy ideas are both necessary—but only their combination is sufficient—for a departure from neoliberal tax policy."); Leo Ahrens, Lukas Hakelberg, & Thomas Rixen, *Transcending Tax Competition: How Financial Transparency Enables Governments to Tax Portfolio Capital*, 49 Intertax 549, 553 (2021) (same as previous); Reuven S. Avi-Yonah, *Has Tax Competition Been Curbed? Reaction to L. Ahrens, L. Hakelberg & T. Rixen*, 49 Intertax 555, 557 (2021) (suggesting that unilateral measures can help counter tax competition and that "a higher effective rate on corporate profits is likely in the near future."); Steven Dean, *Predatory Cooperation: Reaction to L. Ahrens, L. Hakelberg & T. Rixen*, 49 Intertax 558, 560 (2021) (arguing that OECD-led cooperative tax initiatives are predatory because they concentrate benefits among members and diffuse burdens to others); Cees Peters, *Some Reflections on Enabling International Institutions to Tax Capital: Reaction to L. Ahrens, L. Hakelberg & T. Rixen*, 49 Intertax 561, 562 (2021) (arguing that "the regulation of harmful tax competition is too important to be left only to states."); Leo Ahrens, Lukas Hakelberg & Thomas Rixen, *Response to Reuven Avi-Yonah, Steven Dean and Cees Peters*, 49 Intertax 564, 564–68 (2021) (replying to three reactions to their paper); Guillaume Claveres, *Tax Competition and Club Goods*, 29 Int'l Tax & Pub. Fin. 110, 136 (2022) (showing that "an increase in the number of

cupied policymakers, notably at the level of the Organisation for Economic Co-operation and Development (OECD) and the Group of Seven (G7).[4] In 2013, the OECD launched the Base Erosion and Profit Shifting (BEPS) project with 15 actions for member and non-member states to curb aggressive tax avoidance by companies,[5] and most especially the data giants whose un-

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cooperating countries increases all countries' utility, including members of the club and those outside it.").

[4] OECD, Rep. of the Comm. Fiscal Aff., Harmful Tax Competition: An Emerging Issue 19–62 (1998) (establishing factors that may be used to identify tax havens and harmful preferential tax regimes and counteracting measures). For different perspectives on this project, see Karen B. Brown, *Harmful Tax Competition: The OECD View*, 32 Geo. Wash. J. Int'l L. & Econ. 311, 319–20 (1999) (criticizing the project because it was prepared "without input from developing countries on the extent to which sovereign nations may design domestic tax regimes to attract foreign investment . . . ."); Alexander Townsend Jr., *Global Schoolyard Bully: The Organisation for Economic Co-Operation and Development's Coercive Efforts to Control Tax Competition*, 25 Fordham Int'l L. J. 215, 258 (2001) (claiming that the project is "a coercive attempt to alter the tax systems of [nonmember] jurisdictions to conform with the unilateral interests of OECD member nations."); Kimberly Carlson, *When Cows Have Wings: An Analysis of the OECD's Tax Haven Work as It Relates to Globalization, Sovereignty and Privacy*, 35 J. Marshall L. Rev. 163, 178 (2002) (claiming that "the OECD violates the sovereignty of [nonmember] nations that it unilaterally deems tax havens."); Vaughn E. James, *Twenty-First Century Pirates of the Caribbean: How the Organization for Economic Cooperation and Development Robbed Fourteen CARICOM Countries of Their Tax and Economic Policy Sovereignty*, 34 U. Miami Inter-Am. L. Rev. 1, 50 (2002) (claiming that "the OECD countries, like Blackbeard, Bluebeard and the other pirates who plied the waters of the Caribbean during the sixteenth through nineteenth centuries, can smile at their success in once again robbing the Caribbean of its gold—its sovereign right to determine its tax and economic policies, and the rights of its people to shape their destiny."); Michael C. Webb, *Defining the Boundaries of Legitimate State Practice: Norms, Transnational Actors and the OECD's Project on Harmful Tax Competition*, 11 Rev. Int'l Pol. Econ. 787, 819 (2004) (arguing that the project "can be interpreted as an attempt to define the boundary between legitimate and illegitimate tax measures."); J.C. Sharman, Havens in a Storm: The Struggle for Global Tax Regulation 1 (2006) (claiming that, by 2002, the project had failed, notably due to organized opposition by the targeted low-tax jurisdictions); Robert T. Kudrle, *The OECD's Harmful Tax Competition Initiative and the Tax Havens: From Bombshell to Damp Squib*, 8 Glob. Econ. J. 1, 1 (2008) (conducting a data analysis of the project's quantitative impact and finding "no important effect", which the author attributes to the "inadequacy of the very measures insisted upon by the OECD."); Reuven S. Avi-Yonah, *The OECD Harmful Tax Competition Report: A Retrospective After a Decade*, 34 Brook. J. Int'l L. 783, 793 (2009) (claiming that the project did not go far enough, as it reduced tax competition among OECD members but "tax competition continues unabated among non-OECD countries," which the author sees as detrimental to these countries); John McLaren, *The OECD's Harmful Tax Competition Project: Is It International Tax Law?*, 24 Austl. Tax F. 421, 452–53 (2009) (arguing that the project was a desirable form of soft law that led many countries to comply with "the requirements of entering into exchange of information agreements and repealing their bank secrecy laws."); Annet Wanyana Oguttu, *A Critique of the OECD Campaign against Tax Havens: Has It Been Successful? A South African Perspective*, 21 Stellenbosch L. Rev. 172, 199 (2010) (claiming that the project "made it clear to the international community that harmful tax practices that deplete other countries' tax bases will not be tolerated."); Andrew P. Morriss & Lotta Moberg, *Cartelizing Taxes: Understanding the OECD's Campaign against "Harmful Tax Competition"*, 4 Colum. J. Tax L. 1, 4 (2012) (criticizing the project for "providing a framework for interests within a group of high tax states to create a cartel that would channel competition in tax policy away from areas where those states had a competitive disadvantage and toward areas in which they had a competitive advantage.").

[5] OECD, Addressing Base Erosion and Profit Shifting 6, 8–9 (2013) (describing "studies and data available in the public domain regarding the existence and magnitude of

conventional business models seem to facilitate their slipping out of the tax and regulatory net altogether.[6] Together with the Group of Twenty (G20), the OECD later established the Inclusive Framework on BEPS to coordinate and monitor the implementation of those actions as well as to promote other initiatives on tax policy and reform.[7] But it would take a series of economic crises (including the 2008 financial crash that preceded these steps, the COVID-19 pandemic, and the global energy and inflation crises),[8] intense and enduring

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BEPS," identifying "key pressure areas," and recommending the development of a "comprehensive action plan"); OECD, Action Plan on Base Erosion and Profit Shifting 14–26 (2013) (proposing fifteen actions in the following areas: (1) tax challenges of the digital economy; (2) hybrid mismatch arrangements; (3) controlled foreign corporation rules; (4) interest deductions and other financial payments; (5) harmful tax practices, including transparency and substance; (6) treaty abuse; (7) artificial avoidance of permanent establishments; alignment of transfer pricing and value creation with respect to (8) intangibles, (9) risks and capital, and (10) other high-risk transactions; (11) data collection and analysis on BEPS; (12) disclosure of aggressive tax planning; (13) transfer pricing documentation; (14) effectiveness of dispute resolution; (15) development of a multilateral instrument).

[6] Business models in digital markets are numerous, but four main types have received greater attention from the international tax community: multi-sided platforms like Uber, Airbnb, Hotels.com, Booking.com, eBay, Amazon Marketplace, Google, Facebook, and LinkedIn; resellers like Amazon Retail, Alibaba, Spotify, and Netflix (with respect to purchased content); vertically integrated firms like Huawei and Netflix (with respect to produced content); and input suppliers like Intel. Craig Elliffe, Taxing the Digital Economy: Theory, Policy and Practice 67–68 (2021).

[7] This framework currently hosts 143 jurisdictions, including all 38 OECD members, OECD non-members that are part of the G20 (like Argentina, Brazil, China, India, Indonesia, Russia, Saudi Arabia, and South Africa), and many other world sovereigns. OECD, *Members of the OECD/G20 Inclusive Framework on BEPS* (last updated June 9, 2023), https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf [https://perma.cc/L2UY-NCDB].

[8] For context, see Allison Christians, *Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20*, 5 Nw. J. L. & Soc. Pol'y. 19, 26, 28 (2010) (explaining the "G20 endorsement of the OECD's position on tax havens" in the aftermath of the 2008-09 global economic crisis as "a means of returning to the OECD's initially advanced idea that its members' need for revenues is an appropriate reason for targeting tax haven practices."); Dries Lesage & Mattias Vermeiren, *Neo-Liberalism at a Time of Crisis: The Case of Taxation*, 19 Eur. Rev. 43, 49 (2011) (arguing that "[a]s a result of [the 2008-09] international financial and economic turbulence, the perceived lack of international tax cooperation has come prominently in the picture."); Richard Eccleston, The Dynamics of Global Economic Governance: The Financial Crisis, the OECD and the Politics of International Tax Cooperation 90 (2012) (suggesting that "the rejuvenation of the international tax transparency regime can be explained in terms of the OECD's ability to exploit the acute demand for a coherent regulatory response to the financial crisis."); Dries Lesage, Mattias Vermeiren & Sacha Dierckx, *New Constitutionalism, International Taxation and Crisis*, *in* New Constitutionalism and World Order 197, 200 (Stephen Gill & A. Claire Cutler eds., 2014) (arguing that post-2008 budgetary crisis and austerity "brought the issue of international tax competition and the abuse by [wealthy individuals and multinational corporations] of 'unfair' international tax arbitrage opportunities again into the picture . . . ."); Rasmus Corlin Christensen & Martin Hearson, *The New Politics of Global Tax Governance: Taking Stock a Decade After the Financial Crisis*, 26 Rev. Int'l Pol. Econ. 1068, 1083 (2019) (stating that "[w]hile tax havens did not create the [2007-09] financial crisis, they were intimately involved in many of the complex structures at its roots."); Richard Collier, Alice Pirlot & John Vella, *Tax Policy and the COVID-19 Crisis*, 48 Intertax 794, 804 (2020) (arguing that "the COVID-19 crisis adds significant pressure to the focus on the two central themes of the ongoing work of the Inclusive Framework on the digitalization of business, namely the develop-

pressure from civil society members and tax justice activists,[9] and the support of international organizations such as the International Monetary Fund (IMF), the World Bank, and the European Union (EU)[10] for the OECD to find enough political appetite among a critical mass of states to reach a consensus on how to tax the data giants.[11]

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ment of a solution to address the digitalization issue (Pillar 1) and the closing of remaining avoidance opportunities (Pillar 2)."); Tarcísio Diniz Magalhães & Allison Christians, *Rethinking Tax for the Digital Economy After COVID-19*, 11 Harv. Bus. L. Rev. 1, 5–8 (2021) (observing that COVID-19 increased the stakes for reforming the international tax system).

[9] *Cf.* Allison Christians, *Tax Activists and the Global Movement for Development through Transparency*, Tax L. and Development 288, 306 (Yariv Brauner & Miranda Stewart eds., 2012) (describing the OECD as one of the key sources of peer pressure identified and targeted by tax transparency advocates); Richard Eccleston & Ainsley Elba eds., Business, Civil Society and the 'New' Politics of Corporate Tax Justice: Paying a Fair Share? ix (2018) (various contributions providing "a political economy analysis of the global campaign against corporate tax avoidance which has emerged since the financial crisis of 2007-08.").

[10] International Monetary Fund Staff Report, Spillovers in International Corporate Taxation 43 (May 9, 2014), https://www.imf.org/external/np/pp/eng/2014/050914.pdf [https://perma.cc/KQ4E-QL4J] (suggesting that minimum effective tax rates "can prove beneficial even for low tax countries initially below the minimum, since an enforced increase in their own tax rates may lead to an induced increase in tax rates elsewhere from which they can benefit."); Corporate Income Taxes Under Pressure: Why Reform is Needed and How It Could Be Designed v (Ruud de Mooij, Alexander Klemm & Victory Perry eds., 2021) (stating that "international tax issues came into increased prominence after the global financial crisis of 2009, and IMF staff have contributed to the global tax discussions."); David O'Sullivan & Ana Cebreiro Gómez, The Global Minimum Tax: From Agreement to Implementation—Policy Considerations, Implementation Options, and Next Steps 12 (2022) (stating that "[t]he GMT [global minimum tax] is an important development for the international tax framework and will benefit developing countries."); EU, *Taxation and Customs Union: Harmful Tax Competition*, European Commission (Sep. 25, 2023), https://taxation-customs.ec.europa.eu/harmful-tax-competition_en [https://perma.cc/X7EN-C43X] (laying out criteria for identifying potentially harmful tax measures); Rasmus Corlin Christensen, *The Rise of the EU in International Tax Policy*, Global Networks and European Actors: Navigating and Managing Complexity 117, 117–121 (George Christou & Jacob Hasselbalch eds., 2021) (comparing the EU tax policy work on corporate tax transparency to the OECD's). A major international institution so far not explicitly implicated in the tax competition debate is the World Trade Organization (WTO). For an analysis of how WTO agreements could apply in this regard, see Martin G. Vallespinos, *Can the WTO Stop the Race to the Bottom? Tax Competition and the WTO*, 40 Va. Tax Rev. 93, 173 (2020) (proposing a two-step approach to modernize the WTO in order to allow it to "penalize harmful tax competition measures.").

[11] From a normative perspective, there are many problems with how the OECD has historically achieved—since the 1960s, but especially in recent years—consensus on global tax policy that affects non-members, especially low-income countries. *See* Ricardo Garcia Antón, *The 21st Century Multilateralism in International Taxation: The Emperor's New Clothes?*, 8 World Tax J. 147, 192 (2016) (using international relations theory to dispute the view that the OECD promotes true multilateralism in tax); Tarcísio Diniz Magalhães, *What is Really Wrong with Global Tax Governance and How to Properly Fix It*, 10 World Tax J. 499, 504–12 (2018) (using critical legal theory to argue that the OECD uses power and expertise to monopolize global tax policymaking in the interest of its members); Allison Christians & Laurens van Apeldoorn, *The OECD Inclusive Framework*, 72 Bull. Int'l Tax'n 226, 226 (2018) (using political philosophy to criticize the OECD's claim to promote equal footing among nonmembers); Ivan Ozai, *Institutional and Structural Legitimacy Deficits in the International Tax Regime*, 12 World Tax J. 1, 76 (2020) (using political theory to argue that the OECD-based "international tax regime is illegitimate in two main respects . . . ."); Linda Brosens & Jasper Bossuyt, *Legitimacy in International Tax*

Accordingly, the year 2021 marked a historical turn for the century-old international tax system, as 136 jurisdictions accepted (and others later joined) the OECD/G20-spearheaded "two-pillar" plan to update international tax rules for the new century. The goal of this initiative is to make it harder for the data giants to escape taxes, and in so doing make it easier for states to reduce their own propensity to use the tax system to compete amongst themselves.

In broad strokes, the first pillar aims to allocate portions of the profits of the data giants to jurisdictions where consumers or users are located.[12] The second pillar, which is the main focus of this Article, seeks to ensure that the data giants pay at least a 15% tax rate wherever they are doing business, even when they are doing so through unconventional or innovative means.[13] Details about the reform plan were first released in a statement of July 1st, 2021, which was complemented by a second statement on October 8th of the same

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Law-Making: Can the OECD Remain the Guardian of Open Tax Norms?, 12 World Tax J. 313, 375 (2020) (arguing that the OECD's BEPS project lacked input and output legitimacy and that it was also flawed in terms of throughput legitimacy); Shu-Yi Oei, *World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership*, 47 Yale J. Int'l L. 199, 201 (2022) (using event history analysis to explain why lower-income and developing countries joined the OECD's inclusive framework "despite the clear burdens, acknowledged limitations, and questionable benefits that it presents . . . ."); Yariv Brauner, *Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument*, 26 Fla. Tax Rev. 489, 533 (2022) (claiming ongoing multilateral tax initiatives "have done at best little to increase the meaningfulness of non-OECD countries in the regime, and at worst been disingenuous."). Despite these issues, international political accords are still regarded as valid (even if not legally binding and self-enforceable) mechanisms through which sovereign states settle their differences or establish common goals. *But see* Jan Klabbers, *Informal Agreements in International Law: Towards a Theoretical Framework*, 5 Finnish Y.B. Int'l L. 267, 270 (1994) (arguing for "a presumption that informal agreements are legally binding under international law, a presumption which may be rebutted if there is clear evidence of the opposite.").

[12] *Cf. generally* OECD, Tax Challenges Arising from Digitalisation—Report on the Pillar One Blueprint: Inclusive Framework on BEPS (2020). The OECD has made available a series of public consultation documents and progress reports on many aspects of this proposal, including a recent draft multilateral convention: *Action 1 Tax Challenges Arising from Digitalisation*, OECD, https://www.oecd.org/tax/beps/beps-actions/action1/ [https://perma.cc/E4SG-CQCE].

[13] *Cf. generally* OECD, Tax Challenges Arising from Digitalisation—Report on the Pillar Two Blueprint: Inclusive Framework on BEPS (2020); OECD, Safe Harbours and Penalty Relief: Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS (2020); OECD, Tax Challenges Arising from the Digitalisation of the Economy—Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS (2021) [hereinafter Globe Rules]; OECD, Tax Challenges Arising from the Digitalisation of the Economy—Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS (2021) [hereinafter Globe Commentary].

year.[14] To achieve its goals, pillar two puts forward a rule-based proposal dubbed "Global Anti-Base Erosion", or simply Globe.[15]

Globe builds a specially defined tax base (Globe income or loss) in order to measure what amounts to a consolidated pool of potential tax revenues to be collected by various adopting countries. The collection mechanism engages whenever the effective corporate tax rate (also specially defined) of targeted entities falls below 15%. To accomplish this task, Globe constructs a unique computation of the taxes treated as paid by the targeted taxpayers, determines whether the taxes paid represent 15% of the relevant proportion of the Globe income, and where they do not, creates a pool of "top-up taxes" that Globe allocates among the relevant jurisdictions by means of an intricate network of interconnected switchover mechanisms.[16]

Perhaps unsurprisingly, this Globe proposal (as well as the pillar one proposal) has been the object of much debate and criticism due to its complexity, apparent bias against particular countries (especially low-income ones), possible departure from existing tax principles and practices, possible inconsistency with some national laws and regimes, and uncertainty with respect to impact due to a lack of empirical data regarding its revenue-generating potential, among other issues.[17]

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[14] OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (July 1, 2021), https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf [https://perma.cc/ZLV8-CSSM]; OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (Oct. 8, 2021), https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf [https://perma.cc/R2PF-FQJF] [hereinafter Statement]. As the October statement is the latest and more complete document made public, references to the 2021 agreement on the global minimum tax under pillar two will concern this later statement.

[15] We accordingly use the term "pillar two" to refer to the global minimum tax initiative as a whole and "Globe" for the specific ruleset designed to implement the initiative.

[16] *See infra* Part I.C and Part II.

[17] Aitor Navarro, *Jurisdiction Not to Tax, Tax Sparing Clauses, and the OECD Minimum Taxation (GloBE) Proposal*, 1 Nordic Tax J. 1, 17–18 (2021) (claiming Globe sacrifices "the right of a jurisdiction not to tax as a form of expression of tax sovereignty," which implies developing countries "losing tax incentives as a tax policy instrument to attract foreign direct investment."); Andrea Riccardi, *Implementing a (Global?) Minimum Corporate Income Tax: An Assessment of the So-Called "Pillar Two" from the Perspective of Developing Countries*, 4 Nordic J. L. & Soc'y 1, 29 (2021) (claiming Globe was a "rushed political-driven proposal" that affects "tax sovereignty and the allocation of taxing rights" and entails "negative consequences from a developing country perspective."); Afton Titus, *Global Minimum Corporate Tax: A Death Knell for African Country Tax Policies?*, 50 Intertax 1, 10 (2022) (noting "the minimum corporate tax is set far below the corporate income tax rate that is levied in most African countries."); Afton Titus, *Pillar Two and African Countries: What Should Their Response Be? The Case for a Regional One*, 50 Intertax 711, 719–20 (2022) (calling for a regionally coordinated adoption by African countries of a qualified domestic minimum top-up tax and suggesting that these countries could protect existing incentives from Globe by turning them into "non-tax equivalents"); Suranjali Tandon, *The Need for Global Minimum Tax: Assessing Pillar Two Reform*, 50 Intertax 1, 8 (2022) (providing evidence that OECD countries "report a greater share of foregone revenue as a percentage of their gross domestic product (GDP)," so "it is expected that the revenues are likely to be clawed back from

Setting aside for the moment these normative and structural issues, the following sections briefly explain the general targets of pillar two and examine the Globe proposal's overall rationales in turn.

B. *Who is targeted?*

A core aspect of the agreement on pillar two is that the proposed global minimum tax is not meant to apply to all taxpayers. Since the declared objective is to stop excessive tax competition, signatories have agreed to limit the plan's reach to large firms, defined as those with at least 750 million euros in annual consolidated group revenue.[18] Many of these are data giants, and most data giants originate from and are based in the United States. The OECD's October 2021 Statement refers to these groups of companies and operations as a single unit,[19] even if, as explained below, the proposed rules are envisaged to apply to each constituent entity and base of operations separately.[20] Further,

developed countries."); Mona Baraké et al., *Revenue Effects of the Global Minimum Tax under Pillar Two*, 50 Intertax 689, 689 (2022) (estimating that "headquarters countries could collect a total revenue of EUR 179 billion globally" and "the European Union can expect a total tax revenue of EUR 55 billion yearly."); Suranjali Tandon, *Assessing the Impact of Pillar Two on Developing Countries*, 50 Intertax 12, 12 (2023) (demonstrating that "immediate revenue gains of developing countries remain limited, and the [global minimum] tax will restrict the ability to offer tax incentives and will undermine the sovereignty of states in its application to some extent."); Annet Wanyana Oguttu, *Preventing International Tax Competition and the Race to the Bottom: A Critique of the OECD Pillar Two Model Rules for Taxing the Digital Economy—A Developing Country Perspective*, 76 Bull. Int'l Tax'n 547, 565–65 (2022) (stressing that Globe's complexity creates uncertainty, imposes administrative difficulties on taxpayers and tax administrations, and may be inequitable to host countries); Pitambar Das & Amedeo Rizzo, *The OECD Global Minimum Tax Proposal under Pillar Two: Will It Achieve the Desired Policy Objective?*, 76 Bull. Int'l Tax'n 44, 52 (2022) (suggesting that Globe might have been overstated because, on a global scale, "there is very little difference in statutory corporate income tax rates between OECD member countries and those of the developing countries."); Reuven S. Avi-Yonah & Young Ran (Christine) Kim, *Tax Harmony: The Promise and Pitfall of the Global Minimum Tax*, 43 Mich. J. Int'l L. 505, 555 (2022) (identifying flaws in the design of Globe, notably the fact that "the proposed global minimum tax rate of fifteen percent would be lower than the average G20 corporate tax rate, and substance carve-outs would maintain some double non-taxation."); Alexander Fedan, *Case Study Analysis of the OECD Pillar One and Pillar Two Allocations to Developing Countries: What Has Changed Since the 2020 Blueprints?*, 77 Bull. Int'l Tax'n 1, 20 (2023) (arguing that the ongoing increase in Globe's complexity "does not benefit the use of the instrument as a development financing instrument"); Cees Peters, *The Legitimacy of the OECD's Work on Pillar Two: An Analysis of the Overconfidence in a 'Devilish Logic'*, 51 Intertax 1, 10–17 (2023) (questioning Globe's output and throughput legitimacy); Tsilly Dagan, *GloBE: The Potential Costs of Cooperation*, 51 Intertax 1, 7–11 (2023) (extending her skepticism of international tax cooperation based on lock-in and cartelistic effects and risks of excessive membership prices, as elaborated in previous publications, to Globe).

[18] This is the same threshold used in country-by-country reports based on BEPS Action 13. OECD, Transfer Pricing Documentation and Country-by-Country Reporting—Action 13: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project 10 (2015).

[19] Statement, *supra* note 14, at 4 ("Scope: The GloBE rules will apply to MNEs [multinational enterprises] . . . .").

[20] As such, pillar two can be said to constitute a hybrid model (much like pillar one) that combines elements of the separate-entity and unitary approaches to the taxation of economically cohesive and integrated corporate groups. *Cf.* Sol Picciotto & Jeffery M. Kadet, *The Transition*

the Statement leaves outside the plan's scope some government entities, international and nonprofit organizations, and pension and investment funds (together with their holding vehicles).

Given that the scoping threshold here is much lower than under pillar one,[21] the number of companies affected by pillar two is expected to be considerably greater. The OECD explains that this is because "Pillar Two's goal is to ensure that a much broader range of [companies] pay a minimum level of tax . . .".[22] Even though the 750-million-euro cutoff determines which companies states have committed to tax—or let others tax—at a minimum of 15%, the Statement underscores that the threshold does not imply a restriction on headquarter jurisdictions that decide to subject more companies to that same minimum rate.

In the same year the agreement was struck, the OECD released model rules and accompanying commentaries containing a long list of provisions for states to adopt.[23] Article 10 of the model rules, in particular, provides general definitions, including of in-scope taxpayers as well as those that are excluded from the regime. Some specific definitions are found in other provisions, including Article 1.2, for the "MNE group" as a whole; Article 1.4, for the ultimate parent entity (UPE) that owns and controls the entire group (as established in the so-called headquarter jurisdiction); and Article 1.3, for lower-tier entities that integrate the group (more commonly called, in international tax parlance, subsidiaries located in a Globe-adopting jurisdiction, but for these purposes the term also includes permanent establishments doing business in host countries).[24]

The Globe income (or loss) base is constructed on the basis of book income rather than taxable income, that is, the "financial accounting net income or loss" as defined and adjusted in Article 3 of the model rules. One reason for targeting book income rather than taxable income is that international ac-

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to Unitary Taxation, 108 Tax Notes Int'l 453, 454 (2022) (arguing that Globe embraces a unitary approach).

[21] Pillar one's scope includes all groups of companies with a global turnover above 20 billion euros and profit margin (as calculated by dividing profits before tax by revenues) above 10%. The first threshold is to be reduced to 10 billion euros after 7 years of the plan's implementation, if successful. The OECD has estimated that pillar one would affect around 100 multinational groups in the world. OECD, Frequently Asked Questions—Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (July 2022) [hereinafter OECD FAQs].

[22] *Id.* at 1.

[23] Globe Rules, *supra* note 13; Globe Commentary, *supra* note 13.

[24] Related terms that appear in the general definitions include "constituent entity-owner," "departing constituent entity," "designated filing entity," "designated local entity," "excluded entity," "filing constituent entity," "government entity," "group entity," "insurance investment entity," "intermediate parent entity," "investment entity" "investment fund" "liable constituent entity (or entities)," "low-taxed constituent entity," "low-tax entity," "main entity," "minority-owned constituent entity," "minority-owned parent," "minority-owned subgroup," "minority-owned subsidiary," "multi-parented MNE group," "parent entity," "partially-owned parent entity," "pension fund," "pension services entity," and "stateless constituent entity." Globe Rules, *supra* note 13, art. 10.

counting standards provide a more harmonized (or perhaps, more harmonizable) tax base than that which is readily available for taxable income. The complexities created by this design choice are many and will undoubtedly produce much scholarly attention and debate for years to come.[25] For present purposes, it is sufficient to note that to the extent various aspects of the Globe regime are specifically built on book income as defined in accounting standards and adjusted by the model rules, they will not align perfectly with national income taxation principles or constructs.

As such, the core building block of Globe presents something of a departure from conventional expectations that have been built up over a century of income tax coordination among countries.[26] Everything else that flows from Globe starts from this point of apparent departure. Globe's computation of a data giant's "effective tax rate" (ETR) is a similarly unique core component. In common usage, an ETR is the amount a company pays in taxes as a percent of its total income. This usage implies the acceptance of an entity having a separate legal personality from its owners. The taxes an entity pays in one country would normally not be considered to constitute taxes that another entity pays in another country, even where the two are affiliated or commonly controlled.[27]

The model rules challenge this basic assumption, with the concept of "adjusted covered taxes" set out in Article 4. In these rules, an entity's ETR in a jurisdiction is computed by adding to its (pre-Globe) ETR from domestic tax specified corporate shareholder-level taxes imposed as a result of a controlled foreign corporation regime.[28] A controlled foreign corporation regime

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[25] *See* Eva Eberhartinger & Georg Winkler, *Pillar Two and the Accounting Standards*, 51 Intertax 134, 147–49 (2023) (highlighting incentives and adverse effects for multinationals, such as underreporting of profits and overreporting of losses); Tjeerd van de Berg, Marcel Kriek & Ying Than, *Tax Challenges Arising from the Digitalization of the Economy: The Calculation of the Effective Tax Rate—Pillar Two versus Financial Accounting*, 29 Int'l Transfer Pricing J. 1, 19 (2022) (noting significant differences related to "the tax accrual versus tax cash paid basis and the application of the deferred tax accounting concept").

[26] *See generally* International Tax Coordination: An Interdisciplinary Perspective on Virtues and Pitfalls (Martin Zagler ed., 2010).

[27] Tax credits and tax exemptions can produce a consolidating effect, but with allocational consequences for the crediting or exempting jurisdictions; hence, countries seek mutually advantageous terms of cooperation through treaties.

[28] The amount that is attributed to the domestic taxpayer is limited to prevent rates in the controlled foreign corporation jurisdiction above 15% from unduly raising the domestic tax rate above the minimum threshold such that no top-up tax would be imposed. Controlled foreign corporation regimes are explained and compared to the Globe regime *infra* Part II.A and Part II.B. For analyses of the relationship between controlled foreign corporation (CFC) and Globe rules, see Brian J. Arnold, *An Investigation into the Interaction of CFC Rules and the OECD Pillar Two Global Minimum Tax*, 76 Bull. Int'l Tax'n 270, 289 (2022) (considering possible conflicts between CFC rules and Globe rules); Mindy Herzfeld, *More on GLOBE Ordering: CFC Rules*, 106 Tax Notes Int'l 603, 606 (2022) (explaining that Globe rules apply after CFC rules); Johanna Hey, *The 2020 Pillar Two Blueprint: What Can the GloBE Income Inclusion Rule Do that CFC Legislation Can't Do?*, 49 Intertax 7, 10–13 (2021) (considering similarities and differences between CFC and Globe rules and whether the former should be replaced by or integrated into the latter); Michael Lindgren, *"Two's Company, Three's a Crowd"—The Triad of Controlled Foreign Company Rules and the Two-Sided Income Inclusion Rule under the OECD's Pillar Two Global Min-*

is one that treats resident shareholders as having received their pro rata share of the underlying company's income. When used in the context of Globe, "ETR" is accordingly a specialized term of art that in effect consolidates certain tax attributes of different taxpayers that are not typically consolidated for income tax purposes. This form of consolidation is unusual because it permits the targeted taxpayer to reallocate—by pushing down—some amount of income tax they pay at a higher-tier entity level to a lower-tier one.[29]

Treating controlled foreign corporation taxes paid by shareholders as if they were paid by the foreign corporation itself helps the low-taxed constituent entity satisfy the 15% minimum tax requirement and avoid top-up taxes.[30] In doing so, the push-down rule conflicts with the separate-entity principle,[31] and it does so in an inverse relationship to corporate control since the lower-tier entity is given the tax attribute of the higher-tier one, rather than the other way around.[32]

Besides delimitations in terms of taxpayers and taxes, the Statement also excludes international shipping income (Article 3.3 of the model rules) and certain income associated with the carrying value of tangible assets and payroll under a so-called "substance-based carveout" (Article 5.3 of the model rules).[33] The purpose of the carveout, according to the OECD, is to allow developing countries to continue to "offer effective incentives that attract genuine, sub-

imum Tax Proposal, 77 Bull. Int'l Tax'n 21, 29–31 (2022) (also considering the coexistence of both rules, the replacement of one for the other, or their integration into a single regime).

[29] *See* Allison Christians, *Let the GILTI/GLOBE Games Begin*, 106 Tax Notes Int'l 913, 915 (2022) (explaining the mechanism of "pushing down" CFC taxes for purposes of determining Globe tax liability); Mindy Herzfeld, *How to Allocate CFC Taxes Under GLOBE*, 108 Tax Notes Int'l 1513, 1514 (2022) (explaining that covered taxes under Globe include CFC taxes).

[30] For this reason, the stacking order of controlled foreign corporation taxes (as well as the "qualified domestic minimum top-up tax" referenced *infra* Part II) is of utmost importance in terms of the allocative effect of the Globe rules as a whole. To demonstrate how these rules work, the OECD offers an illustration in its "Pillar Two Examples" at Example 4.1.5-2. *See* OECD, Tax Challenges Arising from the Digitalisation of the Economy—Global Anti-Base Erosion Model Rules (Pillar Two) Examples: Inclusive Framework on BEPS 36–37 (2022) [hereinafter OECD Examples].

[31] See *infra* Part III.C.5 for analysis.

[32] A common rationale for controlled foreign corporation taxes is that it is the shareholder's control of the foreign corporation that effectively rationalizes the deeming of distributions, in that a parent can always make the choice to actually distribute the earnings of a subsidiary it controls. See *infra* Part III for discussion of whether control is more than a policy justification and has legal impact in terms of creating an international law requirement for pass-through tax rules. *See also* Tarcísio Diniz Magalhães, *Give Us the Law: Responses and Challenges to UTPR Resisters*, 108 Tax Notes Int'l 1257, 1258 (2022) (arguing that there is no such thing as a control-as-nexus rule of general international law). It should be further noted that corporate law recognizes the possibility of attributing rights, duties, or qualities from one entity to another; not only from the controlled company to shareholders but also the other way around. Mariana Pargendler, *Veil Peeking: The Corporation as a Nexus for Regulation*, 169 U. Pa. L. Rev. 717, 739 (2021).

[33] Starting at 8% for assets and 10% for payroll, the first shall be annually reduced by 0.2% and the second by 0.4% during the first five years. In the subsequent five years, the annual reduction shall be 0.4% and 0.8%, respectively. After this ten-year transition period, a fixed 5% shall apply to both expenses.

stantive foreign direct investment."[34] By excluding from Globe's tax base certain business expenses associated with things like property, plant, equipment, natural resources, and employees, the carveout ultimately reduces the total amount of missing tax that would be charged by a jurisdiction to reach the minimum 15%, thus making room for certain tax incentives to keep being provided for companies.[35] Finally, the Statement anticipated a *de minimis* rule to exclude from Globe jurisdictions hosting multinationals with less than 10 million euros in revenues and less than 1 million euros in profits (Article 5.5 of the model rules).

C. *What explains the mechanics?*

To explain the mechanics of Globe, we introduced in a previous essay the idea of use it or lose it as "one of the unspoken fundamental principles of the international tax system".[36] The principle manifests in its clearest form every time more than one state has a taxing claim over an item of income but one has a primary right, under the condition that the income is ultimately taxed. In case the state with the primary taxing right declines to exercise it, the other gets to step in, reclaiming its equally valid right and imposing its own tax. When this happens, the consequence is that the first state effectively foregoes the opportunity to tax.

By calling this idea a principle, our intention was not to imply that it is an international norm with binding force as a matter of law,[37] but rather that it is a theoretical justification that aims to make sense of the underlying assumptions of the OECD/G20-designed rules as well as of many previous regimes that states have historically adopted. Ontologically, use it or lose it is similar to other principle-based ideas or theories that have been proposed over the years by legal scholars, economists, and experts in international taxation. The most common among these are the economic allegiance doctrine, the benefits theory, the single tax principle, and the more recent "value creation" principle.[38] Even though none of these ideas are legally enforceable in any sense,[39] they serve the explanatory purpose of providing easy-to-grasp de-

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[34] OECD FAQs, *supra* note 21, at 2.

[35] *See generally* Allison Christians et al., A Guide for Developing Countries on How to Understand and Adapt to the Global Minimum Tax: Draft for Consultation (IISD & ISLP 2022); Grace Perez-Navarro, *What Does Pillar Two's Global Minimum Tax Mean for Tax Incentives?*, 51 Intertax 100 (2023); Niels Bammens & Dieter Bettens, *The Potential Impact of Pillar Two on Tax Incentives*, 51 Intertax 155 (2023); Kasper Dziurdź & Christoph Marchgraber, *GloBE: Why a Nominal Tax Rate of More Than 15% Might Not Be Enough*, 76 Bull. Int'l Tax'n 510 (2022).

[36] Allison Christians & Tarcísio Diniz Magalhães, *Undertaxed Profits and the Use-It-or-Lose-It Principle*, 108 Tax Notes Int'l 705, 707 (2022).

[37] On norm categories in international tax law, see Steven A. Dean, *Neither Rules nor Standards*, 87 Notre Dame L. Rev. 537, 553–63 (2011).

[38] See *infra* Part III.C.1 for a discussion of these in greater detail.

[39] It is true that some principles have sometimes been proposed as having international law pedigree. When Reuven Avi-Yonah coined the single tax principle, he asked himself the question, "what is the normative basis for the Single Tax Principle?," responding that it was "justified

scriptions of highly complex and technical systems of legal rules. What distinguishes the use-it-or-lose-it principle is that it is meant to explain a variety of tax approaches to cross-border income streams that states have put in place in the course of the last century, either unilaterally or multilaterally.

Critics of the use-it-or-lose-it principle have taken issue with the idea of a state foregoing or losing a taxing right.[40] But this part of the principle's name in fact reflects probably the most accepted objective of international tax law, that is, to prevent overlapping or double taxation by multiple states. In this vein, the principle professes that if a state with a primary taxing right does not exercise its right when it has the first chance, and another state with a similar taxing right steps in to fill the void, the first state cannot reasonably object. This logic can be identified in many practices in the fields of tax and corporate law, despite also raising controversy and resistance on occasion.

In fact, the introduction of legal regimes based on the idea of use it or lose it echoes what fiscal sociologist and economist Joseph Schumpeter called the "thunder of history", when he wrote that "[t]he spirit of a people, its cultural level, its social structure, the deeds its policy may prepare—all this and more is written in its fiscal history."[41] Precedent in U.S. income tax law can be traced to the origins of the modern income tax regime. In 1913, Congress provided that shareholders would be taxed on their ratable share of corporate income, whether or not it was actually paid out to them, if the corporation was "formed or fraudulently availed of" to accumulate profit so as to avoid the

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as a goal of the international tax regime, on both theoretical and practical grounds." Reuven S. Avi-Yonah, *International Taxation of Electronic Commerce*, 52 Tax L. Rev. 507, 517–18 (1997). Later, Avi-Yonah included the principle as one of the norms in his thesis on "international tax as international law." *See generally* Reuven S. Avi-Yonah, International Tax as International Law: An Analysis of the International Tax Regime (2007). However, Avi-Yonah seems to have then abandoned this position. Reuven S. Avi-Yonah, *Does International Customary Tax Law Exist?*, *in* Research Handbook on International Taxation 2, 9 (Yariv Brauner ed., 2020) ("Like the author of 'The Single Tax Principle,' I do not believe that the broader principles that in my opinion underlie the International Tax Regime (ITR), namely the benefits and single tax principles, are CIL [customary international law] because they are violated too frequently in practice."). *See also* discussion *infra* Part III.

[40] Robert Goulder, *Confessions of a UTPR Skeptic*, 108 Tax Notes Int'l 907, 909 (2022) ("[M]y instinct is to question the basis for the 'lose it' part. It seems to preclude the selective forbearance of national taxing rights, which is as much an expression of fiscal sovereignty as the full exercise of a nation's taxing ability. Moreover, it implies a nonconsensual taking of a thing of great value.").

[41] Joseph A. Schumpeter, *The Crisis of the Tax State*, *in* The Economics and Sociology of Capitalism 99, 101 (Richard Swedberg ed., 2020). *See also* Isaac William Martin, Ajay K. Mehrotra & Monica Prasad, *The Thunder of History: The Origins and Development of the New Fiscal Sociology*, *in* The New Fiscal Sociology: Taxation in Comparative and Historical Perspective 1, 16 (Isaac William Martin, Ajay K. Mehrotra & Monica Prasad eds., 2010) ("[A]s Schumpeter predicted, looking at the American fiscal structure has revealed 'the thunder of history'"); Michael Littlewood, *John Tiley and the Thunder of History*, *in* 9 Studies in the History of Tax Law 55, 56 (Peter Harris & Dominic de Cogan eds., 2019) ("[E]xamining Schumpeter's claim that the thunder of history can best be discerned by looking at taxation.").

individual income tax.[42] These rules eventually evolved into a surtax imposed at the corporate level,[43] but in 1937, the United States adopted foreign personal holding company rules to impose taxes on U.S. shareholders with respect to the income earned by certain foreign companies, again whether distributed to them or not.[44] When these rules were first proposed, not everyone agreed that naturally a state could simply look through the corporate form to impose a tax at the shareholder level, especially when the income was seen as arising in another state. It would take time (and much academic debate) before it became widely accepted that the law could simply deem income to be paid from one person to another.

In the 1960s, when the United States enacted the world's first controlled foreign corporation regime, history repeated itself.[45] Many in the United States—and probably also outside observers—saw controlled foreign corporation rules as incompatible with prevailing assumptions about the legal personhood of corporate entities, jurisdictional boundaries, and ownership and origin of income. Indeed, commentators at the time described a "cascade of protests" grounded on all sorts of legal, political, and economic arguments.[46] In particular, politicians, lawyers, and businesspeople complained that controlled foreign corporation rules would violate U.S. tax treaties, damage the reputation of the United States before the international community, lead to retaliation by treaty partners, harm U.S. companies doing businesses abroad, and ultimately hurt the U.S. economy.[47] Despite all this criticism, controlled foreign corporation regimes became U.S. law, and in the decades that ensued other countries followed the lead: Canada and Germany in 1972, Japan in 1978, France in 1980, New Zealand in 1988, Australia and the United King-

[42] Tariff Act of 1913, ch. 16, § 2, 38 Stat. 166, 167. An even earlier precedent can be found in Act of June 30, 1864, ch. 173, § 117, 13 Stat. 282 (providing that "gains and profits of all companies, whether incorporated or [not were to] be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise"). For a discussion of these early precedents, see Homer L. Elliott, *The Accumulated Earnings Tax and the Reasonable Needs of the Business: A Proposal*, 12 Wm. & Mary L. Rev. 34, 35–36 (1970). These rules evolved over time to address various issues.

[43] Revenue Act of 1934, ch. 277, § 351, 48 Stat. 751. For discussion, see Jerome B. Libin, *Personal Holding Companies and the Revenue Act of 1964*, 63 Mich. L. Rev. 421, 423–24 (1965).

[44] Revenue Act of 1937, ch. 815, § 1, 50 Stat. 813. *See also* Hearings Before the Joint Committee on Tax Evasion and Avoidance, 75th Cong., 1st Sess. (1937); H.R. Doc. No. 337, 75th Cong., 1st Sess. 13–14 (1937); Roy G. Blakey & Gladys C. Blakey, *The Revenue Act of 1937*, 27 Am. Econ. Rev. 698, 701 (1937) ("The 1937 law treats the income of the foreign corporate entity as income of shareholders within the jurisdiction of the United States and requires them to report as their income their equities in the undistributed net income of such companies.").

[45] The relevant provisions are located in the Internal Revenue Code at subtitle A, chapter 1, subchapter N, part III, subpart F; for this reason, the U.S. rules are alternatively referred to as "controlled foreign corporation rules" and "subpart F."

[46] Michael G. Beemer, *Revenue Act of 1962 and United States Treaty Obligations*, 20 Tax L. Rev. 125, 125 (1964).

[47] *Id.* at 125–26.

dom in 1990, and many others since, including emerging powers like Brazil, China, Russia, South Africa, and all the EU member states.[48]

In the same way as controlled foreign corporation and Globe rules, multiple domestic regimes around the world, in both common-law and civil-law countries, assign tax attributes among members of commonly controlled groups.[49] They do so to achieve various anti-avoidance policy goals or to make a specific law effective. The regimes described below help illuminate the intellectual path that roughly started with the adoption of foreign personal holding company rules, followed by the spread of controlled foreign corporation legislation worldwide and the emergence of the Globe regime.[50]

A classic example of a regime that combines income and assigns joint and several liability for taxes among related companies is the so-called domestic consolidation rules.[51] Similarly, one might point to corporate laws that define affiliates by common ownership and then assign liability to remedy harms to all affiliates. Even without express statutory authorization, corporate law scholars and practitioners observe common practices in constitutional, international, tax, corporate, contract, and antitrust law that remedy, to different extents, various corporate behaviors.[52] Such practices include disregarding limited liability to access shareholders' or their corporations' assets ("veil pierc-

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[48] Brian J. Arnold, *The Evolution of Controlled Foreign Corporation Rules and Beyond*, 73 Bull. Int'l Tax'n 631, 638 (2019).

[49] *See generally* Miguel Correia, Taxation of Corporate Groups (2021).

[50] This is recognized even by authors who adhere to the theory of tax nexus or genuine link. Juliane Kokott, *Public International Law and Taxation: Nexus and Territoriality*, *in* Tax Nexus and Jurisdiction in International and EU Law loc. 1.3. (Edoardo Traversa ed., 2022) (ebook) ("[W]hen there is a sufficient nexus with more than one state, as in CFC or minimum taxation situations, non-taxation by the other state(s) strengthens the legitimacy of the taxing state to exercise its jurisdiction."). For analysis see *infra* Part III.

[51] *See generally* Antony Ting, The Taxation of Corporate Groups Under Consolidation: An International Comparison (2021).

[52] Pargendler, *supra* note 32, at 757–79. *See also* S. Ottolenghi, *From Peeping Behind the Corporate Veil, to Ignoring It Completely*, 53 Mod. L. Rev. 338, 340–51 (1990) (discussing "peeping behind the veil," "penetrating the veil," "extending the veil," and "ignoring the veil"). Karen Vandekerckhove, Piercing the Corporate Veil 11–16 (2007) (discussing corporate veil piercing v. independent legal bases for liability, corporate veil piercing v. identification, direct and indirect piercing, general piercing v. bankruptcy piercing, reverse piercing, and voluntary piercing); José Maurício Bello, *An Overview of the Doctrine of the Piercing of the Corporate Veil as Applied by Latin American Countries: A U.S. Legal Creation Exported to Civil Law Jurisdictions*, 14 ILSA J. Int'l & Comp. L. 615, 628–30 (2008) (explaining how veil piercing was created by U.S. common law but found its way into Latin America's more formalistic legal regimes); Dante Figueroa, *Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America*, 50 Duq. L. Rev. 683, 782–94 (2012) (also considering how Latin American civil law systems incorporated U.S. veil piercing, and the differences in approaches); Albana Karapanço & Ina Karapanço, *The Piercing of the Corporate Veil Doctrine: A Comparative Approach to the Corporate Veil in European Union and Albania*, 2 Academic J. Interdisc. Stud. 153, 158 (2013) (stating that veil piercing by U.S., U.K., and EU courts is largely similar); Teona Mgeladze, *Piercing the Corporate Veil of Shareholder in German, US and Georgian Legal Doctrine*, 2 Tbilisi St. Univ. J.L. 45, 65 (2018) (arguing that Georgia's veil-piercing approach should follow U.S. and German judicial practice); Tan Cheng-Han, Jiangyu Wang & Christian Hofmann, *Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives*, 16 Berkeley Bus. L.J. 140, 157–203 (2019)

ing"), but also more targeted approaches that either look through the corporate veil to achieve certain legal goals ("veil lifting") or impute rights, duties, and qualities from shareholder to company and vice versa ("veil peeking").[53] In a similar way, Globe establishes a form of tax pass-through regime that looks behind—or peeks through—the corporate veil to reassign income or tax attributes among related parties located in different jurisdictions and thus achieve the agreed-upon 15% minimum.

This is corroborated by the fact that the Globe model rules also assign controlled foreign corporation taxes to the local company level. Accordingly, Article 4.3.3 of the OECD model rules determines the attribution of shareholders' tax payments to their controlled entities.[54] There are good reasons for including this provision: if controlled foreign corporation taxes are not considered when computing a company's minimum effective tax rate, then the calculation runs the risk of appearing economically incoherent because controlled foreign corporation-level taxes are presumably borne by the underlying profits that gave rise to their existence.

In assigning the subsidiary a tax attribute of its owner, Globe recognizes that the controlled foreign corporation tax is a (residence-level) substitute for a missing local (source-level) tax. As a matter of intersecting rule mechanics, this is because if the source jurisdiction had imposed a tax on the relevant income, the shareholder would have typically been allowed a foreign tax credit to reduce or eliminate the residence-level tax accordingly.[55] If one taxpayer may not be assigned the tax attribute of another, then pushing down controlled foreign corporation taxes to calculate a subsidiary's effective tax rate should also not be possible. If, however, shifting tax attributes for this purpose makes sense, then doing the same to achieve the minimum tax is a coherent component of the overall scheme.

Finally, this logic is also at work in the kill-switch provisions added to the U.S. model tax treaty in 2016.[56] These provisions would turn off preferential treaty rates for interest, royalties, and other income in specific situations.[57] The kill-switch mechanism applies when a person makes a specified payment to a "connected person" who is eligible for a special tax regime. Persons are defined as connected not only when one has control over the other, but also when both are under the control of the same persons.[58] That is, the provisions would impose a higher rate of tax on a U.S. company whether it is the con-

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(comparing veil piercing in common law jurisdictions like England, Singapore, and the United States with civil law jurisdictions like China and Germany).

[53] Pargendler, *supra* note 32, at 737.

[54] Globe Rules, *supra* note 13, at 24.

[55] For the relevant U.S. rules for crediting source-based taxes, see I.R.C. §§ 901–909.

[56] *See generally* United States Model Income Tax Convention (U.S. Dep't of Treas. 2016), https://home.treasury.gov/system/files/131/Treaty-US-Model-2016_1.pdf [https://perma.cc/2MFE-NJ87] [hereafter US MTC].

[57] Allison Christians & Alexander Ezanagu, *Kill-Switches in the U.S. Model Tax Treaty*, 41 Brook. J. Int'l L. 1025, 1048–55 (2016).

[58] US MTC, *supra* note 56, at art. 3(1)(m).

trolled or controlling entity in an affiliated group, when one of the members of the group receives a tax reduction through a special tax regime. By altering the tax consequences of domestic companies by reference to the tax attributes of foreign-controlled as well as controlling entities, kill-switch provisions are also generally based on the use-it-or-lose-it principle.

Returning to the Globe rules, one way to understand how they interact to overcome the logic of tax competition is by visualizing these rules as an interconnected series of on/off switches, each of which provides support for the efficacy of the overall scheme to reach the agreed minimum effective tax rate of 15%.

The functioning of each rule depends on the possibility that it could be switched off by another rule. For example, the first rule under Globe is the income inclusion rule (IIR),[59] which switches off the undertaxed profits rule (UTPR).[60] But both the IIR and the UTPR can be switched off by a qualified domestic minimum top-up tax (QDMT).[61] Finally, the subject-to-tax rule (STTR) is a complementary mechanism that potentially switches on before all others, but its operation depends on bilateral treaty negotiations.[62]

By working in tandem, these rules establish a system of interlocked backstops. Professor Ruth Mason has described this system as "diabolical machinery" aimed at neutralizing defection by participating states.[63] But without assurances to all states involved, the perverse logic of the race to the bottom would prevent each from implementing any of the rules. Therefore, a more appropriate way to describe Globe's structure is by reference to what the late Professor Arthur Cockfield called "commitment projectors".[64] Each rule sig-

[59] See *infra* Part II.A for a discussion of the IIR.

[60] See *infra* Part II.B for a discussion of the UTPR.

[61] For a discussion on the importance of the QDMT, including for developing countries, see Noam Noked, *Potential Response to GLOBE: Domestic Minimum Taxes in Countries Affected by the Global Minimum Tax*, 102 Tax Notes Int'l 943, 943–44 (2021) (recommending that countries protect their primary taxing rights by adopting a domestic minimum tax modeled after Globe); Noam Noked, *The Case for Domestic Minimum Taxes on Multinationals*, 105 Tax Notes Int'l 667, 672 (2022) (arguing that, since a domestic minimum tax would take priority over Globe rules, it would benefit developing countries); Noam Noked, *Designing Domestic Minimum Taxes in Response to the Global Minimum Tax*, 50 Intertax 678, 688 (2022) (noting that "more work is needed on domestic minimum taxes and related issues such as collateral benefits."); Victory Perry, *Pillar 2, Tax Competition, and Low Income Sub-Saharan African Countries*, 51 Intertax 105, 117 (2023) (arguing that low-income Sub-Saharan African countries should "unambiguously" adopt a qualified domestic minimum top-up tax because "[t]here is no apparent down side", meaning they can appropriate the tax revenue, instead of leaving it to other countries, "without any disincentives to investment."); Victory Perry, *Pillar 2: Tax Competition in Low Income Countries and Substance-Based Income Exclusion*, 44 Fisc. Stud. 23, 23 (2023) (similarly positing that low-income countries "should adopt qualified domestic minimum top-up taxes, and that this will not itself have a negative impact on their competitiveness.").

[62] See *infra* Part II.C for a discussion of the STTR.

[63] Ruth Mason, *A Wrench in GLOBE's Diabolical Machinery*, 107 Tax Notes Int'l 1391, 1393–94 (2022).

[64] *Cf.* Arthur J. Cockfield, *The Limits of the International Tax Regime as a Commitment Projector*, 33 Va. Tax Rev. 59, 62 (2013) (describing the international tax regime as "serving as 'a commitment projector' that enables governments to offer reasonably reliable promises to affected

nals commitments toward the participating states that if one of them does not tax a certain in-scope income by applying one of the rules, others will do so via other rules available under the scheme.

Various components of the Globe initiative have attracted challenges in public international law terms. In the Part that follows, we examine which of the components are most directly challenged and on what grounds.

II. What Globe Rules Might Violate or be Prohibited by Law?

A critique that authors have recently raised against Globe—somewhat unprecedented in the literature—concerns the validity under general public international law of the rules that states agreed to implement at a domestic level. The novelty in this line of argument stems from the fact that, to date, tax law has been regarded by most authors and experts in the field as governed mainly, if not exclusively, by national legal regimes and bilateral conventions voluntarily entered into by states.[65] Non-treaty international law norms, including both customary rules and general principles, have attracted relatively modest attention in the academic literature. Even well-accepted norms and principles have arguably little real-world impact in terms of governing the outcomes of specific cross-border tax disputes, whether or not a treaty is involved.[66]

The debate surrounding the IIR and the UTPR has produced the main legal arguments in general international law. Conversely, the STTR has pro-

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taxpayers, members of the general public, and other governments that they will resolve disputes over competing claims on a taxpayer's property.").

[65] *See infra* Part III.

[66] We bracket the question of whether Globe violates tax treaties because the analysis is specific not only to the wording of particular agreements but also the two contracting states' internal laws respecting a given agreement and the interpretation thereof. This is because tax treaties largely rely on domestic legal concepts as well as the understandings of national courts and authorities. *See generally* Tax Treaties and Domestic Law (Guglielmo Maisto ed., 2006). In practice, most tax treaty disputes are not settled within domestic appeal processes but instead within the much less transparent context of mutual agreement procedures. *See generally* Allison Christians, *How Nations Share*, 87 Ind. L.J. 1407 (2012). In any case, domestic legal concepts can and often do change over time, even contrary to treaty terms when the legal system admits treaty override (a common practice among many states). *See infra* note 78. Beyond legislative override, treaty terms, like most written law, also change through judicial interpretation. *See* Irik Bjorge, The Evolutionary Interpretation of Treaties 140–41, 149 (2014) (stating that there is nothing exceptional about an evolutionary treaty interpretation, which is consistent with the Vienna Convention's general rules, in the search for what treaty partners objectively intended); Christian Djeffal, Static and Evolutive Treaty Interpretation: A Functional Reconstruction 358 (2016) (showing that the Vienna Convention is intertemporally open, leaving "some leeway to the interpreter" and serving as "a guide for the interpreters to extrapolate their agreed reading of the treaty."); Ulf Linderfalk & Maria Hilling, *The Use of OECD Commentaries as Interpretative Aids: The Static/Ambulatory—Approaches Debate Considered from the Perspective of International Law*, 1 Nordic Tax J. 34, 58 (2015) (arguing that the choice between a static or ambulatory interpretation of tax treaties ultimately depends on the particular provision and case at hand). *Cf. also* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2086 (2018) (reinterpreting tax nexus for purposes of U.S. states' retail sales taxes by arguing that previous Courts did not have before them "the present realities of the interstate marketplace, where the Internet's prevalence and power have changed the dynamics of the national economy.").

duced arguments regarding whether treaty reform would be most effective on a bilateral or multilateral basis. Each is discussed in turn.

A. *Income inclusion rule*

The main rule under Globe is the IIR, which effectuates the inclusion of income of a low-taxed, lower-tier company into the tax base of the ultimate parent entity or, alternatively, an intermediate parent entity, when such income has not been sufficiently taxed at a minimum 15%.[67] Preference is accorded by the model rules to the ultimate parent jurisdiction by way of a so-called top-down approach: Only when the highest parent company in the chain does not remediate under-taxation in one of its subsidiaries is the opportunity to do so shifted to an intermediate holding company.[68]

This rule has been largely regarded as similar to controlled foreign corporation-based tax provisions and, therefore, compatible with international law.[69] To clarify, controlled foreign corporation taxation consists of imposing a tax on a domestic corporate shareholder in respect of profits of a foreign company it controls, by virtue of legislatively lifting the corporate veil between those two companies for tax purposes.[70]

Despite the close similarity, a few commentators have argued that the IIR "would not only conflict with the logic of tax treaties, but potentially also with the current notion of jurisdiction in international law."[71] This claim has not garnered much support even among many of Globe's most vocal critics, because the claim is only loosely based on the idea that there is no "objective or personal connection" between the IIR jurisdiction and the taxed income.

Tax lawyers Pedro Schoueri and Ricardo Galendi, for example, recognize that states' longtime acceptance of controlled foreign corporation regimes

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[67] Globe Rules, *supra* note 13, arts. 2.1, 2.2., and 2.3.

[68] Globe Commentary, *supra* note 13, at 9 ("The IIR incorporates a top-down approach which ensures priority in the application of the IIR is given to the Parent Entity at the highest point in the ownership chain.").

[69] Reuven S. Avi-Yonah, Letter to the Editor, *UTPR's Dynamic Connection to Customary International Tax Law*, 108 Tax Notes Int'l 951, 952 (2022) ("Clearly, the income inclusion rule is consistent with CITL [customary international tax law], because nobody (including Vander-Wolk [one of Globe's main critics]) would argue [otherwise].").

[70] *See* William W. Park, *Fiscal Jurisdiction and Accrual Basis Taxation: Lifting the Corporate Veil to Tax Foreign Company Profits*, 78 Colum. L. Rev. 1608, 1612 (1978) ("Piercing the veil of corporate personality does, however, increase the number of rival claims to jurisdiction over the same pot of income, which may in turn result in multiple taxation of company profits.").

[71] Pedro Guilherme Lindeberg Schoueri & Ricardo André Galendi Júnior, *Who is the "Taxpayer" for the IIR and Why Does It Matter?*, Kluwer Int'l Tax Blog (Aug. 16, 2022), http://kluwertaxblog.com/2022/08/16/who-is-the-taxpayer-for-the-iir-and-why-it-does-matter/ [https://perma.cc/BK32-YGSZ]. *Accord* Peter Hongler, *Is the Pillar 2 Agreement Infringing International Law Obligations?*, 107 Glob. Tax Gov. Blog (Nov. 12, 2021), https://globtaxgov.weblog.leidenuniv.nl/2021/11/12/is-the-pillar-2-agreement-infringing-international-law-obligations/ [https://perma.cc/BM87-W2G9]; M.F. (Maarten) de Wilde, *Why Pillar Two Top-Up Taxation Requires Tax Treaty Modification*, Kluwer Int'l Tax Blog (Jan. 12, 2022), https://kluwertaxblog.com/2022/01/12/why-pillar-two-top-up-taxation-requires-tax-treaty-modification/ [https://perma.cc/TX7A-DHKK].

might weaken objections to the IIR, given that controlled foreign corporation rules traditionally apply, regardless of any transactions, to income that is not directly linked to the national controlling taxpayer.[72] But Schoueri and Galendi counter that controlled foreign corporation rules should be seen as an exceptional type of regime that is justified for "anti-abuse reasons", which are ostensibly absent under the IIR.[73] The two authors, however, do not provide a legal basis for this distinction or for the argument that the presence of abusive arrangements is an international law requirement for look-through tax regimes, except for making an analogy to property taxes.[74] As we show in Part

[72] Schoueri & Galendi Jr., *supra* note 71, at 4 ("It is true that the CFC reasoning has, to a certain extent, eroded this understanding, resorting to fictions and deeming provisions to tax the income of the subsidiary as income of the parent."). Controlled foreign corporation rules apply when the subsidiary does not engage in a dividend transaction with its parent and, as Michael Schler has demonstrated, even when the latter has as little as 10% ownership of voting power or value. Michael Schler, Letter to the Editor, *UTPR: The CFC Precedent*, 109 Tax Notes Int'l 27, 27 (2023) ("It is universally agreed that taxes on controlled foreign corporations such as subpart F . . . are valid under international law and tax treaties, even though the shareholder being taxed on income of the CFC might have no nexus with the jurisdiction of the CFC."). *See also* Kokott, *supra* note 50, loc. 1.2.2. ("CFC regimes trigger additional taxation of the parent company in its residence state when there has been (in the parent company state's view) insufficient taxation of the foreign controlled company in that company's residence state."); Asif H. Qureshi & Ajay Kumar, The Public International Law of Taxation: Text, Cases and Materials 37 (2nd ed. 2019) ("[I]n substance the CFC legislation can be regarded as constituting a direct taxation of the profits of a foreign corporation."). See *infra* Part III.C.2 for an explanation of the soft-law nature of connections based on the idea of tax nexus.

[73] Schoueri & Galendi Jr., *supra* note 71, at 2–3.

[74] *Id.* at 4 ("In his lectures, Prof. Luís Schoueri makes a point by asking students whether Brazil can levy a property tax on the White House. The negative answer is not attributable to the absurdity of the idea, but to the notion of jurisdiction: Brazil lacks jurisdiction to levy a tax on property situated outside its territory (and we do not need a tax treaty stating that)."). They also cite the OECD Commentary on Article 7 of its Model Tax Convention on why controlled foreign corporation rules are treaty compatible, yet the binding effect of these commentaries is highly disputed since they are produced by an international organization without lawmaking power. *See* Aitor Navarro, *International Tax Soft Law Instruments: The Futility of the Static v. Dynamic Interpretation Debate*, 48 Intertax 848, 851–53 (2020) (arguing that OECD commentaries are soft law that cannot derive binding status from international public law *acquis*); Craig West, *References to the OECD Commentaries in Tax Treaties: A Steady March from "Soft" Law to "Hard" Law?*, 9 World Tax J. 117, 149 (2017) (noting that, even when OECD commentaries are referenced by treaty or protocol, they might represent "a *hard legal form*, but not necessarily hard law."); Peter J. Wattel & Otto Marres, *The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties*, 43 Eur. Tax'n 222, 234 (2003) (recognizing the uncertainties around the legal status of the OECD commentaries but submitting that they "may be regarded as 'context'" or "equated to parliamentary history" for purposes of treaty interpretation); Thomas Dubut, *The Court of Justice and the OECD Model Tax Conventions or the Uncertainties of the Distinction between Hard Law, Soft law, and No Law in the European Case Law*, 40 Intertax 1, 12 (2012) (observing "a slight but steady evolution" of the European Court of Justice's caselaw towards rejecting the OECD model and its commentaries as a valid legal basis for deciding cases involving tax treaties or domestic law). *But see* Frank Engelen, *Some Observations on the Legal Status of the Commentaries to the OECD Model*, Bull. Tax Treaty Monitor 105, 109 (2006) (arguing that "the OECD Member countries may, by conduct, be held to have accepted the Commentaries so as to become bound by the Commentaries for the purpose of interpreting the tax treaties in force between them.").

III below, there are in fact no established binding international law norms that confine regimes looking through the corporate form to situations involving abuse or artificiality.

B. *Undertaxed profits rule*

Observers closely following developments at the OECD quickly noticed that, in the first pillar two documents and discussions, the abbreviation UTPR referred to undertaxed payments, and not undertaxed profits, as the rule is now known among subject matter experts. The underlying idea is constant, though: The UTPR's role is to be a backstop to the IIR. When the model rules expanded the application of the UTPR from payments to profits (Articles 2.4, 2.5, and 2.6), the outcome was to effectively broaden the pool of countries participating in the overall Globe scheme of collecting the difference between the effective tax rate paid by a low-taxed constituent entity and the agreed 15% rate. This shift in the design of the rule generated pushback, igniting an intense debate among international tax experts regarding whether the new UTPR could be considered lawful under both treaty and non-treaty international law.

One of the first to raise issues was Professor Jinyan Li. She noted that the rule change deviated from the terms of the 2021 agreement;[75] that the new UTPR would conflict with existing tax treaties, specifically Articles 7 (permanent establishment),[76] 9 (business profits),[77] 23 (double tax relief), and 24 (nondiscrimination), as well as the *pacta sunt servanda* principle (Article 26 of the Vienna Convention),[78] and some domestic laws of either the adopting ju-

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[75] Jinyan Li, *The Pillar 2 Undertaxed Payments Rule Departs from International Consensus and Tax Treaties*, 105 Tax Notes Int'l 1401, 1405 (2022). *See also* Angelo Nikolakakis & Jinyan Li, *UTPR: Unprecedented (and Unprincipled?) Tax Policy Response*, 109 Tax Notes Int'l 473, 750 (2023) (claiming that the new UTPR "departs from the value creation principle," "is, indeed, diabolical," and "arguably more of an economic sanction to coerce jurisdictions into adopting an IIR and/or a QDMTT."); Angelo Nikolakakis & Jinyan Li, *UTPR—No Taxation Without Value Creation!*, 110 Tax Notes Int'l 49, 49 (2023) (replying to criticisms of the previous essay).

[76] *See also* Ana Paula Dourado, Editorial, *The Pillar Two Top-Up Taxes: Interplay, Characterization, and Tax Treaties*, 50 Intertax 388, 395 (arguing Globe rules qualify as income taxes within the scope of tax treaties and that they are "incompatible with the allocation of taxing rights as defined in Articles 7 and 10-13 (at least)"). For discussion, see *infra* Part III.C.3.

[77] *See also* Vikram Chand, Alessandro Turina & Kinga Romanovska, *Tax Treaty Obstacles in Implementing the Pillar Two Global Minimum Tax Rules and a Possible Solution for Eliminating the Various Challenges*, 41 World Tax J. 3, 33–37 (2022) (suggesting that domestic adoption of the IIR and UTPR might result in overriding Article 9 in tax treaties); *infra* Part III.C.4.

[78] These issues relate to treaty overrides, which are possible in countries like the United States, the United Kingdom, Australia, Canada, New Zealand, Austria, and Germany as well as via EU directives, but might face challenges in some other jurisdictions. Whether overriding a treaty with domestic law is possible depends on each legal system and usually involves the questions of whether a specific country adopts the monist approach (national and international law form one single order) or the dualist approach (national and international law are separate), how local courts interpret and apply the *lex posterior* and *lex specialis* doctrines, and whether the national constitution considers treaties to be hierarchically superior. For a discussion, see Reuven S. Avi-Yonah, *Pacta Sunt Servanda? The Problem of Tax Treaty Override*, 1 Brit. Tax Rev. 25, 33–34 (2022) (observing that "[i]n the last century, the US was almost alone in overriding tax treaties"

risdiction itself or others;[79] and that the end result could be national courts reaching disparate decisions in cases of dispute. Professor Li's article quickly led to two opposing responses within the international tax community: One criticizing her claims and the other lending support.[80] Later, other commentators built on the issues she raised to argue that pillar two, if it were to be compatible with treaties, would need to follow the same path as pillar one, which is planned to be implemented through a new multilateral instrument.[81] Others joined the debate either to further criticize the UTPR,[82] or to defend it against

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but "today, the picture is different," with domestic law overriding tax treaties in, for example, Australia, Canada, Germany, New Zealand, the United Kingdom, as well as EU law in respect to member states' tax treaties); Lilian V. Faulhaber, *The Current State of Tax Treaty Overrides*, 1 Brit. Tax Rev. 21, 23 (2022) ("[O]ur understanding of treaty overrides needs to be much more nuanced than the commonly held view that the US engages in treaty overrides and all other countries do not."); Sachin Sachdeva, *Tax Treaty Overrides: A Comparative Study of the Monist and the Dualist Approaches*, 41 Intertax 180, 206 (2013) (classifying Canada, China, France, Germany, India, Japan, Spain, the Netherlands, the United Kingdom, and the United States between monist, dualist, or dialectical in respect to general treaty practice and tax treaty practice, and asserting whether they authorize override).

[79] *See also* Ana Paula Dourado, Editorial, *Pillar Two and the Principles of Ability-to-Pay, Legality, and Symmetry*, 51 Intertax 448, 450 (2023) (suggesting that Globe rules could violate constitutional and EU legal principles); Lucas de Lima Carvalho, *The Constitutional Case Against the UTPR in Brazil*, 109 Tax Notes Int'l 609, 615–617 (2023) (arguing that the UTPR could be declared unconstitutional in Brazil). For a response to the second paper, *see* Tarcísio Diniz Magalhães & Débora Ottoni Uébe Mansur, *How Brazil Could Design a Tax to Achieve UTPR Goals*, 110 Tax Notes Int'l 225, 226–28 (2023) (citing Brazilian legislation, judicial precedent, and doctrine that could support the constitutionality of the UTPR).

[80] Casey Plunket, Letter to the Editor, *What's in a Name? The Undertaxed Profits Rule*, 108 Tax Notes Int'l 1507, 1507–08 (2022) (contesting Li's claims); Angelo Nikolakakis, Letter to the Editor, *Bait and Switch—A Reply to Casey Plunket*, 106 Tax Notes Int'l 191, 191–95 (2022) (defending Li's claims).

[81] Michael Lebovitz et al., *If Pillar 1 Needs an MLI, Why Doesn't Pillar 2*, 107 Tax Notes Int'l 1009, 1013 (2022) (suggesting that both pillars reallocate profits in contradiction with existing bilateral tax treaties, thus requiring a multilateral instrument to be legally valid); Robert Goulder, *Pillar 2 and Tax Treaties: MLI, Where Art Thou?*, 108 Tax Notes Int'l 775, 778 (2022) (arguing that "pillar 2 would benefit from an MLI [multilateral instrument]" to avoid "a surge of costly and time-consuming disputes."); Antonio Tomassini & Marica De Rosa, *Uncertainties Hold Back Achievement of OECD Pillar II Goals*, 51 Intertax 183, 190 (2023) (predicting that, absent a multilateral instrument to implement Globe, there will be "uncertainty and a surge of tax litigation.").

[82] Jefferson VanderWolk, Letter to the Editor, *Tax Treaties Pose Problems for the UTPR*, 108 Tax Notes Int'l 29, 29 (2022) (claiming CFC rules are compatible with tax treaties but not the UTPR because "[t]here is clearly a difference between taxing a controlling shareholder on the profits of a CFC and taxing a company on the profits of an affiliate over which it has no control."); Jefferson VanderWolk, Letter to the Editor, *The UTPR is Flawed: A Response to Prof. Picciotto*, 108 Tax Notes Int'l 285, 285 (2022) (claiming the UTPR violates Article 9 because this provision "relates only to situations in which affiliates resident in the two contracting states have had dealings with each other" and Article 7 because this provision "prevents the contracting states from taxing business profits of a resident of the other contracting state unless the profits are attributable to a permanent establishment in the taxing jurisdiction."); Jefferson VanderWolk, Letter to the Editor, *The UTPR Disregards the Need for Nexus*, 108 Tax Notes Int'l 545, 545 (2022) (claiming the UTPR involves "the collection of tax by a country on income from business activities and sales having no economic connection to the taxing country."); Jefferson VanderWolk, Letter to the Editor, *Much Ado About Pillar 2*, 108 Tax Notes Int'l 821,

each new critique.[83] Among the novel critiques were non-treaty arguments of

821 (2022) (responding to various essays defending the legality of the UTPR); Jefferson VanderWolk, Letter to the Editor, *The UTPR is Far from Becoming Part of Customary International Tax Law*, 108 Tax Notes Int'l 1069, 1069 (2022) (responding to Avi-Yonah's defense of the UTPR); Jefferson VanderWolk, Letter to the Editor, *The UTPR: Taxing Rights Gone Wild*, 108 Tax Notes Int'l 1369, 1370 (2022) (claiming "the UTPR departs from one of the fundamental elements of tax jurisdiction—the nexus requirement—in an unprecedented way"); Jefferson VanderWolk, *Global Minimum Tax: The Road Ahead*, 109 Tax Notes Int'l 51, 52 (2023) (claiming "the UTPR top-up tax in a given country will relate to profits that have no connection to the country imposing the tax."); Jefferson VanderWolk, Letter to the Editor, *The UTPR, Treaties, and CFC Rules: A Reply to Avi-Yonah and Schler*, 109 Tax Notes Int'l 187, 187 (2023) (responding to two letters defending the UTPR's compatibility with tax treaties); Nathan Boidman, Letter to the Editor, *Two More Weak Links in the Pillar 2 Project*, 107 Tax Notes Int'l 1485, 1485 (2022) (claiming the UTPR could be challenged in courts and invite U.S. retaliation); Nathan Boidman, Letter to the Editor, *No Rationale Role for the UTPR*, 108 Tax Notes Int'l 287, 287 (2022) (claiming the UTPR "would *plain* and *simple* be taxing phantom/nonexistent profit"); Nathan Boidman, Letter to the Editor, *Avi-Yonah's Customary International Tax Law Doesn't Cut It in Canada*, 108 Tax Notes Int'l 1079, 1079 (2022) (responding to Avi-Yonah's defense of the UTPR); Nathan Boidman, Letter to the Editor, *An Ironic Turn: Skeptic and Supporter Find Some UTPR Common Ground*, 108 Tax Notes Int'l 1533, 1533 (2022) (claiming "the UTPR is totally invalid"); Nathan Boidman, Letter to the Editor, *Pillar 2—The Ironic Circularity of the UTPR Debate*, 109 Tax Notes Int'l 29, 29 (2023) (claiming the UTPR was intended "to function as an *in terrorem* weapon that each subsidiary country holds over a parent country to adopt the IIR."); Nathan Boidman, Letter to the Editor, *UTPR's Effect on Outside Shareholders: Another Reason to Oppose?*, 109 Tax Notes Int'l 577, 577 (2023) (claiming the UTPR would have an "inappropriate effect on outside or minority shareholders."); Nathan Boidman, Letter to the Editor, *Christians and Shay Almost See UTPR's Fatal Flaw*, 109 Tax Notes Int'l 189, 189 (2023) (claiming the UTPR "is an invalid expropriation or illegal confiscation"); Nathan Boidman, Letter to the Editor, *Another Nail in the Pillar 2 Coffin?*, 110 Tax Notes Int'l 703, 703 (2023) (same as previous); Nathan Boidman, Letter to the Editor, *Undiscussed UTPR Fundamentals Sorely Missed*, 110 Tax Notes Int'l 1015, 1015 (2023) (calling the UTPR "totally unprincipled", an "utterly unsupportable fiat", and "diabolical"); Nathan Boidman, Letter to the Editor, *More Pillar 2 Imponderables?*, 110 Tax Notes Int'l 1187, 1187 (2023) (calling the UTPR "ridiculous"); Kim Blanchard, Letter to the Editor, *UTPR: An Undemocratic Vehicle to Force GLOBE Compliance*, 109 Tax Notes Int'l 1219, 1219 (2023) (calling the UTPR "blackmail"); Kim S. Blanchard, *Can U.S. Worldwide Taxation and Pillar 2's Minimum Tax Peacefully Coexist?*, 111 Tax Notes Int'l 639, 666 (2023) (claiming that under the UTPR "the requisite connection between the income being taxed and the identity of the taxpayer does not exist."); Scott Wilkie, *Pillar 2—'What's It All About?'*, 110 Tax Notes Int'l 449, 499 (2023) (questioning the need for the UTPR); Angelo Nikolakakis, Letter to the Editor, *What's It All About? We Come Full Circle Under Pillar 2*, 110 Tax Notes Int'l 587, 587 (2023) (claiming that, even if the UTPR is an excise tax rather than an income tax, it would still violate treaties' nondiscrimination provisions); Sjoerd Douma et al., *The UTPR and International Law: Analysis from Three Angles*, 110 Tax Notes Int'l 857, 882 (2023) (arguing the UTPR creates frictions with tax treaties and customary international law but frictions with EU law are less likely); Yariv Brauner, Editorial, *The Rule of Law and the Rule of Reason in the Aftermath of BEPS*, 51 Intertax 268, 269 (2023) (claiming the UTPR is incompatible with "the norms of public international law"); Peter Hongler et al., *UTPR—Potential Conflicts with International Law?*, 111 Tax Notes Int'l 141, 141 (2023) (claiming the UTPR might infringe tax treaties, customary international law, the right to property, and bilateral investment treaties); Catherine Brown & Elizabeth Whitsitt, *Implementing Pillar Two: Potential Conflicts with Investment Treaties*, 71 Can. Tax J. 189, 201–05 (2023) (considering possible investment treaty-based claims against Globe rules).

[83] Sol Picciotto, Letter to the Editor, *UTPR Critics Miss the Point of Tax Treaty Principles*, 108 Tax Notes Int'l 153, 153 (2022) (criticizing tax practitioners for "casting around for legal

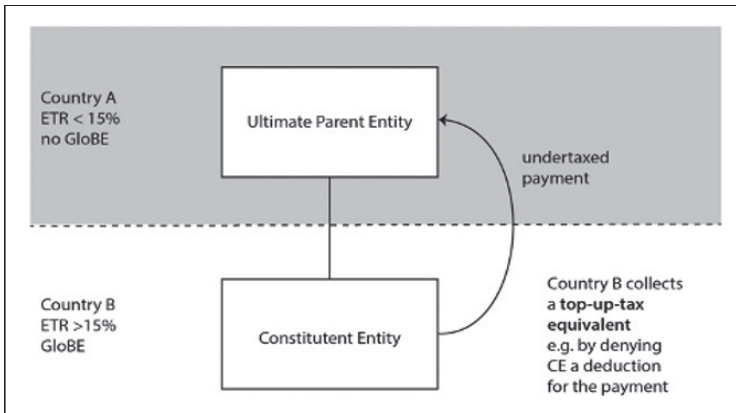
arguments to support challenges in national courts" to the UTPR); Sol Picciotto, Letter to the Editor, *Formulary Apportionment: The Last Best Hope for MNEs*, 108 Tax Notes Int'l 437, 437 (2022) (affirming the compatibility of the UTPR with Articles 7 and 9 in tax treaties); Sol Picciotto, Letter to the Editor, *Justifying the UTPR: Nexus and Economic Connection*, 108 Tax Notes Int'l 667, 667 (2022) (claiming the UTPR allocates taxing rights "in proportion to the MNE's [multinational enterprise] employees and physical assets in the jurisdiction."); Sol Picciotto, Letter to the Editor, *The Long and Winding Road Leads to the Unitary Approach*, 108 Tax Notes Int'l 1065, 1066 (2022) (opining that the UTPR's allocation factors (payroll and physical assets) provide "a much clearer economic connection . . . than the presence of controlling shareholders does for the IIR"); Sol Picciotto, *Fixing or Nixing GLOBE*, 111 Tax Notes Int'l 1325, 1332 (2023) (stating that "[p]resenting arguments to challenge the validity of the new rules via treaties is no doubt meat and drink for many practitioners."); Jeffery M. Kadet, Letter to the Editor, *Defending the UTPR: Creative Corporate Structuring Can't Hide Real Connections*, 108 Tax Notes Int'l 1071, 1072 (2022) (claiming the UTPR's "linkage is assumed based on global economic data."); Tarcísio Diniz Magalhães, Letter to the Editor, *UTPR Opposition: A Game of Whack-a-Mole*, 108 Tax Notes Int'l 1507, 1507 (2022) (pointing out that UTPR opposers keep alternating between unsubstantiated claims); Avi-Yonah, *supra* note 69, at 952 (proposing that the 137-country agreement on Globe represents "a change in CITL [customary international tax law], and it is too late to argue that [CITL] precludes any of these countries from applying the UTPR, even if it results in taxing a U.S. multinational enterprise on U.S.-source income."); Reuven S. Avi-Yonah, *The UTPR and the Treaties*, 109 Tax Notes Int'l 45, 46 (2023) (restating that customary international tax law was recently modified by the Globe agreement and that treaties present no obstacle to the UTPR because they do not "generally limit taxation by a country of its own residents . . . ."); Reuven S. Avi-Yonah, Letter to the Editor, *China Yawns at Pillar 2*, 110 Tax Notes Int'l 1363, 1184 n.2 (2023) (restating that "nothing in the treaties prevents a country from applying the UTPR to its own corporations or permanent establishments . . . ."); Reuven S. Avi-Yonah, *The UTPR and the Credits*, 110 Tax Notes Int'l 1183, 1368 (2023) (arguing that "[t]he critique that the UTPR is affecting Congress's ability to impose U.S. taxes on the U.S. income of U.S. MNEs [multinational enterprises] seems exaggerated."); Reuven S. Avi-Yonah, *Pillar 2 and the BITs* (May 28, 2023) (unpublished paper) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4461285 [https://perma.cc/W3XC-B29M] (claiming that it is unlikely investors will challenge the UTPR under bilateral investment treaties (BITs) because even a favorable arbitral award would trigger top-up taxation by other Globe participants that are not parties to the invoked BIT); Schler, *supra* note 72, at 27 (arguing there is no substantive distinction between CFC rules and the UTPR); Michael L. Schler, Letter to the Editor, *Pillar 2 and Minority Interests*, 109 Tax Notes Int'l 715, 715 (2023) (arguing someone who invests in a company subject to the UTPR after its entering into force has no legal standing or grounds to object to a publicly known tax); Heydon Wardell-Burrus, *Four Questions for UTPR Skeptics*, 108 Tax Notes Int'l 699, 703 (2022) (inviting opponents of the UTPR to see the bigger picture); Heydon Wardell-Burrus, Letter to the Editor, *The UTPR as a Rule of Recognition*, 108 Tax Notes Int'l 1527, 1529 (2022) ("To challenge a working UTPR on the basis that it is in breach of customary international law seems to make the claim that a critical mass of the international community, acting collectively and through their law-making institutions, is breaching a set of international customary legal norms that they consider binding."); Radhakishan Rawal, Letter to the Editor, *A Different Angle on UTPR and International Tax Law*, 108 Tax Notes Int'l 1073, 1074 (2022) (observing that "the fact that the new law is different from the old law, deviating from the old law's rationale, is unlikely to help" a lawsuit against the UTPR); Allison Christians & Stephan E. Shay, *The Consistency of Pillar 2 UTPR with U.S. Bilateral Treaties*, 109 Tax Notes Int'l 445, 447–48 (2023) (arguing the UTPR does not violate income tax treaties because it is not a tax on income); Michael Lennard, *Customary International Law and Tax—The Fog of Law*, 109 Tax Notes Int'l 601, 607–08 (2023) ("[T]he concept of general principles of law does not assist in providing a nexus requirement that might be contravened by the UTPR"); Tarcísio Diniz Magalhães & Allison Christians, *UTPR, Normative Principles, and the Law: A Rejoinder to Nikolakakis and Li*, 109 Tax Notes Int'l 1137, 1139–40 (2023) (stating that UTPR critics are demanding extralegal requirements for states to tax their own residents).

violations of the principle of comity,[84] of customary international law,[85] of a nexus requirement,[86] and of general boundaries to the tax jurisdiction.[87]

To understand the current stage of the debate and all the criticisms so far, it is necessary to explain and compare the original and more recent format of the UTPR. The following paragraphs provide such analysis. But readers should bear in mind that, under either format, an amount still only gets collected if none of the involved jurisdictions taxes first with an IIR or, even before that, with a QDMT. Only when those elements are missing is the UTPR switch engaged.

Under a payment-based UTPR, the jurisdiction from which an entity (typically, a lower-tier entity, such as a subsidiary) makes an outgoing payment (typically, upstream to a parent company) collects the equivalent of the top-up tax. This equivalent can be collected, for example, by denying part of the deduction of the payment against domestic income, or by an equivalent measure such as increased withholding. Figure 1 illustrates.

Figure 1. Undertaxed Payments Rule



[84] VanderWolk, *The UTPR is Flawed*, *supra* note 82, at 285. Comity is understood as a norm of courtesy or politeness between states, thus lacking enforceability. *See* Joel R. Paul, *Comity in International Law*, 32 Harv. Int'l L.J. 1, 79 (1991) ("Comity then cannot be justified on the basis of international legal obligation."); Danielle Ireland-Piper, *Outdated and Unhelpful: The Problem with the Comity Principle and Act of State Doctrine*, 24 Austl. Int'l L.J. 15, 33 (2018) (showing that the comity principle is unsatisfactory in adjudicating extraterritoriality cases and arguing that it should be abandoned). In any case, comity seems unable to bar Globe because one of states' key commitments under pillar two is to "accept the application of the GloBE rules applied by other IF [Inclusive Framework] members including agreement as to rule order and the application of any agreed safe harbours." Statement, *supra* note 14, at 3. We return to the issue of comity with respect to the corporation *infra* Part III.D.

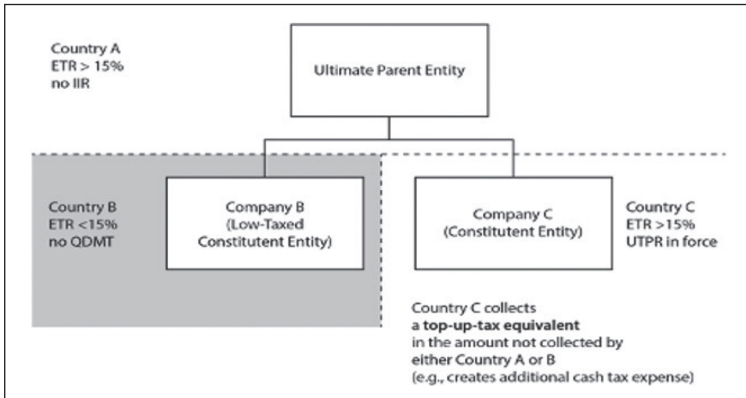
[85] VanderWolk, *The UTPR is Far from Becoming Part of Customary International Tax Law*, *supra* note 82, at 1069–70. The existence of customary international tax law is considered *infra* Part III.

[86] VanderWolk, *Much Ado About Pillar 2*, *supra* note 82, at 823. See *infra* Part III for a discussion of tax nexus.

[87] VanderWolk, *The UTPR: Taxing Rights Gone Wild*, *supra* note 82, at 1369–70. See *infra* Part III for discussion of jurisdiction in tax matters.

Under the new profit-based UTPR, by contrast, any country in the corporate structure (other than the ultimate or intermediate parent jurisdiction) can collect a top-up-tax equivalent amount so long as there is no QDMT or IIR doing so first. The overall effect is to switch the top-up tax collection from the unwilling top-level jurisdiction to basically any other willing jurisdictions downstream in the chain of companies that form the data giant. For example, imagine a simple three-entity, three-country structure in which the parent (Company A) is in Country A, which does not adopt Globe; one of the subsidiaries (Company B) is in Country B, where its effective tax rate falls below 15%; and the other (Company C) is in Country C, which adopts Globe. Upon Country B's reluctance to tax Company B at 15% (for example, with a QDMT), and Country A's unwillingness to collect the top-up tax (via an IIR), Country C's UTPR switches on. Figure 2 illustrates.

Figure 2. Undertaxed Profits Rule



According to the Globe model rules (Article 2.4.1), this additional tax can be collected by way of a denial of deduction or any other domestic measure that results in an "additional cash tax expense" for Company C. The cash tax expense must match the amount of top-up tax that was computed for Company B but collected by neither Country B (via a QDMT) nor Country A (via an IIR). Because in our example Country C is the only other available jurisdiction in the data giant's structure, the entire top-up amount could be collected by Country C. The situation gets more complicated when there is more than one host country within the multinational's structure willing to collect the top-up tax. If in the example, Country D (hosting another subsidiary) has an effective tax rate above 15% and adopts Globe, the top-up tax amount is split between the UTPR jurisdictions according to a formula using the number of employees and net book value of tangible assets (Article 2.6.1), again with a switchover rule if for some reason one does not collect its share (Article 2.6.3).[88]

[88] OECD Examples, *supra* note 30, at 20–22.

Some critics claim that it is nonsensical to treat the income of sister and parent entities located abroad as anything but fully separate from a domestic subsidiary because the subsidiary does not control those entities. The reformatted UTPR, so the argument goes, would allow countries to tax income from outside sources that lack a direct connection with the national taxpayer. This is illustrated in Figure 2, where Country C, despite itself imposing taxes above the minimum rate, taxes its constituent entity more because Country B's constituent entity has undertaxed profits.

For instance, scholars Filip Debelva and Luc De Broe have invoked customary international law to argue that the UTPR conflicts with what they call the "nexus rule" and the "principle of personality".[89] On the first, Debelva and De Broe claim "the UTPR allocates taxes to entities that have no (or a very indirect and remote) shareholding in the low-taxed subsidiaries (e.g., sister companies) independent from any economic nexus with the realization of profit in the other jurisdiction."[90] On the second, Debelva and De Broe claim the UTPR violates the idea that "the legal personality of an entity should be respected, and a look-through approach should only be applied in exceptional cases, such as in situations of abuse."[91] These and the previous critiques based on general international law are considered, and refuted, in specific sections of Part III below.

C. *Subject to tax rule*

Finally, the STTR is distinguished from the QDMT, IIR, and UTPR in that the STTR imposes a 9% tax rate instead of the generally agreed minimum 15%, and that it takes precedence over the other rules. Owing to this ordering rule, the STTR partially switches off both the IIR and the UTPR (and perhaps even the QDMT). Because the STTR can only charge a top-up tax of maximum 9%, it leaves room for the other rules to catch the 6% difference to get to the global minimum rate. This conclusion stems from the fact that Globe treats STTR-based taxes as covered taxes for purposes of assessing whether an in-scope company has paid an effective tax rate of 15%.

The STTR is further distinguished from the other Globe components in that it is the only treaty-based rule within the Globe framework. For this reason, its implementation cannot be achieved unilaterally through domestic law reform like the other rules. The STTR requires negotiation among treaty partners and formal amendment of each applicable treaty, unless a multilateral instrument is designed to modify the whole treaty network at once, as it is currently being considered by the OECD's inclusive framework.

Lastly, the STTR does not apply to all income within Globe's scope, but only to a set of prescribed deductible payments between related parties, such

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[89] Filip Debelva & Luc De Broe, *Pillar 2: An Analysis of the IIR and UTPR from an International Customary Law, Tax Treaty Law and European Union Law Perspective*, 50 Intertax 1, 1–5 (2022).

[90] *Id.* at 5.

[91] *Id.* at 4.

as interest and royalties. As such, it is similar to the original UTPR in the way it operates, that is, the STTR imposes a withholding tax (or raises a treaty's existing withholding tax) on gross (rather than net) income arising from outgoing payments, in cases where that income is being taxed below 9%.

The STTR is a mechanism that was included in pillar two at the request of developing countries (understood as those countries with low gross national income (CNI) per capita as calculated by the World Bank).[92] But the OECD has not provided as much attention or guidance on the implementation of this rule, as compared to the other three.[93]

III. What is the Legal Content of the Purported Prohibitions?

In this Part, we aim to respond to each of the general international law-based prohibitions referenced above. Part A reviews the literature on sovereignty and the right to tax, presenting the views of a wide range of scholars who have explicitly written on this topic.[94] Part B examines the existence and scope of customary international tax law as a possible barrier to reform. Part C lays out a set of norms that commentators have raised as possible barriers and examines the potential legal impact of each. Finally, Part D examines the notion of comity with respect to recognition of the corporate form, and the implications of this norm for tax law. We conclude that the prohibitions commentators have raised to date may have persuasive authority for decision makers, but none constitute "binding, mandatory, or imperative authority"[95] in the sense of enforceable law that could be invoked to bar states from reforming their tax systems.

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[92] Statement, *supra* note 14, at 5 ("IF [Inclusive Framework] members recognize that the STTR is an integral part of achieving a consensus on Pillar Two for developing countries.").

[93] *Compare* Alexander Fedan, *Case Study Analysis of the OECD Pillar One and Pillar Two Allocations to Developing Countries*, 75 Bull. Int'l Tax'n 382, 399 (2021) (arguing that only the STTR "may generate the relatively consistent and stable financing stream required for developing countries to better mobilize their domestic resources") *with* Heydon Wardell-Burrus, *Pillar Two and Developing Countries: The STTR and GloBE Implementation*, 51 Intertax 118, 126 (2023) (arguing the STTR "will not in fact allow developing countries to raise significant additional revenue.").

[94] Our review is limited to English-language sources, which might exclude many views from different parts of the world. We also recognize that this literature is largely dominated by Global North (often male) scholars, though we also cite scholarship written in English by scholars from outside North America and Europe.

[95] On this distinction, see Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 Okla. L. Rev. 55, 63–64 (2009) (providing a preliminary list of sources that, though cited by courts, are not binding: "1. Other courts outside of the court's own jurisdiction, whether other circuit courts or other state courts (majority and concurring opinions). 2. The laws of other states or of the federal government and agency regulations. 3. Legislative history or debate, especially if the question is one of statutory interpretation. 4. Restatements of the law, such as the Restatement of Torts or Contracts. 5. Treatises, such as Lawrence Tribe's *American Constitutional Law*. 6. Law review articles, notes, and comments. 7. Other academic sources, such as book-length treatments of an issue (e.g., John Rawls' *Theory of Justice*) or empirical or economic studies of a certain matter. 8. General interest sources (books, periodicals, and possibly literary sources). 9. General new sources (newspapers and magazines). 10. Internet sources, including blogs. 11. Moral principles themselves, such as the golden rule or the idea of equality. 12. Discouraged, but in principle possible sources: memorandum opinion and judgments, the Bible, the *National Enquirer*, the judge's father-in-law.").

A. *Sovereignty and the right to tax*

The literature on state sovereignty, the power to tax, and fiscal jurisdiction is voluminous, and authors have approached these topics from various angles, including philosophy, economics, international relations, and law.[96] In legal doctrine, it is not always easy to determine with certainty every author's position on whether and how precisely general international law norms might constrain states in approving tax laws that affect economic situations not confined to national borders. Some legal scholars are less than explicit about their views on the so-called "right to tax" (or "taxing right"), or what the affirmation of international law impediments to taxation might entail for different groups of countries. Nevertheless, it seems possible to organize the various doctrinal works in the legal field according to two main traditions or schools of thought.

The first group either outrightly rejects any overarching international law limitations on states' taxing powers, or argues instead that, even though such limits could exist, they are too abstract, vague, or impossible to define in a way that provides clear guidance on how these rights are to be delimited. Examples

[96] *See* Tax Sovereignty in the BEPS Era xxiii (Sérgio André Rocha & Allison Christians eds., Kluwer 2016) (describing various legal analyses "dealing with different facets of a single topic: How tax sovereignty is shaped in a post-BEPS world."); Diane Ring, *What's at Stake in the Sovereignty Debate? International Tax and the Nation-State*, 49 Va. J. Int'l. 155, 159–83 (2008) (tax scholar using international relations theory); Diane Ring, *Democracy, Sovereignty and Tax Competition: The Role of Sovereignty in Shaping Tax Cooperation*, 9 Fla. Tax Rev. 555, 592–94 (2009) (same as previous); Allison Christians, *Sovereignty, Taxation and Social Contract*, 18 Minn. J. Int'l L. 99, 129–48 (2009) (tax scholar using social contract theories, specifically John Rawls' and Martha Nussbaum's); Allison Christians, *Putting the Reign Back in Sovereign*, 40 Pepp. L. Rev. 1373, 1389–02 (2012-2013) (analysis of sovereignty in the context of the U.S. Foreign Account Tax Compliance Act (FATCA)); Tsilly Dagan, *Tax Sovereignty in an Era of Multilateralism*, *in* EU Law and the Building of Global Supranational Tax Law: EU BEPS and State Aid 37, 40–42 (Dennis Weber ed., 2017) (tax scholar using market theories); Tsilly Dagan, *The Marketization of Tax Sovereignty*, *in* Forms of Pluralism and Democratic Constitutionalism 301, 302–03 (Andrew Arato, Jean L. Cohen & Astrid von Busekist eds., Columbia University Press 2017) (same as previous); Tsilly Dagan, *Unbundled Tax Sovereignty—Refining the Challenge*, 76 Bull. Int'l Tax'n 318, 319–21 (2022) (same as previous); Jennifer Bird-Pollan, *The Sovereign Right to Tax: How Bilateral Investment Treaties Threaten Sovereignty*, 32 Notre Dame J.L. Ethics & Pub. Pol'y 107, 119–28 (2018) (tax scholar using investment law); Luis Calderon Gomez, *Transcending "Tax" Sovereignty and Tax Standardization: Three Questions*, 45 Yale J. Int'l L. 191, 204–12 (2020) (tax scholar using human rights and trade law); Eric San Juan, *Fiscal Sovereignty: Tax Havens and the Demarcation of the Third World*, 54 Geo. Wash. Int'l L. Rev. 43, 74–95 (2022) (tax scholar using political economy); International Tax Competition: Globalisation and Fiscal Sovereignty 10 (Rajiv Biswas ed., 2002) ("[C]ollection of papers by experts who have, for the most part, been closely involved during the period since the publication of the 1998 OECD Report in the matter of international tax competition, particularly from the small states and developing country perspective."); Laurens van Apeldoorn, *BEPS, Tax Sovereignty and Global Justice*, 21 Crit. Rev. Int'l Soc. & Pol. Phil. 478, 480–93 (2018) (philosophical analysis); Peter Dietsch, *Rethinking Sovereignty in International Fiscal Policy*, 37 Rev. Int'l Stu. 2107, 2116 (2011) (philosophical analysis); Peggy B. Musgrave, *Sovereignty, Entitlement, and Cooperation in International Taxation*, 26 Brook. J. Int'l L. 1335, 1336–44 (2001) (economist's analysis); Peggy B. Musgrave, *Combining Fiscal Sovereignty and Coordination: National Taxation in a Globalizing World*, *in* The New Public Finance: Responding to Global Challenges 167, 168–73 (Inge Kaul & Pedro Conceição eds., 2006) (same as previous).

of authors, in the chronological order of their scholarship, more or less sharing one of these two views include: Harold Wurzel,[97] Martin Norr,[98] Rudolf Weber-Fas,[99] Yitzhak Hadari,[100] William Park,[101] Arnold Knechtle,[102] Robert Palmer,[103] Wolfgang Schön,[104] Michael Kobetsky,[105] Jérome Monsenego,[106]

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[97] Harold Wurzel, *Foreign Investment and Extraterritorial Taxation*, 38 Colum. L. Rev. 809, 814, 816 (1938) ("[I]s there anything in the written or unwritten law of nations to indicate a universally recognized rule authoritatively assigning among nations, and thereby impliedly limiting, the jurisdiction to tax? The answer is very definitely in the negative . . . [T]here is nothing approaching unanimity among experts, except as to their common starting point, *i.e.,* that there is no *recognized* jurisdictional rule in international tax law.").

[98] Martin Norr, *Jurisdiction to Tax and International Income*, 17 Tax L. Rev. 431, 431 (1962) ("No rules of international law exist to limit the extent of any country's tax jurisdiction . . . except to the extent they may be provided by treaty in any particular case . . . [W]ithin its own legal and fiscal framework a country is free to adopt whatever rules of tax jurisdiction it chooses. This is true no matter how broad may be the reach of the resulting tax net.").

[99] Rudolf Weber-Fas, *Corporate Residence Rules for International Tax Jurisdiction: A Study of American and German Law*, 5 Harv. J. on Legis. 175, 175 (1968) ("[T]here exist no rules of international customary law which limit the extent of any country's tax jurisdiction to the confines of its territory.").

[100] Yitzhak Hadari, *The Choice of National Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprises*, 1974 Duke L.J. 1, 53 (1974) ("No rules of international law exist to limit the tax jurisdiction of nation-states over their nationals . . . [W]ithin its own legal and fiscal framework, a country is free to adopt any theories of tax jurisdiction it selects.").

[101] William W. Park, *Fiscal Jurisdiction and Accrual Basis Taxation: Lifting the Corporate Veil to Tax Foreign Company Profits*, 78 Colum. L. Rev. 1609, 1609–10 (1978) ("Although not yet *locus classicus,* [Martin Norr's] assertion summarizes a view that finds favor among academic and practicing lawyers. Even if it is admitted that a relevant nexus must exist between the taxing sovereign and the person, property, or income to be taxed, the competing jurisdictional claims of other states are seldom viewed as imposing limits on national competence.").

[102] Arnold A. Knechtle, Basic Problems in International Fiscal Law 37 (1979) ("Up to the present, there has been no internationally recognized principle in public international law which limits the sovereignty of states in fiscal matters. . . . Fiscal jurisdiction, i.e. sovereignty in the sphere of fiscal law means the non-derivative sovereignty of a state, which is in principle internally as well as externally unlimited.").

[103] Robert L. Palmer, *Toward Unilateral Coherence in Determining Jurisdiction to Tax Income*, 30 Harv. Int'l L.J. 1, 3–4 (1989) ("Principles of international law provide only very general guidance regarding the "proper" bounds of national tax jurisdiction. Each country therefore has substantial unfettered discretion to decide how far its tax collectors should cast their nets.").

[104] Wolfgang Schön, *International Tax Coordination for a Second-Best World (Part I)*, 1 World Tax J. 67, 93 (2009) ("While it should be accepted that the 'genuine link' approach under international public law does only define the outer limits of tax jurisdiction, the wide leeway offered by this analysis to governments makes it unadvisable to rely on it for the details of tax allocation. The allocation of taxing rights does not follow automatically from such legal principles. To the contrary, the wide range of accepted 'links' clearly shows the necessity to make political choices at the national level and to find political consensus in the international arena.").

[105] Michael Kobetsky, International Taxation of Permanent Establishments: Principles and Policy 23 (2011) ("There is general agreement among commentators that a sovereign country has almost unlimited fiscal jurisdiction.").

[106] Jérôme Monsenego, Taxation of Foreign Business Income within the European Internal Market 41, 60 (2012) ("[A]lthough one may instinctively support the view that some connection should be required by international law, the impossibility to objectively define it impedes this view. . . . . [N]o internationally accepted minimum connection is required from and binding on states to exercise jurisdiction to prescribe in the field of tax law.").

Caroline Heber and Christian Sternberg,[107] Asif Hasan Qureshi and Ajay Kumar,[108] and Brian Arnold.[109]

A second group of authors follows what is sometimes called the doctrine of close connection. This doctrine basically prescribes that some link between the taxing jurisdiction and the taxpayer or the taxable income must exist for the lawful exercise of tax jurisdiction. It is common to find among these authors statements conveying the sense that situations involving no discernible link would prohibit taxation but the presence of either a personal or territorial (also called objective) connection is sufficient for a valid tax claim. Among the authors making this kind of claim are Roy Rohatgi,[110] Alexander Rust,[111]

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[107] Caroline Heber & Christian Sternberg, *The Extraterritorial Reach of the German Progression in Income Tax Law in the Light of International Law*, 45 Intertax 254, 260 (2017) ("The Nottebohm case [decided by the ICJ in 1955] and the principle of non-intervention are often used as the grounds for the genuine link or sufficient nexus requirement. However, the analysis has revealed that both the Nottebohm case and the principle of non-intervention do not provide any limit to states' wide discretion to exercise jurisdiction to prescribe.").

[108] Qureshi & Kumar, *supra* note 72, at 42 ("Up to the present there has been no internationally recognized principle in public international law which limits the sovereignty of States in fiscal matters."). *See also* Asif H. Qureshi, *The Freedom of a State to Legislate in Fiscal Matters Under General International Law*, 41 Bull. Int'l Fisc. Doc. 14, 21 (1987) (stating that fiscal legislative jurisdiction is not constrained "by the requirement of a "reasonable link" . . . .").

[109] Brian J. Arnold, International Tax Primer 175 (4th ed. 2019) ("With minor exceptions, tax laws are not "international"—they are creations of sovereign states. Arguably at least, there is no overriding international law of taxation arising either from the customary practice of sovereign states or from actions of some international body such as the UN or the OECD.").

[110] Roy Rohagti, Basic International Taxation, vol 1: Principles of International Taxation 14–15 (2nd ed. 2005) ("Although the issue is still unsettled, both views accept that 'connecting factors' give a State the right to tax. These connecting factors link the taxpayer personally to a particular tax jurisdiction. They include personal links with the home State by virtue of residence, domicile or citizenship for natural persons, and the place of incorporation or location of a registered office, or management and control for legal persons. An economic activity is also connected with the host State, which exercises its taxing rights due to the territorial link.").

[111] Alexander Rust, *Double Taxation*, *in* Double Taxation within the European Union 1, 3 (Alexander Rust ed., 2011) ("[C]ustomary international law does not forbid double taxation but prevents states from taxing when there is no genuine link between the income and the taxing state. This link can consist in a personal (residence or citizenship) or a territorial connection. In general, states do not go so far that they tax everything which would be possible under public international law; they do not tap their full potential.").

Peter Harris and David Oliver,[112] Kevin Holmes,[113] Guillermo Teijeiro,[114] Stjepan Gadžo,[115] Michael Lang,[116] Peter Hongler,[117] and Juliane Kokott.[118]

If international law is to limit a states' power to tax, it is important to define which specific legal sources support these claimed limitations. Traditionally, international law sources have been identified as those enumerated in Article 38(1) of the Statute of the International Court of Justice.[119] This provision establishes three primary sources: First, particular and general international conventions expressly accepted by states (that is, bilateral or multilateral treaties); second, international customs evidenced by general practice

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[112] Peter Harris & David Oliver, International Commercial Tax 44 (2010) ("Customary international law is particularly vague in this area, but it is, perhaps, appropriate to suggest that it requires some sort of connecting factor, some link to a country for the country to have a recognizable jurisdiction to tax. This may be little more than a reflection of the fact that, if there is no connecting factor, a country will find it difficult to enforce its tax outside its territorial limits.").

[113] Kevin Holmes, International Tax Policy and Double Tax Treaties: An Introduction to Principles and Application 3 (2nd ed. 2011) ("The generally accepted convention under international law is that, while a country is free to levy tax however it chooses, it cannot enforce its tax claims on the territory of another country . . . [T]ax laws normally cover two kinds of activities: (1) the activities of a resident of that country in foreign countries; and (2) the activities of a non-resident in that country.").

[114] Guillermo O. Teijeiro, *Opening Pandora's Box in the International Tax Field: Double Taxation*, 42 Tax Plan. Int'l Rev. 3, 4–5 (2015) ("The principles of customary international law resulting from the leading case *SS Lotus* decided by the Permanent International Court of Justice ('PICJ'), allow a state to tax only if there is a sufficient connection (genuine link or nexus) between the taxing jurisdiction and the taxpayer (nationality, residence), or between the taxing jurisdiction and the taxable transaction, assets or income (situs, source).").

[115] *See generally* Stjepan Gadžo, Nexus Requirement for Taxation of Non-Residents' Business Income: A Normative Evaluation in the Context of the Global Economy (2018).

[116] Michael Lang, Introduction to the Law of Double Taxation Conventions loc. 1.1. (3rd ed. 2021) (ebook) ("Tax sovereignty, however, is not unlimited. Not all situations can be taxed. There must either be a personal or an objective nexus, or connection, between the taxpayer and the state. . . . In international law practice, there are no significant limits on the tax sovereignty of states. In designing the domestic personal tax law, the national legislator can even tax situations when, for example, only a "genuine link" exists. It is only when neither the person nor the transaction has any connection with the taxing state that tax cannot be levied.").

[117] Peter Hongler, Justice in International Taxation: A Normative Analysis of the International Tax Regime 80 (2019) ("[F]rom an international law perspective, legally prohibited extraterritorial taxation is given if there is no link to a certain jurisdiction and such jurisdiction nevertheless levies income taxes."); Peter Hongler, International Law of Taxation 21–22 (2021) ("[T]here is no single definition of what a sufficient genuine link is . . . Moreover, the genuine link may also develop . . . Importantly, the genuine link doctrine does not provide any guidance on how to allocate income. In other words, income allocation among jurisdictions (i.e., between the source and the resident state) is mainly a political task, and the outcome is not clear at all.").

[118] Juliane Kokott, *The 'Genuine Link' Requirement for Source Taxation in Public International Law*, *in* Tax and the Digital Economy: Challenges and Proposals for Reform 15, 23 (Werner Haslehner et al. eds., 2019) (arguing that personal-based taxation is unlimited and source-based taxation is limited but recognizing that "state practice is becoming more lenient."); Kokott, *supra* note 50, at loc. 1.1. (arguing that "the most important basis for (tax) jurisdiction, i.e. territoriality, has undergone substantial change. The new territoriality has to be understood broadly, and the difference between territorial and extraterritorial jurisdiction is blurred.").

[119] Statute of the International Court of Justice, June 26, 1945, U.N.T.S.

accepted as law; and third, general principles of law adopted by "civilized nations".[120] The same provision also mentions two secondary sources, namely judicial decisions (which are only binding for the parties involved) and "the teachings of the most highly qualified publicists of the various nations," yet these only serve as subsidiary means of determining international legal rules.

There is no doubt that specific double tax conventions will limit, subject to interpretation and application by local courts and authorities (which take into account domestic law concepts), the exercise of tax jurisdiction by the two treaty partners. Recently, states even created, for the first time in history, a comprehensive multilateral convention that currently includes 100 signatories.[121] But treaties are generally unable to clarify jurisdictional boundaries because they tend to leave open the question of whether the specific agreement should be seen as introducing exceptions to general international law or, by contrast, voluntary limitations on the parties' sovereignty that did not exist prior to the

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[120] The third source is typically understood as common procedural principles of jurisprudence, judicial decision-making, and legal reasoning accepted by the domestic law of most states and applied by national courts and international tribunals alike (such as principles of acquiescence, estoppel, good faith, *res judicata*, and so forth). James Crawford, Brownlie's Principles of Public International Law 31–35 (9th ed. 2019).

[121] *See generally* Multilateral Convention to Implement Treaty Related Measures to Prevent Base Erosion and Profit Shifting, June 7, 2017, https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf [https://perma.cc/E2PM-FSFC]; OECD, *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf [https://perma.cc/DV6V-Z8JS]. This multilateral instrument, or MLI, is a special kind of treaty that serves the sole purpose of updating some specific bilateral tax treaty provisions according to some of the BEPS Actions that are considered minimum standards to be adopted by all of the inclusive framework members, namely Actions 2, 6, 7, and 14. *See* A Multilateral Convention for Tax: From Theory to Implementation 1 (Sérgio André Rocha & Allison Christians eds., 2021) ("Bringing together authors from multiple countries with varying perspectives who analyze the MLI from multiple angles across the spectrum of the theoretical to the practical."); The Implementation and Lasting Effects of the Multilateral Instrument liii (Georg Kofler et al. eds., 2021) (bringing "together 34 national reports from experts in international tax law with strong knowledge in the OECD/G20 BEPS Project developments where they discuss their countries' positions and experiences regarding the impact of the MLI in their countries' tax treaty network."); Nathalie Bravo, A Multilateral Instrument for Updating the Tax Treaty Network 1 (2020) (examining "the foundations of the Multilateral Instrument" and addressing the research question "how the Multilateral Instrument impacts the tax treaty network."); Dirk Broekhuijsen, A Multilateral Tax Treaty: Designing an Instrument to Modernise International Tax Law (2019) (reviewing the history of multilateral tax rules and providing a normative and realistic view on multilateral tax cooperation). On previous multilateral tax treaties at more regional levels, see Michael Lang et al., Multilateral Tax Treaties: New Developments in International Tax Law ix (1998) (presenting the findings of a research project on the "arguments which speak for and against the conclusion of a multilateral tax treaty" and a draft for a multilateral tax treaty); Marjaana Helminen, The Nordic Multilateral Tax Treaty as a Model for a Multilateral EU Tax Treaty 6, 8 (2014) (examining the Nordic multilateral tax treaty between Denmark, the Faroe Islands, Finland, Iceland, Norway and Sweden, concluded on September 23, 1996, and whether it "could provide a model for a multilateral EU income tax treaty.").

agreement.[122] In international tax law, however, the latter view is more aligned with the common understanding of the effects of double tax conventions.[123]

The other primary source of international law that has been considered by some tax academics as potentially limiting states' taxing powers is international customs.[124] Accordingly, the next Section presents the current state of the debate regarding the existence of customary international tax law.

B. *Customary international tax law*

Paraphrasing an unnamed Chinese legal scholar, Geoffrey Watson notes that "the most difficult thing about international law is finding it."[125] This is especially true for unwritten rules such as those deriving from customary international law. Some of the literature on this topic focuses on the relevance of treaty provisions for identifying international customs. A difficulty with this approach is explaining why states would enter into a treaty whose only purpose is to restate an existing legal obligation.[126] Unless a signing authority

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[122] The Case of the S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J., 2, 18 (Sep. 7) ("The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."). *See also* Edwin van der Bruggen, *State Responsibility under Customary International Law in Matters of Taxation and Tax Competition*, 29 Intertax 115, 121 (2001) ("To assume that sovereignty is limited in some respect, must be specifically, expressly stipulated. It cannot be deduced or implied from any other sources."). On the possibility of international law exceptions, see Lorand Bártels & Federica Paddeu eds., Exceptions in International Law 1 (2020) ("In international law, as in every legal system, rules are invariably subject to exceptions.").

[123] In this respect, Klaus Vogel's famous stencil metaphor is often cited to describe a tax treaty "covering" some of the parties' domestic tax rules, thus switching them off. Klaus Vogel, *Double Tax Treaties and Their Interpretation*, 4 Int'l Tax & Bus. Law 1, 26 (1986).

[124] Some speculate that "fiscal sovereignty" and "reasonable nexus" could be candidates for "general principles of law recognized by nations and the international tax system," but this conclusion would ultimately depend on court decisions. John Bentil, *Situating the International Tax System within Public International Law*, 49 Geo. J. Int'l L. 1219, 1245 (2018) (stating that "the nexus principle's status as a norm of customary international law is uncertain.").

[125] Geoffrey R. Watson, The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements 308 (2000).

[126] *Cf.* Allison Christians, *Hard Law, Soft Law, and International Taxation*, 25 Wisc. Int'l L.J. 325, 330 (2007) ("[Tax treaty] norms are probably not customary law, since states would not be expected to enter into treaties if they thought an existing law already applied."); Stjepan Gadžo, *The Principle of 'Nexus' or 'Genuine Link' as a Keystone of International Income Tax Law: A Reappraisal*, 46 Intertax 194, 201 (2018) (accepting that tax treaties might prove state practice but not *opinio juris*); Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 Wash. L. Rev. 971, 980–82 (1986) (arguing that, contrary to the Vienna Convention's rules, human rights obligations and diplomatic immunity, customary international law cannot be derived from technical agreements on tax, trade, or extradition, as corroborated by the American Law Institute's position in the Restatement of the Foreign Relations Law of the United States). *Cf. also* ILA, *Committee on Formation of Customary (General) International Law*, 69 Int'l L. Ass'n Rep. Conf. 712, 754 (2000) ("There is no general presumption that a treaty codifies existing customary international law. Commentary: Treaties seldom simplify codify well-established and uncontroversial rules of customary international law: it would not be worth the parties' efforts to do so."). *But cf.* Fernando Lusa Bordin, *Reflections of Customary Inter-*

expressly declares that the treaty encapsulates or represents customary international law, the link is indeterminate.[127]

Traditionally, ascertaining customary rules that bind all states even in the absence of treaties has depended upon demonstrating widespread consent in the form of an objective or external element and a subjective or internal element—respectively, state practice and *opinio juris*.[128] Between these two, the latter is usually assumed to be the harder to prove, although there are also challenges in trying to establish state practice.[129] The difficulty of finding and enforcing inter-

national Law: The Authority of Codification Conventions and ILC Draft Articles in International law, 63 Int'l & Comp. L.Q. 535, 537 (2014) ("[I]t is widely accepted that treaties may be relevant to prove the existence of international custom, and the work of a Commission composed of individuals elected by the UNGA [United Nations General Assembly] by virtue of their expertise in international law must surely belong to the 'teachings of the most highly qualified publicists of the various nations'. But these explanations can be somewhat misleading.").

[127] For example, the U.S. State Department occasionally expresses its view that a given treaty represents customary international law. *See generally* Curtis Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997).

[128] These elements have been differently weighted by contemporary authors and experts in international law, with some prioritizing one over the other. In the literature, it is common to find references to a traditional and a modern approach, where the latter gives greater emphasis to *opinio juris*. *See* Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance between Modern and Traditional Customary International Law*, 40 Va. J. Int'l L. 639, 641 (2000) (discussing old/traditional/positivist approaches to identifying international customary law rules versus new approaches, and arguing that both have "little if any effect on national behavior"); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 Am. J. Int'l L. 757, 788 (2001) (explaining that "the traditional and modern approaches to custom appear to be opposed, with traditional custom emphasizing state practice and modern custom emphasizing *opinio juris*."); Thomas William Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, 45 Geo. J. Int'l L. 445, 447 (2014) (explaining that traditional and modern approaches to customary international law "reflect the use of the inductive and deductive methods respectively, with the former excusing the freedom of action of the state and the latter limiting the freedom of the state."). *See also* Alberto Alvarez-Jiménez, *Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence 2000-2009*, 60 Int'l & Comp. L.Q. 681, 686–703 (2011) (showing the ICJ uses a variety of approaches, such as the strict inductive and flexible deductive methods (traditional approaches) and the recognition of express rules in judicial decisions or implicit rules in state practice or treaty (nontraditional approaches)).

[129] Niels Petersen, *Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 Am. U. Int'l L. Rev. 275, 276–77 (2008) (noticing disagreement among scholars on "what kind of activity constitutes state practice" and "the duration and frequency of the activity that is necessary to satisfy the definition"); Jack L. Goldsmith & Eric A. Posner, The Limits of International Law 23 (2005) ("There is little agreement about what type of state action counts as state practice."). *Cf. also* Jack Goldsmith & Eric A. Posner, *The Limits of International Law Fifteen Years Later*, 22 Chi. J. Int'l L. 110, 114 (2021) (clarifying that one of their book's central claims is that "customary international law is more fragile than treaties . . . .").

national customary rules is that it requires collecting enough evidence to support a claim that a considerable number of the world's 195 or so independent sovereign states not only have adopted a certain practice but also subjectively share a deep-rooted understanding that they are legally bound by that practice.[130] In building such a claim, it is necessary to consider so-called "persistent objectors" (that is, states that are exempt from a norm because they have expressly and continuously opposed it during its formation) as well as "subsequent objectors" (that is, states that drive change by opposing a custom after its emergence in the international legal order).[131] On top of that, some international law scholars have argued that, even if a custom exists, it is still possible for a state to unilaterally withdraw from it under certain circumstances.[132]

In the field of tax law, where states fundamentally diverge in their approaches (despite efforts by international organizations, key among them the OECD, to try to harmonize international tax rules), proving the existence of customary international tax law has been a daunting task.[133] For example, Pro-

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[130] *Cf.* North Sea Continental Shelf Cases (Ger. v. Den.), Advisory Opinion, 1969 I.C.J. 1, 45 (Feb. 20) ("Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it . . . The States concerned must feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.").

[131] *See generally* James A. Green, The Persistent Objector Rule in International Law (2016).

[132] *See* Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 Yale L.J. 202, 275 (2010) (terming the conventional wisdom that, contrary to treaties, states cannot unilaterally exist established customs "the Mandatory View," and proposing that, "for some categories of CIL [customary international law], a Default View [that recognizes unilateral withdrawal rights similar to treaty practice] might be more appropriate."); Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 Duke. J. Comp. & Int'l L. 1, 3 (2010) (responding to reactions to their thesis); Rachel Brewster, *Withdrawing from Custom: Choosing Between Default Rules*, 22 Duke. J. Comp. & Int'l L. 47, 47–48 (2010) (raising issues with Bradley and Gulati's thesis); Samuel Estreicher, *A Post-Formation Right of Withdrawal from Customary International Law: Some Cautionary Notes*, 21 Duke. J. Comp. & Int'l L. 57, 64 (2010) (welcoming Bradley and Gulati's thesis but showing some hesitance in fully accepting it); Laurence R. Helfer, *Exiting Custom: Analogies to Treaty Withdrawals*, 21 Duke. J. Comp. & Int'l L. 65, 80 (2010) (supporting Bradly and Gulati's thesis); C.L. Lim & Olufemi Elias, *Withdrawing from Custom and the Paradox of Consensualism in International Law*, 21 Duke. J. Comp. & Int'l L. 143, 153–56 (2010) (supporting Bradly and Gulati's thesis); Christiana Ochoa, *Disintegrating Customary International Law: Reactions to 'Withdrawing from International Custom'*, 21 Duke. J. Comp. & Int'l L. 157, 171–72 (2010) (disputing Bradly and Gulati's thesis); Anthea Roberts, *Who Killed Article 38(1)(B)? A Reply to Bradley & Gulati*, 21 Duke. J. Comp. & Int'l L. 173, 189–90 (2010) (disputing Bradly and Gulati's thesis); Carlos M. Vázquez, *Withdrawing from International Custom: Terrible Food, Small Portions*, 120 Yale L.J. 269, 290–91 (2011) (disputing Bradly and Gulati's thesis); Ehsan A. Siddiq, *Bangladesh Withdraws from Customary International Law: The Practical Implications of Trifling with Custom*, 7 J. Pol. & L. 163, 163 (2014) (criticizing the Supreme Court of Bangladesh's reliance on Bradly and Gulati's thesis in a case involving customary rules that "define the jus cogens offence of crimes against humanity . . . .").

[133] *Cf.* Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. Rev. 665, 704 (1986) (criticizing the Third Restatement of Foreign Relations Law of the United States and the U.S. District Court decision on *Timberlane Lumber Co. v. Bank of America N.T. & S.A.* (1983), and inferring a rule of customary international law according to which "states are

fessor Reuven Avi-Yonah has for decades defended the thesis that "parts of international tax law can be seen as customary international law and therefore as binding even in the absence of treaties."[134] But the claim has attracted relatively little support from fellow scholars.[135] Over the years, Avi-Yonah has considerably restricted the scope of his thesis,[136] but there have been a few others trying to make the case that some specific tax standards might have risen to the level of international customs.[137] These claims, however, have also not been generally able to convince most authors.[138]

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free to regulate economic activity that has minimum contacts with its territory or nationals whenever its interests so dictate, subject only to limitation by treaty (as in the tax field).").

[134] Reuven S. Avi-Yonah, *International Tax as International Law*, 57 Tax L. Rev. 483, 496–501 (2004) (making the case for the arm's-length standard under transfer pricing, the nondiscrimination norm, most residence and source rules, double tax relief via credit or exemption, income categories such as active and passive, and controlled foreign corporation legislation). *See also* Letícia Pires, *The Brazilian Controlled Foreign Company Regime: A Comparative Analysis from an International Tax Law Perspective*, 67 Bull. Int'l Tax'n 295, 297 (2013) (merely stating, without providing support, that "international tax law can be said to be constructed mainly by customary international law and general principles of law."); J. Clifton Fleming Jr., *To What Degree Does Customary International Law Require Accommodation of a Source Country's Right to Tax High, Tax Low or Not Tax at All?*, *in* A Commitment to Excellence: Essays in Honour of Emeritus Professor Gabriël A. Moens 312, 321 (Augusto Zimmermann ed., 2018) (arguing that customary international law gives source states the right to tax foreigners' income within their territories, requires residence states to mitigate double taxation up to their own tax rates, and allows residence states to tax the difference between their own tax rates and that of source states); Ruth Mason, *The Transformation of International Tax*, 114 Am. J. Int'l L. 353, 355 (2020) (merely stating that "[u]nder tax treaties and international custom, a state may tax a nonresident corporation only on income "sourced" in its territory."); Céline Braumann, *Taxes and Custom: Tax Treaties as Evidence for Customary International Law*, 23 J. Int'l Econ. L. 747, 748 (2020) (reasoning that "only about 16%, i.e. one out of six of all possible, bilateral relationships is dictated by a DTT [double tax treaty]," which the author considers as evidence that "84% of all bilateral relationships are subject to CIL [customary international law] on cross-border taxation."). For older sources, see A.R. Albrecht, *The Taxation of Aliens under International Law,* 29 Brit. Y.B. Int'l L. 145, 185 (1952) (recognizing that contradictory practices among states does not allow definite conclusions about international customary tax rules, but still concluding that "[t]he right to tax aliens is a prerogative of the sovereign state—a prerogative which is limited by rules of customary and conventional international law."); Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y. B. Int'l L. 145, 179–80 ("Customary international law permits a State to levy taxes only if there is a genuine connection between the State and the taxpayer (nationality, domicile, long residence, etc.), or between the State and the transaction or property in respect of which the tax is levied.").

[135] Avi-Yonah, *supra* note 69, at 951 ("I have long advocated the view that CITL [customary international tax law] does exist . . . But this has until now been a minority position . . .").

[136] Avi-Yonah, *Does International Customary Tax Law Exist?*, *supra* note 39, at 3–9 (limiting his thesis to four norms, namely jurisdiction to tax, permanent establishment, the arm's-length standard, and nondiscrimination, and excluding the single tax and benefits principles).

[137] Chantal Thomas, *Customary International Law and State Taxation of Corporate Income: The Case for the Separate Accounting Method*, 14 Berkeley J. Int'l L. 99, 123–35 (1996) (regarding the arm's-length standard); Teijeiro, *supra* note 114, at 5 (regarding controlled foreign corporation rules); Roberto Codorniz Leite Pereira, *The Emergence of Transparency and Exchange of Information for Tax Purposes on Request as an International Tax Custom*, 48 Intertax 624, 634–39 (2020) (regarding transparency and exchange of information on request).

[138] Brian D. Lepard, Customary International Law: A New Theory with Practical Applications 304–05 (2010) ("[T]he arm's length standard does not have any legal authority (whether persuasive or binding) under customary international law."); H. David Rosenbloom, *In-*

On the contrary, the scholarship on the structure of the international tax system does not seem to subscribe to the view that there are well-defined customs binding states even in the absence of treaties. This is mainly for three reasons: The existence of considerable and persistent differences between tax systems, including how individual states define residence and source;[139] the central role of high-

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ternational Tax Arbitrage and the 'International Tax System', 53 TAX L. REV. 137, 154, 166 (2000) (calling Avi-Yonah's thesis "mysterious" and "imaginary"); Asif H. Qureshi, *Coherence in the Public International Law of Taxation: Developments in International Taxation and Trade and Investment Related Taxation*, 10 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 193, 199 (2015) (criticizing Avi-Yonah's thesis for being "not only controversial but also unsubstantiated."); Bentil, *supra* note 124, at 1270 (agreeing with Rosenbloom's and Qureshi's critiques of Avi-Yonah's thesis); van der Bruggen *supra* note 122, at 115 ("Especially when states respect a 'reasonable link' between the income or the taxpayer and their territory, there is little reason to assume general principles of international law or customary international law limit the sovereignty of the state in any way with regard to taxation."); Heber & Sternberg, *supra* note 107, at 262 ("[W]ith respect to tax law, rules of customary international law that limit the states' discretion cannot be found."); KOBETSKY, *supra* note 105, at 24 ("[T]he rules on fiscal jurisdiction have not attained the status of customary international law."); Magalhães, *supra* note 11, at 505–06 (arguing that Avi-Yonah's thesis is controversial and enforces "a specific set of ideas, as if such ideas were neutral and regardless of their distributional implications."); Elizabeth Gil García, *The Single Tax Principle: Fiction and Reality in a Non-Comprehensive International Tax Regime?*, 11 WORLD TAX J. 305, 346 (2019) ("[T]he international tax regime does not rise to the level of customary international tax law, and, therefore, it does not have force of law."); Wolfgang Schön, *Is There Finally an International Tax System?*, 13 WORLD TAX J. 357, 363 (2021) (claiming that customary tax norms "did not get much traction in the international debate."); DAGAN, *supra* note 3, at 3 ("[N]otwithstanding views that a customary international law of taxation has emerged and that its rules limit states' choices, every country is still independently making its own tax policy and setting its own rules and tax rates."); HONGLER, JUSTICE IN INTERNATIONAL TAX LAW, *supra* note 114, at 166–67 (denying that controlled foreign corporation rules are customary law); HONGLER, INTERNATIONAL LAW OF TAXATION, *supra* note 114, at 123 (arguing that tax law's highly technical rules "disallow the creation of customary international law through its main elements: state practice and *opinio iuris*."); Alexis Galán & Ricardo García Antón, *Principal Purpose Test and Customary International Law: A Note of Caution*, 14 WORLD TAX J. 617, 650 (2022) (arguing that customary tax norms would "simply add further uncertainty," "provide even more leeway to states", and "undermine the purpose of those international tax law norms."); Boidman, *Pillar 2—The Ironic Circularity of the UTPR Debate*, *supra* note 82, at 29 ("International tax issues are not decided in [common-law] countries by any other source [besides domestic statutory law, tax treaties brought into effect by enactment or other formal domestic process, and prior domestic court decisions], no matter how high sounding or principled."); Lennard, *supra* note 83, at 608 ("[W]e seem far from having evidenced *opinio juris* for international tax rules, even if there is sufficiently relevant and consistent practice across countries in different positions.").

[139] *Cf.* Lawrence Lokken, *The Sources of Income from International Uses and Dispositions of Intellectual Property*, 36 TAX LAW REV. 233, 235 (1981) (examining various income source rules in Sections 861 through 863 of the U.S. Internal Revenue Code); Klaus Vogel, *Worldwide vs. Source Taxation of Income: A Review and Re-Evaluation of Arguments, Part I*, 8/9 INTERTAX 216, 217–28 (1988) (showing that worldwide and source-based taxation are not self-defining, accommodate different concepts in each jurisdiction, and change over time); Wolgang Schön, *Persons and Territories: On the International Allocation of Taxing Rights*, 6 BRIT. TAX REV. 554, 554 (2010) ("We do not really know what personal and territorial attachment means and what its consequences for international tax policy should be."); Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1303–12 (2011) (examining three different theories on citizenship for tax purposes); Edward A. Zelinsky, *Defining Residence for Income Tax Purposes: Domicile as Gap-Filler, Citizenship as Proxy and Gap-Filler*, 38 MICH. J. INT'L L. 271, 275–78 (2017) (stating that domicile is "manipulable" and "difficult to enforce"); Wei Cui, *Minimalism about Residence and Source*, 38 MICH. J. INT'L L. 245, 250 (2017) ("there are quite

ly technical rules mostly found in domestic law, despite the expansion of tax treaty networks;[140] and the pluralistic, fragmented, and contentious nature of the

different bases for determining which individuals are subject to worldwide taxation; none of the major rules are clearly superior to others; and all are normatively arbitrary to substantial extents."); Omri Marian, *Jurisdiction to Tax Corporations*, 54 B.C. L. Rev. 1613, 1613 (2013) (observing that tax scholars agree that corporate tax residence is "meaningless" because corporations are "imaginary entities" that cannot have a "real residence", but proposing a "functional approach"); David Elkins, *The Elusive Definition of Corporate Tax Residence*, 62 St. Louis U. L.J. 219, 236 (2017) ("The fact that the literature has heretofore been incapable of providing a test of corporate residence that conforms to a reasonable criterion suggests that there exists no such test."); David Elkins, *The Myth of Corporate Tax Residence*, 9 Colum. J. Tax L. 5, 5 (2017) (arguing that "the concept of tax residence is inapplicable to corporations" and "corporate residence is a misnomer."); David Elkins, *A Scalar Conception of Tax Residence*, 41 Va. Tax Rev. 149, 151, 159–72 (2022) (reviewing the concept of tax residence in Australia, Canada, France, Germany, Israel, United Kingdom, United States, and tax treaties, and stating that "[d]espite the centrality of residence in the field of international taxation, there is no universally agreed upon definition of the term."); Lawrence Lokken, *What Is This Thing Called Source?*, 37 Int'l Tax J. 25, 26 (2011) ("The U.S. source rules do not, individually or collectively, express a general concept of source."), *reprinted in* The Proper Tax Base: Structural Fairness from an International and Comparative Perspective—Essays in Honor of Paul McDaniel 139 (Yariv Brauner & Martin J. McMahon Jr. eds., 2012); Yariv Brauner, *Treaties in the Aftermath of BEPS*, 41 Brook. J. Int'l L. 973, 1037 (2016) ("[C]orporations do not 'reside' anywhere. Countries assign corporate residence based on various unconvincing constructs."); Peter Behrens, *General Principles on Residence of Companies: A Comparative Analysis of Connecting Factors Used for the Determination of the Proper Law of Companies*, *in* Residence of Companies under Tax Treaties and EC Law 3, 7–10 (Guglielmo Maisto ed., 2009) (describing "indeterminate connecting factors" (nationality, domicile, and residence) and "determinate connecting factors" (place of incorporation, place of registration, registered office, legal (statutory) seat, nerve center, place of principle administration/center of management, place of most important decisions, place of implementation of most important decisions, place of controlling organ such as board meetings or shareholders' meetings, principal place of business, principal place of activities, and place of *d'exploitation*)); Corporate Tax Residence and Mobility v (Edoardo Traversa ed., 2018) (country reports of different corporate tax residence rules from 22 jurisdictions).

[140] *Cf.* Diane M. Ring, *One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage*, 44 B.C. L. Rev. 79, 79 (2002) ("The central challenge in international tax is navigating the relationship between an individual country's tax system and the rest of the world—a question of how nations should balance competing demands of revenue, domestic policy, retaliation, and global goals."); Julie Roin, *Taxation Without Coordination*, 31 J. Legal Stud. S61, S62 (2002) ("[R]easonable people motivated solely by public-spirited concerns may prefer to allow full or partial diversity in income definitions at the national level to adherence to an international standard."); Allison Christians, *Networks, Norms, and National Tax Policy*, 9 Wash. U. Global Stud. L. Rev. 1, 3 (2010) (explaining that, contrary to trade taxation which is regulated by supranational institutions under an overarching legal regime, income taxation develops through soft mechanisms of "network-based collaboration, modeling, peer pressure, and emulation . . . ."); Daniel N. Shaviro, Fixing U.S. International Taxation 15–16 (2014) (referring to a "global convention fallacy" in international tax policy); Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, *in* Follow the Money: Essays on International Taxation 83, 93 (2016) ("[M]any authors simply assume that the normative basis for international income tax rules is widely understood and enjoys universal agreement."); Tsilly Dagan, *Tax Treaties as a Network Product*, 41 Brook. J. Int'l L. 1081, 1085 (2016) ("In the decentralized international tax market, each country makes its own tax rules. Consequently, there tends to be great divergence across countries in the specifics of their systems."); Rebecca M. Kysar, *Unraveling the Tax Treaty*, 104 Minn. L. Rev. 1755, 1767 (2020) ("The domestic rules of international tax are as varied as the number of countries that employ them . . . ."); Wei Cui, *New Puzzles in International Tax Agreements*, 75 Tax L. Rev. 201, 243

transnational tax law order, in which states make their own choices about taxation including the scope of their coordination of conflicting claims.[141]

There is also a danger with the proposition that current tax standards should reflect binding customary international law on all of the world's states, which concerns the reinforcement of geoeconomic and geopolitical power imbalances and unjust patterns of international distribution through taxation. Global South international law scholars often suspect that customary international law might serve as a vehicle for powerful states to advance their own economic interests.[142] At the same time, many tax scholars have long

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(2022) ("[T]reaties often require elimination of double taxation only according to the provisions of domestic law, thus giving eminent primacy to domestic rather than treaty law.").

[141] *Cf.* Tsilly Dagan, *National Interests in the International Tax Game*, 18 Va. Tax Rev. 363, 365 (1998) ("[T]he players in the international tax game are sovereign states trying to maximize their own long-term welfare rather than global long-term welfare (or merely short-term national welfare)."); Allison Christians et al., *Taxation as a Global Socio-Legal Phenomenon*, 14 ILSA J. Int'l & Comp. L. 303, 305 (2008) (stating that international taxation is characterized by a "failure of states to agree sufficiently on an increasingly lengthy list of key areas . . . ."); Diane Ring, *International Tax Relations: Theory and Implications*, 60 Tax L. Rev. 83, 84 (2007) (stating that the "focus on the 'tax' piece of international tax has been at the expense of the "international" aspect, the unique and complex dynamics of multijurisdictional relations."); Diane Ring, *Who Is Making International Tax Policy? International Organizations as Power Players in a High Stakes World*, 33 Fordham Int'l L.J. 649, 655 (2010) ("It is improbable that any one organization would fully occupy the field of tax policy, especially where organizations may have competing agendas, and where states still serve as the source of hard law in international tax."); Allison Christians, *BEPS and the New International Tax Order*, 2016 BYU L. Rev. 1603, 1610–11 (2016) ("[S]tates rely on a combination of mainly bilateral treaties tied together and reinforced by a web of 'soft law' coordination methods, including 'network-based collaboration, modeling, and peer pressure.'"); Rifat Azam, *Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS*, 50 Suffolk U. L. Rev. 517, 523 (2017) ("[T]he structure of the international tax regime continues to be dominated by unilateral and bilateral hard law, with some increase in the influence of multilateral soft law."); Tsilly Dagan, *Community Interests in International Taxation*, *in* Community Interests Across International Law 316, 330–36 (Eyal Benvenisti & Georg Nolte eds., 2018) (denying the possibility of a coherent international tax community interest given the variety of competing interests among states); Steven A. Dean, *A Constitutional Moment in Cross-Border Taxation*, 3 J. Fin. Develop. 1, 7 (2021) (agreeing with Dagan's description of the international tax regime, as opposed to an anarchic view or one based on customary international law); Eduardo A. Baistrocchi, *The International Tax Regime and Global Power Shifts*, 20 Va. Tax Rev. 219, 231–56 (2021) (describing a spiral evolution of international tax norms along three eras marked by global power shifts).

[142] Mohammed Bedjaoui, Towards a New International Economic Order 135 (1979) (arguing that customary international law "has always been anti-democratic" because it "was devised having regard to the requirements of the European nations . . . in accordance with [their] needs . . . ."); H.A. Strydom, *Customary International Law: The Legacy of the False Prophets*, 27 Comp. & Int'l L.J. S. Afr. 276, 276 (1994) ("Post-war experimentation with the international customary law concepts of practice and *opinio juris* has run its course. What remains after the orgy of intellectual opportunism is an amorphous body of opinion characterized by obscurity and contradiction . . . The observation that international law scholars are loose and muddled in their views on the sources of the law and are prepared to cite almost anything in support of a claim of law, is obviously true . . . The greater part of the discourse would appear to have collapsed into a proliferation of imaginary thought on the magical powers of factual patterns of behaviour and the accompanying subjective conviction that these patterns reflect binding legal obligations."). For an overview of Global South critiques, see generally B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 Am. J. Int'l L. 1 (2021). *See also* J. Patrick Kelly, *Revolution by Custom-*

emphasized how tax treaties have favored the revenue interests of richer countries.[143] Similar complaints have been advanced by nongovernmental or-

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ary International Law?, 112 Am. J. Int'l L. 297, 297 (2021) (agreeing with Chimni's critique about "the unfairness and dubious validity of the persistent objector principle, the lack of access and attention to non-European state practice, and the questionable legitimacy of CIL [customary international law] norms developed without the participation of a majority of states or their consent," but disagreeing with the proposed solutions); Anthony Carty, *The Need to Be Rid of the Idea of General Customary Law*, 112 Am. J. Int'l L. 319, 319 (2021) (arguing that Chimni's critique fails to fully recognized the dysfunctionality of customary international law, and proposing "a complete break" with it); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 Va. J. Int'l L. 449, 451 ("Under the indeterminate and manipulable theory of CIL [customary international law], all . . . positions are tenable. CIL is then a matter of taste."); J. Patrick Kelly, *Customary International Law in Historical Context: The Exercise of Power without General Acceptance*, *in* Reexamining Customary International Law 47, 51 (Brian D. Lepard ed., 2017) (demonstrating "the confluence of natural law ideas with the history of customary international law development in which idealized versions of European norms were universalized in order to justify the colonial enterprise and later treated as customary international law binding on all."); Fernando R. Téson, *Fake Custom*, *in* Reexamining Customary International Law 86, 87 (Brian D. Lepard ed., 2017) (describing a widespread practice of fake custom among "[i]nternational lawyers, norm entrepreneurs, and international courts . . . ."); Joel P. Trachtman, *Reports of the Death of Treaty are Premature, but Customary International Law May Have Outlived Its Usefulness*, 108 AJIL Unbound 36, 38–39 (2014) (declaring the death of customary international law because it is "ill-fitted to respond to the needs for international law of cooperation," "primitive," "limited in its flexibility," "doctrinally uncertain," and since it "cannot easily be specified in detail" it ultimately lacks "consent, or even legitimacy."); Joel P. Trachtman, *The Growing Obsolescence of Customary International Law*, *in* Custom's Future: International Law in a Changing World 172, 172 (Curtis A. Bradley ed., 2016) (favoring "more effective mechanisms [that] include treaty-based hard law and soft law" instead of customary international law).

[143] *Cf.* Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. Int'l L. & Pol. 939, 939 (2000) (arguing that tax treaties redistribute revenues from poor to rich countries); Kim Brooks, *Global Distributive Justice: The Potential for a Feminist Analysis of International Tax Revenue Allocation*, 21 Can. J. Women & L. 267, 295–97 (2009) (defending the use of tax treaties to allocate more revenues to low-income countries); Ilan Benshalom, *The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law*, 85 NYU L. Rev. 1, 67–81 (2010) (defending the use of the international tax regime to allocate more revenues to capital-importing (developing) countries); Kim Brooks & Richard Krever, *The Trouble Role of Tax Treaties*, *in* Tax Design Issues Worldwide 159, 162–65 (Geerten M.M. Michielse & Victor Thuronyi eds., 2015) (discussing how tax treaties shift taxing rights away from capital-importing (developing) countries); Magalhães, *supra* note 11, at 510 (arguing that OECD dominance over the international tax regime creates a "distributive bias towards residence or capital-exporting countries."); Miranda Stewart, *Redistribution Between Rich and Poor Countries*, 72 Bull. Int'l Tax'n 297, 305–06 (2018) (considering a better international allocation of the tax base as a mode of global redistribution); Ivan Ozai, *Two Accounts of International Tax Justice*, 33 Can. J.L. & Jur. 1, 322–27 (2020) (arguing that the international tax regime faces distributive justice deficits that significantly affect developing countries); Oladiwura Ayeyemi Eyitayo-Oyesode, *Source-Based Taxing Rights from the OECD to the UN Model Conventions: Unraveling Efforts and an Argument for Reform*, 13 L. & Dev. Rev. 193, 223 (2020) (showing how both the OECD and UN tax treaty models contain restrictive source-based taxing rights that violate inter-nation equity); Allison Christians & Laurens van Apeldoorn, Tax Cooperation in an Unjust World 9–62 (2021) (demonstrating how the international tax regime violates basic conceptions of international justice by allowing rich wealthy countries to claim more from the global economy than they are morally or economically justified).

ganizations and developing country representatives,[144] recently leading to a proposal to shift policy-making to the United Nations.[145]

These observations suggest that attributing legal status to an international system that is seen by many states as inherently unfair would do nothing to solve these concerns. Rather, it would make the system's unfairness legally enforceable against the unfavored states.[146]

C. *Common norms and practices*

The legal scope of tax jurisdiction, especially in relation to the idea of nexus, is an enduring concept that has never been settled and may be unresolvable as a matter of law. Despite an extensive literature, many fundamental questions remain unanswered and perhaps unanswerable, leading scholars to revisit them from time to time.[147] In the sections that follow, we first return to the beginning of the modern international income tax law system to illuminate some of its formative principles, while also considering more recent propositions regarding the basis upon which taxing rights can or should be divided.

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[144] *See generally* Martin Hearson, Imposing Standards: The North-South Dimension of Global Tax Politics (2021). *See also* Martin Hearson & Wilson Prichard, *China's Challenge to International Tax Rules and the Implications for Global Economic Governance*, 94 Int'l Aff. 1287, 1291–93, 1296–1302 (2018) (describing developing countries' criticisms of the OECD-based international tax regime and China's alternative approaches); Gov't of Ind., Ministry of Fin., Dep't of Rev., Cent. Bd. of Direct Taxes, Public Consultation on the Proposal for Amendment of Rules for Profit Attribution to Permanent Establishment, No. 500/33.2017-FTD.I, at 13, 48, 54, 78 (Apr. 18, 2019) (criticizing OECD approaches to international taxation as detrimental to developing countries like India); Cassandra Vet, Danny Cassimon & Anne Van de Vijver, *Getting the Short End of the Stick: Power Relations and Their Distributive Outcomes for Lower-Income Countries in Transfer Pricing Governance*, *in* Taxation, International Cooperation and the 2030 Sustainable Development Agenda 3, 23 (Irma Johanna Mosquera Valderrama, Dries Lesage & Wouter Lips eds., Springer 2021) (arguing that "the standard-setters [of the international tax regime] decided on a bigger cake, but lower-income countries only got the crumbs of this cake without the tools to actually eat it."); Martin Hearson, Rasmus Corlin Christensen & Tovony Randriamanalina, *Developing Influence: The Power of 'The Rest' in Global Tax Governance*, Rev. Int'l Pol. Econ. 1, 10–17 (2022) (providing two cases studies on how low-income and developing countries might challenge OECD-dominated global tax governance); Rasmus Corlin Christensen & Martin Hearson, *The Rise of China and Contestation in Global Tax Governance*, 28 Asia Pacific Bus. Rev. 165, 165 (2022) (showing "how China variously challenges, defends, and develops alternatives to global tax standards in three cases: global efforts to tackle corporate tax avoidance, bilateral tax treaty negotiations, and administrative tax cooperation.").

[145] G.A. Res. A/C.2/77/L.11/Rev.1 (Nov. 16, 2022). *See also* Stephanie Soong, *United Nations Chief Backs Calls for U.N. Tax Convention*, 108 Tax Notes Int'l 91, 91–92 (2022) (reporting on various calls for a U.N. tax convention); Sharon Katz-Pearlman, *Definitely Not Boring: The U.N. Tax Committee and OECD Collide*, 109 Tax Notes Int'l 753, 753 (2023) (explaining that Nigeria proposed, on behalf of a Group of African States, a resolution that was later adopted by the United Nations to increase the "U.N. involvement and responsibility over the international tax negotiation framework.").

[146] *Cf.* Lennard, *supra* note 83, at 608 ("[W]e must avoid using concepts and applications of customary international law or general principles of law to seek to impose laws that suit one jurisdiction or set of jurisdictions over others.").

[147] For a recent volume that reinforces the lack of agreement among authors, see generally Tax Nexus and Jurisdiction in International and EU Law (Edoardo Traversa ed., 2022).

Next, we explore attempts by scholars to define and qualify tax nexus in a way that would give this norm more practical relevance. We conclude by demonstrating that all of the concepts described in the literature as common tax law norms or practices are at their core vague and under-defined, and therefore unable to create international legal obligations or impose prohibitions about what states can do as a matter of domestic tax law. At their most persuasive, these concepts might be regarded as soft-law norms but only when they are written into widely-accepted documents such as OECD or UN guidance, model rules, and the like.[148]

1. Economic allegiance, benefits theory, and value creation

Given that some of Globe's critics have invoked the economic allegiance doctrine, benefits theory, and the value creation principle as possible legal barriers to the implementation of some of the rules proposed by the OECD,[149] it makes sense to start by analyzing these theories and exploring their origins and roles within the international tax system. This exploration will also help shed light on the issues that jurisdiction and nexus might raise for taxation.

About a century ago, lawmakers started to realize that the spread of income tax systems around the world would lead to the rise of competing claims by more than one state over the same items of income. To ensure that double or multiple taxation would not be a problem for cross-border investments, the League of Nations struck a committee of four economists to study and design standards to be incorporated into international agreements for the allocation of taxing rights among the parties.[150] The framework developed by these economists established a certain division of global profits that became highly influential in both the theory and practice of international taxation, as their 1923 report laid out the foundations of what came to be known as the economic allegiance doctrine.

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[148] For a critique of the soft-law thesis in international law, see Jan Klabbers, *The Redundancy of Soft Law*, 65 Nordic J. Int'l L. 167, 168 (1996) ("The term soft law, thus (admittedly loosely) delimited, denotes those instruments which are to be considered as giving rise to legal effects, but do not (or not yet, perhaps) amount to real law."). *But see* Julien Chaisse & Xueliang Ji, *"Soft Law" in International Law-Making: How Soft International Taxation is Reshaping International Economic Governance*, 13 Asian J. WTO & Int'l Health L. & Pol'y 463, 467–68 (2018) (arguing that, in international tax where consensus is hard to achieve, soft law is an appropriate way to avoid conflicts with trade and investment).

[149] Li, *supra* note 75, at 1402, 1405 (claiming that the UTPR departs from "the existing international tax consensus based on the economic allegiance theory and value creation principle" and that "[t]he economic allegiance doctrine reflects the benefit principle."). *See also* Jinyan Li, Nathan Jin Bao & Huaning Li, *Value Creation: A Constant Principle in a Changing World of International Taxation*, 67 Can. Tax J. 1107, 1108–17 (2019) (arguing that value creation is a re-elaboration of the economic allegiance doctrine). In a recent paper, however, Li recognizes that "[i]t is true that there is no public international law that prohibits Canada from asserting the taxing right through the UTPR. In fact, Canada may have a political obligation to adopt the UTPR as part of the global consensus." Jinyan Li, *Introducing a Global Minimum Tax (Pillar Two) in Canada: Some Knowns and Unknowns*, 71 Can. Tax J. 103, 127 (2023).

[150] *See generally* Econ. Fin. Comm'n, *Report on Double Taxation Submitted by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp*, League of Nations (1923) [hereinafter LN Report].

The idea of economic allegiance is intuitively appealing because it transposes to the international context one of two classic theories that have been used to justify domestic taxation, namely the benefits and ability-to-pay principles. Relying on the assumption that people should contribute through the payment of taxes to those states that provide them with public benefits, the economic allegiance doctrine prescribes that the link with a taxpayer should be based on economic factors rather than political or social bonds with a particular polity. But benefits theory is largely rejected as an inappropriate parameter for evaluating domestic tax policies,[151] so it is unclear why it would have better chances of success in solving international tax relations issues embedded in complex commercial deals, investment flows, and legal arrangements.

Furthermore, even the original exponents of the economic allegiance doctrine recognized the practical impossibility of objectively splitting every dollar produced through economic interdependence by a multiplicity of cooperating states for the purpose of geographically assigning taxable income.[152] If this was true in a much less globalized and certainly undigitized scenario, there are no good reasons to believe that economic allegiance or benefits would be able to provide guidance on tax jurisdiction today.[153]

Perhaps realizing the shortcomings of both theories, the OECD proposed, in the context of the BEPS project, a new principle based on the idea that taxing rights should be allocated to where value is created. Much academic work has been generated on the principle of value creation,[154] but by now there appears to be universal agreement that the principle is as accommodat-

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[151] Allison Christians, *Introduction to Tax Policy Theory* (May 29, 2018) (unpublished paper) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186791 [https://perma.cc/22C9-HBDG].

[152] LN Report, *supra* note 149, at 49–50 ("[W]e do not see any other form of compromise which is likely to reconcile the conflicting interests and to have any prospect of success upon three points: (1) to reconcile the widely opposed interests of debtor and creditor exchequers; (2) to admit those ideas which, though widely accepted in many countries, are, in our view, in relation to income tax, to a considerable extent economically undeveloped in so far as they ascribe undue importance to origin taxation; and, lastly, (3) to conform to what is, in the experience of fiscal administrations, practically possible in dealing, in such a complex world, with the income of individual persons.").

[153] *Cf. id.* ("[T]his memorandum has already shown that it is almost impossible in economic theory to get a direct assignment of a quantitative character of finally resultant income amongst all the national agents who may be said to have had a finger in the pie. If it is theoretically difficult we may conclude that it will be no less difficult in practice unless a compromise or arbitrary assignment is adopted.").

[154] *See generally* Allison Christians & Laurens van Apeldoorn, *Taxing Where Value is Created*, 22 Fla. Tax Rev. 1 (2018); Clair Quentin, *Gently Down the Stream: BEPS, Value Theory and the Allocation of Profitability along Global Value Chains*, 13 World Tax J. 163 (2021); Clair Quentin, *Corporate Tax Reform and 'Value Creation': Towards Unfettered Diagonal Re-Allocation Across the Global Inequality Chain*, 7 Account. Econ. Law 1 (2017); Johanna Hey, *'Taxation Where Value Is Created' and the OECD/G20 Base Erosion and Profit Shifting Initiative*, 72 Bull. Int'l Tax'n 203 (2018); Susan C. Morse, *Value Creation: A Standard in Search of a Process*, 72 Bull. Int'l Tax'n 196 (2018); Victoria Plekhanova, *Value Creation within Multinational Platform Firms: A Challenge for the International Corporate Tax System*, 17 eJ. Tax Res. 280 (2020); David Elkins, *The Right and the Good: Taxing Rights, Value Creation, and the Rhetoric of International Taxation*, 24 Fla. Tax Rev. 191 (2020).

ing as the previous theories it tries to supplement.[155] To be sure, this does not mean that none of these theories are in any way useful in guiding international tax decisions and legal reform. However, neither the OECD's positions in policy documents nor the legal literature provide support to conclude that economic allegiance, benefits theory, or value creation are binding norms that can be enforced against sovereign states.

2. "Genuine link" and other qualified connections

From the analysis above, it is apparent that even scholars who adhere to the theory that a "genuine link" is necessary for taxation to comply with international law usually do not provide a clear and definite content to the idea of tax nexus. At maximum, authors refer to the two types of connections that states have historically considered sufficient. The first is a personal link with the taxpayer, which usually takes the form, for individuals, of citizenship, residence/domicile, or both, and for companies, of place of incorporation or place of (effective) management, or both. The second is a territorial link with the income that a foreign taxpayer earns in the taxing jurisdiction, which can be ascertained on the basis of local assets, transactions, activities, the existence of a fixed place of business, or other economic interests in the source state. But even in relation to these two minimal links, the fact that states adopt certain practices does not in itself automatically imply a sense of legal obligation (*opinio juris*), as required by general international law. This is because, as seen, *opinio juris* constitutes an element autonomous and distinct from state practice. More relevant, however, is that states have considerably diverged even in their practices concerning the definition of residence and source for tax purposes.[156]

Because of these uncertainties, one author has called for more research on qualifying tax nexus with adjectives like "adequate", "reasonable", "sufficient", "meaningful", or "substantial", in an attempt to determine concrete universal limits to states' taxing powers.[157] In support of this call, Gadžo's work has been conveniently cited for arguing that the "genuine link" idea is a principle of international law.[158] However, Gadžo himself expressly recognizes a

[155] For a recent collection of contributions from many authors on the topic, see Taxation and Value Creation iii (Werner Haslehner & Marie Lamensch eds., 2021) (introducing the volume by stating that "it rapidly became clear (at least to academics) that there would be no obvious answer to the question 'where is value being created?' in a manner that would be relevant for (international) tax purposes, inter alia in view of the different models of value creation within corporate entities.").

[156] *See supra* note 139.

[157] Philip Baker, *Some Thoughts on Jurisdiction and Nexus*, *in* Current Tax Treaty Issues: 50th Anniversary of the International Tax Group 441, 452 (Guglielmo Maisto ed., 2020) (arguing that the nexus requirement can vary according to the type of tax or taxpayer, that different forms of tax nexus might be weighted differently, including for administrability reasons, and that the validity of a nexus claim can change over time). Note, however, that Globe establishes a new tax regime that reaches a specific set of taxpayers, thus theoretically complying with that author's criteria.

[158] Gadžo, *supra* note 126, at 208 (arguing that "the nexus principle forms part of general international law of income tax jurisdiction, since it has attained the status of international cus-

high degree of malleability in defining what a "genuine link" is. Gadžo's analysis concludes that states retain considerable tax policy space to determine the tax bases that belong to their territory.[159]

In any case, some of Globe's critics have pushed the idea of an "adequate" or "reasonable" nexus further, in order to make the case for other forms of connections in addition to traditional residence and source. Given that the IIR and the UTPR impose taxes on resident companies or local permanent establishments (thus, arguably in compliance with personal or territorial link requirements),[160] critics have claimed that Globe still violates general international law because the taxed income has no "transactional" or "economic" connection with the taxing jurisdiction or, in the specific case of the UTPR, because the taxed income is not controlled by the targeted taxpayer. But even proponents of the theory that international law requires a "relevant nexus or minimum connection" would not agree with these complaints.[161] For example, when Howard Liebman considered in 1976 what could justify taxation of foreign-companies' profits under the U.S. controlled foreign corporation legislation (subpart F), he stated that both control and the fact that the controlled foreign corporation income was "unconnected with U.S. business or income-generating activities" were irrelevant since tax jurisdiction can be anchored on "citizenship or residency of the persons to be taxed."[162] As such, Liebman concluded: "The tax imposed by the enactment of Subpart F remains within the jurisdictional limits mandated by international law because jurisdiction is only asserted over 'U.S. shareholders'."[163]

A similar counterargument to the critique that UTPR income lacks a direct economic connection with the UTPR jurisdiction has been offered by Professor Jeffery Kadet. Kadet claims that, even without a visible link in the form of intercompany transactions, a real economic connection indirectly "arises from the clear pervasiveness of centrally managed groups that have consciously managed their allocations of group profit amongst group mem-

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tom.").

[159] *Id.* at 209 ("[T]he role of customary international law is very restricted. States generally have wide freedom in defining content of abstract concepts like fiscal residence or source of income. They only have to abide with the requirement that a reasonable connection in territorial (spatial) terms has to be established. Accordingly, in this regard a high degree of flexibility pervades international tax law, as states can lawfully impose income tax on manifold bases. The decision on which among these bases will actually be relied upon is largely a matter of tax policy.").

[160] Christians & Shay, *supra* note 83, at 447 ("[W]hen imposed on a resident person, the UTPR is a residence-based tax, and when it is imposed on a foreign person operating through a PE [permanent establishment], it is a source-based tax.").

[161] *Cf.* Howard M. Liebman, *Taxation of Foreign Source Income: Implications of CCA, Inc.*, 17 Harv. Int'l L.J. 335, 341 (1976).

[162] *Id.* at 343. *See also* Avi-Yonah, *supra* note 69, at 952 ("[I]f the CITL [customary international tax law] jurisdictional limits (taxation requires residence or source jurisdiction) are binding, then they should bind whether control exists, and that is not the case."); Avi-Yonah, *The UTPR and the Treaties*, *supra* note 83, at 46 ("[C]ontrol is irrelevant to jurisdiction."); Magalhães, *supra* note 32, at 1261.

[163] Liebman, *supra* note 160, at 342–43.

bers, all of which use separate-entity accounting, through voluntarily created corporate structuring and intercompany agreements."[164] Such real economic connection has been justified on the account that the UTPR effectively allocates income by reference to the number of employees and net book value of assets in the UTPR jurisdiction.

One of this Article's authors has argued, together with Professor Stephen Shay, that profit allocation metrics are unnecessary to justify the UTPR because, as mentioned in Part II, the rule technically creates an "additional cash tax expense" for the subsidiary or permanent establishment located in the UTPR jurisdiction.[165] This could mean that the UTPR imposes in effect a charge that amounts to "an excise tax on the status of membership in a MNE [multinational enterprise] group subject to the UTPR", thus remaining outside the scope of tax treaties on income and capital.[166]

Either way, the point is that tax nexus is, and might always be, an insufficiently defined concept that is susceptible to vastly different interpretations. The consequence of this vagueness is that claims that general international law would bar Globe are inadequately supported in theory and practice.

3. Permanent establishment and physical presence

In international tax law, a common rule that determines when source countries can tax business income from a foreign resident is the so-called "permanent establishment".[167] This concept is found in many bilateral tax treaties under Articles 5 and 7,[168] and sometimes it is also regulated in domestic law, especially among European countries.[169] When referring to permanent establishments, the OECD and some scholars use expressions like "fundamental or basic principle" to refer to what is, in reality, one among many possible ways to divide taxing rights between residence and source.[170] As Professor Sérgio André Rocha has convincingly argued, the permanent establishment idea does not reflect an "absolute and universal criterion".[171] Rocha further

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[164] Kadet, *supra* note 83, at 1071.

[165] Christians & Shay, *supra* note 83, at 447.

[166] *Id*. at 448.

[167] OECD Model Tax Convention on Income and on Capital, at 31–34 (Nov. 21, 2017) [hereinafter OECD MTC]; U.N. Dep't of Int'l Econ. & Soc. Affairs, U.N. Model Double Tax Convention Between Developed and Developing Countries, at 10–16, U.N. Doc. ST/ESA/378, U.S. Sales No. E.21.XVI.1 (2021) [hereinafter UN MTC].

[168] OECD MTC, *supra* note 167; UN MTC, *supra* note 167.

[169] Brian Arnold & Geoffrey Loomer, *Article 5: Permanent Establishment*, *in* Global Tax Treaty Commentaries 1, 18 (2022) (ebook).

[170] *Cf. generally* Arvid Aage Skaar, Permanent Establishment: Erosion of a Tax Treaty Principle (2nd ed. 2020).

[171] *See* Sérgio André Rocha, *International Fiscal Imperialism and the "Principle" of the Permanent Establishment*, 68 Bull. Int'l Tax'n 83, 84 (2014). Under domestic law, some countries like Brazil, Canada, South Africa, and the United States do not even have a general legal concept of permanent establishment. Arnold & Loomer, *supra* note 169, at 18 ("The countries that do not use the PE concept in their domestic law generally focus on the business activities taking place in their territories rather than the existence of a fixed place of business. The domestic rules in

claims that this idea reflects "simply a model that protects certain interests of developed countries",[172] leading him to conclude that "[t]here is no justification for developing countries to include Article 7 in their tax treaties."[173]

Even if one does not fully embrace Rocha's claim about the dispensability of Article 7, it should be recognized that treaty-based source rules like the permanent establishment are negotiated thresholds, and not mandatory international norms limiting all the world's states even in the absence of treaties.[174] This conclusion finds support in the history of tax treaty model drafting and transnational negotiations between developed and developing countries.[175]

At the time of the League of Nations, there were already discussions about the importance of source rights for debtor countries. By the 1940s, the conflict between residence (favored by developed countries) and source (favored by developing countries) would become apparent with the drafting of two opposing tax treaty models: The Mexico Draft of 1943 (pro-source) and the London Draft of 1946 (pro-residence).[176] Supported by developed countries, the London Draft had a greater impact within the League of Nations, influencing the design of the world's first model tax convention by the then 20-member OECD in 1963.[177] The Mexico Draft would only shape an alter-

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these countries often may not even require a sustained period of business activity in the country, but may apply to isolated transactions or one-off transactions where they have the character of business transactions contrary to the ordinary meaning of business, which may suggest regular organized activity over a significant period.").

[172] Rocha, *supra* note 171, at 84.

[173] Sérgio André Rocha, *Should Developing Countries Include Article 7 in Their Tax Treaties?*, 71 Bull. Int'l Tax'n 354, 355 (2017).

[174] This is even acknowledged by one of the main UTPR critics. Boidman, *Avi-Yonah's Customary International Tax Law Doesn't Cut It in Canada*, *supra* note 82, at 1079 ("There has never been a suggestion that that is limited by the PE [permanent establishment] notion unless there is a relevant treaty that has been enacted by Parliament as part of Canadian law.").

[175] *See generally* Sunita Jogarajan, Double Taxation and the League of Nations (2018); Nikki J. Teo, The United Nations in Global Tax Coordination: Hidden History and Politics (2023).

[176] *Cf.* Richard Vann, *Writing Tax Treaty History*, *in* The History of Double Taxation Conventions in the Pre-BEPS Era 23, 28, 39 (Michael Lang & Ekkehart Reimer eds., 2021).

[177] Annet Wanyana Oguttu, *A Critique of International Tax Matters and the OECD BEPS Project in Addressing Fair Treaty Allocation of Taxing Rights between Residence and Source: The Case of Tax Base Eroding Interests, Royalties and Service Fees from an African Perspective*, 29 Stellenbosch L. Rev. 314, 321 (2018) ("[T]he allocation of taxing rights has for years favoured developed countries. It was only in the Mexico Draft that developing country interests received favourable attention, but the London Draft reversed this to some extent."). *See generally* Robert Willis, *Great Britain's Part in the Development of Double Taxation Relief*, 1965 Brit. Tax Rev. 270 (1965); Robert Willis, *Double Taxation Relief: The Role of the United Kingdom*, 13 Can. Tax J. 499 (1965); Donald R. Whittaker, *An Examination of the O.E.C.D. and U.N. Model Tax Treaties: History, Provisions and Application to U.S. Foreign Policy*, 8 N.C.J. Int'l & Com. Reg. 39 (1982-1983); John F. Avery Jones, *Understanding the OECD Model Tax Convention: The Lesson of History*, 10 Fla. Tax Rev. 1 (2009).

native treaty model in 1980 with the publication of the United Nations' Model Tax Convention.[178]

When the United Nations was still developing this model in the 70s, one of the main points in the agenda of developed countries was to limit source-based taxation as much as possible.[179] In response, some developing countries took the opposite position that source countries should be granted exclusive taxing rights.[180] Exclusivity of source taxation, however, was strongly resisted by developed countries, as the world's capital exporters and consequently the residence of most cross-border investors.[181] Since many members within the UN Group of Experts had worldwide tax systems, the Group ended up focusing on trying to expand the scope of source treaty provisions, by using the OECD model as a point of departure.[182] The outcome, as one of the developing countries' negotiators within the UN Group at the time put it, was that "the UN Model was basically the OECD Model, with some modifications aimed at establishing a 'priority'—not exclusivity—to the source principle."[183]

The main ways in which the UN model tries to prioritize source is by reducing the permanent establishment threshold and allowing higher with-

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[178] Reuven S. Avi-Yonah & Haiyan Xu, *A Global Treaty Override: The New OECD Multilateral Tax Instrument and Its Limits*, 39 Mich. J. Int'l L. 155, 156 (2018). *Cf. also* Elliott Ash & Omri Marian, *The Making of International Tax Law: Evidence from Tax Treaty Texts*, 24 Fla. Tax Rev. 151, 185–87 (2020) (identifying, based on empirical data, roughly equal similarities between the two drafts and the texts of active treaties until the 1970s, when the Mexico Draft started to become more influential as a result of the UN work).

[179] Stanley S. Surrey, *United Nations Group of Experts and the Guidelines for Tax Treaties between Developed and Developing Countries*, 19 Harv. Int'l L.J. 1, 8 (1978).

[180] Francisco Neves Dornelles, *O Modelo da ONU para Eliminar a Dupla Tributação da Renda e os Países em Desenvolvimento* [The UN Model to Eliminate Double Income Taxation and Developing Countries], *in* Princípios Tributários no Direito Brasileiro e Comparado: Estudos em Homenagem a Gilberto Ulhôa Canto [Tax Principles in Brazilian and Comparative Law: Studies in Homage to Gilberto Ulhôa Canto] 195, 196–197 (Agostinho Toffoli Tavolaro, Brandão Machado & Ives Gandra da Silva eds., 1988) ("Since the beginning of the work, experts from developing countries criticized the structure of the OECD Model Convention because it 'grants the right to tax the investor's State of residence and only secondarily the State where the income was generated' and also because it 'requires the receiving State to waive taxes on income from investments in an excessively large number of cases'. The same experts—highlighting the need to change the concepts included in the OECD Model—felt that the model to be developed by the Group should assure the principle of exclusive taxation in the country of the source of income (income country) and, consequently, there would be no taxation in the country of residence of the beneficiary of the income."), *translated in* Sérgio André Rocha, Brazil's International Tax Policy 28 (2017).

[181] *Id*.

[182] Surrey, *supra* note 178, at 8–9.

[183] Dornelles, *supra* note 180, *translated in* Rocha, *supra* note 180, at 28. *See also* Sérgio André Rocha, *Brazil's Treaty Policy*, 71 Bull. Int'l Tax'n 333, 335 (2017) ("The structures of the OECD Model and the UN Model are very similar.").

holding taxes on passive or investment income,[184] but also by adopting the so-called force of attraction rule, even if limited. This rule "attracts" income derived by a non-resident from the sale of goods or the provision of services in the source state that are similar to those provided through a permanent establishment in that same state.[185]

There are, however, examples of regional multilateral conventions or agreements between developing countries that have incorporated the principle of exclusive source taxation.[186] This is the case of the 1971 Latin American multilateral tax convention among Bolivia, Chile, Colombia, Ecuador, and Peru, namely the Andean Community's "Agreement among Member Countries to Avoid Double Taxation and of the Standard Agreement for Executing Agreements on Double Taxation between Member Countries and other States outside the Subregion,"[187] and the 1994 Intra-Regional Double Taxation Agreement among the members of the Caribbean Community and Common Market (CARICOM).[188] A regional model that also seeks to safe-

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[184] *Cf.* Eyitayo-Oyesode, *supra* note 143, at 215–23.

[185] Amar Mehta, *The Limited Force of Attraction Rule*, 21 Asia-Pacific Tax Bull. (2015) ("The UN MC [model convention] extends the taxing right of the source state by way of inclusion of the so-called 'limited force of attraction rule' (LFA rule) in article 7(1). [It is important to note that the OECD MC does not endorse the force of attraction rule (either full or limited)]. As per the LFA rule, the source state is permitted to tax income—even if not attributable to a PE [permanent establishment]—to the extent it is derived from sale of goods or provision of services in the source state, provided such goods or services are of the same kind as those sold or provided by the PE."). *Cf. also* Suhas Sagar, *How "Limited" is the Limited Force of Attraction? An Analysis of the Relevant Case Law and the Potential Implications of the OECD/G20 BEPS Initiative*, 71 Bull. Int'l Tax'n 180, 182, 211 (2017) (claiming "[f]ull force of attraction, given its expansive nature, has never gained much currency in international taxation and is widely considered to be a provision that broadens the tax base of the source state without justification" and that limited force of attraction, as proposed by the UN model, "has not been adopted as a general standard of international tax law, has failed to gain popularity even with the capital-importing countries, and appears to suffer from interpretational and practical difficulties.").

[186] Sunita Jogarajan, *A Multilateral Tax Treaty for ASEAN—Lessons from the Andean, Caribbean, Nordic and South Asian Nations*, 6 Asian J. Comp. L. 1, 10–12 (2017).

[187] SICE Foreign Trade Information System, Decision 40: Approval of the Agreement among Member Countries to avoid double taxation and of the Standard Agreement for executing agreements on double taxation between Member Countries and other States outside the Subregion, http://www.sice.oas.org/trade/junac/decisiones/dec040e.asp [https://perma.cc/78JK-FRRG] ("Article 4: Tax Jurisdiction—Irrespective of the nationality or residence of the persons, such income of any kind as they may obtain shall be taxable only in the Member Country where the source of production of that income is located, save in the exceptional cases provided for in this agreement.").

[188] Agreement Among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment, CARICOM States, July 6, 1994, https://caricom.org/wp-content/uploads/Agreement-Among-The-Member-States-of-The-CARICOM-for-the-Avoidance-of-Double-Taxation-and-the-Prevention-of-Fiscal-Evasion-……..pdf [https://perma.cc/MN6L-XFZ6] ("Article 5: Tax Jurisdiction—Irrespective of the nationality or State of residence of a person, income of whatever nature accruing to or derived by such person shall be taxable only by the Member State in which the income arises, except for the cases specified in this Agreement.").

guard greater source taxing rights is the Multilateral Model Tax Convention for Latin America (ILADT).[189]

These examples further corroborate the character of the permanent establishment concept as a commonly accepted norm or practice without authoritative status of a general international legal norm that binds all states. Indeed, the whole idea of conditioning the taxation of cross-border business income to a physical presence depends upon written domestic or treaty provisions to become hard law.

4. Separate-entity approach and the arm's-length standard

Treating related parties for tax purposes as if they were at arm's length has been a central component of modern income tax systems.[190] The idea has covered situations ranging from members of a family group to corporate entities under common ownership, management, or control. At a domestic and individual level, the concern is that related persons might shift income from high earners to low earners in order to avoid reaching higher brackets in the progressive rate scale.[191] In a cross-border context, the key issue is that taxpayers might take advantage of corporate structures to organize economic activities, establish entities, and set prices and conditions for intercompany transactions in a way that leaves most profits in low-tax jurisdictions.[192]

For this reason, many countries over the years have adopted transfer pricing legislation. Such legislation grants tax authorities the statutory power to reprice related party transactions (including any deals or arrangements between business affiliates) to appropriately reflect taxable income that would arise under market conditions applicable to unrelated and independent actors.[193] The core idea of transfer pricing regimes is that income taxation rests on the accurate computation of each taxpayer's profit, so rules are necessary to ensure that related parties do not strategically inflate or reduce their inter-company prices in order to achieve a lower tax burden for the group as a whole.

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[189] *See* Pedro Schoueri, *Comparison of the OECD and ILADT Model Conventions*, 68 Bull. Int'l Tax'n 333, 335 (2017).

[190] *See generally* Reuven Avi-Yonah, Nicola Sartori & Omri Marian, Global Perspectives on Income Tax Law (2011); Victor Thuronyi, Kim Brooks & Borbala Kolozs, Comparative Tax Law (2nd ed. 2016); Hugh J. Ault, Brian J. Arnold & Graeme S. Cooper, Comparative Income Taxation: A Structural Analysis (4th ed. 2019).

[191] John G. McDonald, *The Arm's Length Concept*, 3 Can. Tax J. 25, 25 (1955) ("Current heavily-taxed income received by the head of a household may be split up among the members of the family by assignments of income. The aggregate of the income tax payable by the family would be considerably less than the original amount payable by the head of the household.").

[192] For a review of transfer pricing methods and a discussion on the nature of the arm's-length standard, see Aitor Navarro, Transactional Adjustments in Transfer Pricing 3–49 (2018) (considering arm's length as "an optimization mandate with a minimum content," "a unit of measurement in the context of the ability-to-pay principle," and "a full or limited fiction").

[193] For example, if a parent or subsidiary in one jurisdiction sells a product to an entity of the same economic group located abroad, the price of the transaction must be comparable to what an independent seller would have charged under similar circumstances.

When there is a tax treaty regulating the relationship between two countries, the power to adjust prices is usually laid out in Article 9, which accordingly allows the adjustment of "any profits" arising between "associated enterprises" operating under conditions that differ from "those that would be made between independent enterprises."[194] This provision does not prescribe a specific methodology for the price and income adjustments, however. Because methodological mismatches can lead to double taxation, the OECD has since the 1990s tried to harmonize transfer pricing methods between members and nonmembers around the so-called "arm's-length principle,"[195] even if diverging interpretations of this principle continue to permeate contemporary individual state practices.[196]

The OECD seeks global harmonization of transfer pricing by way of designing and constantly updating an extensive set of technical guidance on how to economically determine arm's-length prices, which the OECD then promotes as international best practices for both multinationals and governments.[197] As such, OECD transfer pricing guidelines have often been understood as nonbinding or non-controlling standards, a view that is corroborated by some domestic court decisions.[198] The legal question concerning separate accounting and the arm's-length standard, therefore, is whether they consti-

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[194] OECD MTC, *supra* note 167, at 34.

[195] For a rigorous critique of those who call the arm's-length standard an international norm, see generally Stanley I. Langbein, *The Unitary Method and the Myth of Arm's Length*, 30 Tax Notes 625 (1986).

[196] Marta Pankiv, Contemporary Application of the Arm's Length Principle in Transfer Pricing 134 (2017) ("The arm's length principle embedded in article 9(1) of the OECD Model is often subject to quite a broad interpretation that jeopardizes legal certainty, despite the clear purpose of this treaty article.").

[197] *See generally* OECD, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2022).

[198] Canada v. GlaxoSmithKline Inc., [2012] S.C.R. 3, 16 (Can.) ("[T]he *Guidelines* are not controlling as if they were a Canadian statute and the test of any set of transactions or prices ultimately must be determined according to s. 69(2) [of the Canadian Income Tax Act] rather than any particular methodology or commentary set out in the *Guidelines*."); Cameco Corporation v. Her Majesty the Queen, [2018] TCC 195, 241 (Can. Tax Ct.) ("[A]lthough the general thrust of Canada's domestic transfer pricing rule is no doubt consistent with the arm's length principle described in the Model Convention, regardless of the meaning given to Article 9 by the 1995 Guidelines, the determination of the application and scope of the domestic transfer pricing rules must be based on the text chosen by Parliament, interpreted according to accepted principles of statutory interpretation."). *See also* Steve Suarez, *The Cameco Transfer Pricing Decision: A Victory for the Rule of Law and the Canadian Taxpayer*, 92 Tax Notes Int'l 877, 878 (2018) ("[T]he Cameco decision is an important reminder that OECD pronouncements—including the transfer pricing guidelines emanating from the OECD's base erosion and profit-shifting project—are not the law in Canada."). For academic discussions of the legal status of the OECD transfer pricing guidelines, see generally Jose Calderón, *The OECD Transfer Pricing Guidelines as a Source of Tax Law: Is Globalization Reaching the Tax Law?*, 35 Intertax 4 (2007); Krzysztof Lasiński-Sulecki, *OECD Guidelines: Between Soft-Law and Hard-Law in Transfer Pricing Matters*, 17 Comp. L. Rev. 63 (2014); Bogumił Brzeziński, Krzysztof Lasiński-Sulecki & Wojciech Morawski, *OECD Transfer Pricing Guidelines as a Quasi Source of Law in a Post-BEPS World—Legislative and Judicial Developments from a Polish Perspective*, 27 Int'l Transfer Pricing J. 187 (2020).

tute, in any authoritative sense, norms of international law that states must apply, even if under different adjustment methods.

Since the Carroll report prepared for the League of Nations in 1933 on methods for the allocation of taxable income, it is widely accepted that the separate-entity approach is one among many possible approaches for the taxation of multinational companies.[199] In a world that lacked effective cooperative governance structures to allow information flows among tax administrators, pragmatic reasons dictated that the separate-entity approach should prevail for cross-border taxation. But even before the recent rise of multilateral initiatives in international taxation, there were notable divergences between states, the main example perhaps being Brazil's system of pre-fixed margins.[200] Other countries have also adopted unique approaches, even if not in complete or explicit conflict with the OECD, as evidenced by the country chapters of China, India, Mexico, South Africa, and Kenya included in the UN's manual on transfer pricing.[201] In addition, there have been notable exceptions at a domestic level, such as in Canada, Switzerland, and the United States. These three countries have long used formulary apportionment instead of arm's-length prices to allocate profits across provinces, cantons, and states, and the approach has also been considered for the European Union and the Canada-Mexico-United States Agreement (formerly North American Free Trade Agreement) region.[202]

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[199] *See* Mitchell B. Carroll, *Methods of Allocating Taxable Income*, *in* 4 Taxation of Foreign and National Enterprises, at 45–96, League of Nations Doc. C.425(b).M.217(b).1933.II.A. (1933) (delineating three methods, namely separate accounting, empirical methods, and (limited and unlimited) formulary apportionment, and cataloguing jurisdictions that adopt them). *See also* Langbein, *supra* note 195, at 17 ("Carroll expressed no conclusion as to preferred methods for allocation in the associated enterprise context.").

[200] Recently, Brazil decided to align its transfer pricing rules with the OECD guidelines with the goal of improving its chances of becoming an OECD member. *Cf. generally* OECD & Receita Federal do Brasil, *Transfer Pricing in Brazil: Towards Convergence with the OECD Standards: A Joint Assessment of the Similarities and Differences between the Brazilian and the OECD Framework* (2019); Alex de Almeida, *The 1997 Brazil Transfer Pricing Policy Approaches Its End*, 27 Int'l Transfer Pricing J. 143 (2020); Stephanie Soong Johnston & Alexander F. Peter, *Brazil Drafting Law for OECD—Aligned Transfer Pricing Revamp*, 106 Tax Notes Int'l 410 (2022).

[201] *Cf.* United Nations [U.N.], Practical Manual on Transfer Pricing for Developing Countries 537–645 (3rd ed. 2021).

[202] *See generally* Giammarco Cottani, *Formulary Apportionment: A Revamp in the Post-Base Erosion and Profit Shifting Era?*, 44 Intertax 755 (2016) (comparing the Canadian and U.S. models with EU proposals); Martti Nieminen, *Destination-with-Credit Formula: A Simple Add-On that Would Make the CCCTB More Resilient in the Face of Tax Competition and Tax Planning*, 47 Intertax 490 (2019); Christoph Spengel & Kathrin Stutzenberger, *Comment on M. Nieminen: 'Destination-with-Credit Formula: A Simple Add-On that Would Make the CCCTB More Resilient in the Face of Tax Competition and Tax Planning'*, 47 Intertax 496 (2019); Stefan Mayer, Formulary Apportionment for the Internal Market (2009); Joann Martens Weiner, *Practical Aspects of Implementing Formulary Apportionment in the European Union*, 8 Fla. Tax Rev. 629 (2007); Antonio Russo, *Formulary Apportionment for Europe: An Analysis and a Proposal*, 33 Intertax 2 (2005); Walter Hellerstein, *The Case for Formulary Apportionment*, 12 Bull. Int'l Tax'n 103 (2005); Charles E. McLure Jr., *Replacing Separate Entity Accounting and the Arm's Length Principle with Formulary Apportionment*, 56 Bull. Int'l Tax'n 586 (2002); Paul R. McDaniel, *NAFTA and Formulary Apportionment: An Exploration of the Issues*, 3 Intertax 105 (1994); Paul R. McDaniel, *Formulary Taxation in the North American Free Trade Zone*, 49 Tax L.

However, two U.S. scholars have famously defended that the arm's-length standard according to separate accounting ought to be seen as part of customary international law. International economic law professor Chantal Thomas argued in 1996 that "[t]here seems to be substantial evidence that the separate accounting method is in fact a rule of customary international law."[203] Because the United States internally adopts formulary apportionment,[204] Thomas claimed that "there also seems to be at least some evidence that suggests that the United States may be a 'persistent objector' to, and therefore exempt from, this rule as it applies to the states."[205] Thomas' analysis, however, was debunked by international law professor Brian Lepard, in an extensive investigation based on "general legal philosophy, social psychology, international relations theory, game theory, and the philosophy of international law".[206] In particular, Lepard employed the distinction between persuasive and binding authority, as articulated by legal philosopher Joseph Raz, to show that argumentative persuasiveness in favor of the adoption of the arm's-length standard does not imply a legal obligation to do so as a matter of general law.[207]

Professor Reuven Avi-Yonah has also made a case for treating the arm's-length standard as a norm of customary international law, even if this would mean that the U.S. Supreme Court decision in *Barclays* was wrong in validating formulary apportionment in light of the U.S. Constitution's commerce clause.[208] Avi-Yonah's argument is that the arm's-length standard's status as an international custom derives from the OECD's long-standing position re-

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Rev. 691 (1994); Richard D. Pomp, *Issues in the Design of Formulary Apportionment in the Context of NAFTA*, 49 Tax L. Rev. 795 (1994).

[203] Thomas, *supra* note 137, at 135.

[204] Historically, U.S. states applied the unitary method, with the Supreme Court's approval, even to multinationals with entities based inside and outside the United States. Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 159 (1983) ("California's application of the unitary business principle to appellant and its foreign subsidiaries was proper."). After much political debate and friction between the federal government and business interests, many U.S. states decided to embrace a so-called "water's edge" approach, keeping formulary apportionment but limiting it to income sourced in the United States. *See* Daniel L. Simmons, *Worldwide Unitary Taxation: Retain or Rationalize, or Block at the Water's Edge?*, 21 Stan. J. Int'l L. 157, 158 (1985).

[205] Thomas, *supra* note 137, at 135.

[206] Brian D. Lepard, *Is the United States Obligated to Drive on the Right? A Multidisciplinary Inquiry into the Normative Authority of Contemporary International Law Using the Arm's Length Standard as a Case Study*, 10 Duke J. Comp. & Int'l L. 43, 46 (1999).

[207] *See also* Lepard, *supra* note 138, at 285–305 (reiterating the same conclusion).

[208] Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 320 (1994) ("[W]e cannot agree that 'international practice' has such force as to dictate this Court's Commerce Clause jurisprudence."). *See also* Bradley & Goldsmith, *supra* note 127, at 847 n. 209 (criticizing the modern position on customary international law and stating that "[m]any states tax international corporations by first determining their worldwide income and then attributing a portion of that income to the taxing state. According to the Restatement (Third), it is an open question whether this 'worldwide' taxation method is consistent with CIL [customary international law] limitations on extraterritorial jurisdiction. . . . Thus, although the Supreme Court has held that such methods of international taxation are consistent with federal constitutional and statutory law, *see* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 303 (1994), CIL could, under the modern position, render these state practices illegal.").

garding the proper allocation of profits among related parties.[209] This view reflects the OECD's enduring influence in shaping international practices on tax policy even though the OECD is a body with limited membership and no express mandate for acting as a world tax organization.

Neither Thomas' nor Avi-Yonah's positions have garnered much support in the international tax law literature, and the diverging state practices mentioned above further disallow definite conclusions about the separate accounting method being an enforceable norm of general international law.

5. Legal personality and the corporate form

As mentioned in Part II, a specific criticism directed at both the IIR and the UTPR is that these rules might defy the idea of legal personhood. According to this claim, separability of companies could only be disregarded in exceptional circumstances of demonstrated abuse of the corporate form. Some authors accordingly cite the 1970 decision by the International Court of Justice (ICJ) in the famous *Barcelona Traction* case.[210] As seen in Section A above, judicial decisions are considered a secondary source of international law that only binds the parties involved. Yet, in the case of *Barcelona Traction*, the principles arising from the ICJ's ruling have even been considered "obsolete" in light of both the ICJ's subsequent jurisprudential pronouncements and international law developments since the 1970s.[211]

Even if *Barcelona Traction* is not considered obsolete, it did not concern taxation at all, but rather addressed whether the residence jurisdiction of shareholders (in Belgium) of a foreign company (located in Canada) had legal standing before the Court, with respect to alleged violations by a third country (Spain) of the company's rights.[212] Canada had first considered filing a lawsuit against Spain at the ICJ but then decided to drop it. Because of that, Belgium brought a case itself before the Court in the name of the Belgian shareholders. The ICJ, however, declined Belgium *jus standi* for lacking legal interest in the dispute, after interpreting and applying the parties' domestic laws ("municipal law" in the Court's language).[213]

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[209] Reuven S. Avi-Yonah, *Altera, the Arm's Length Standard, and Customary International Tax Law*, 38 Mich. J. Int'l L. 1, 7 (2017) ("[U]ntil the OECD is persuaded otherwise, the ALS [arm's-length standard] is part of CITL [customary international tax law] . . . .").

[210] *See generally* Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, 1970 I.C.J. 3 (February 5) [hereinafter Barcelona Traction].

[211] Marius Emberland, *The Corporate Veil in the Case Law of the European Court of Human Rights*, 63 ZaöRV 63, 959, 968 (2003) (criticizing the European Court of Human Rights for relying on *Barcelona Traction* because this case is "not necessarily in tune with international law trends at this point" and "subsequent practice from the ICJ registers an implicit rejection of its 1970 holding."); Lawrence Jahoon Lee, *Barcelona Traction in the 21st Century: Revisiting Its Customary and Policy Underpinnings 35 Years Later*, 42 Stan. J. Int'l L. 237, 275 (2006) (also calling *Barcelona Traction* obsolete).

[212] *See generally* Herbert W. Briggs, *Barcelona Traction: The Jus Standi of Belgium*, 65 Am. J. Int'l L. 327 (1971).

[213] Barcelona Traction, *supra* note 210, at 34 ("[I]nternational law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic

The ICJ therefore did not affirm an international law principle of strict respect for corporate personality for all states.[214] Indeed, international law does not regulate nor prescribe any specific form or right to corporate entities except for what is provided in particular treaties or state-investor contracts.[215] In 2007, the ICJ decided the *Diallo* case concerning diplomatic protection of two companies incorporated in the Democratic Republic of Congo that were owned by a national of the Republic of Guinea.[216] In reaching its decision, the Court revisited the reasoning in *Barcelona Traction* to deny "protection by substitution" of the rights of Mr. Ahmadou Sadio Diallo as a shareholder and manager of the Congolese corporations, and then stated the following:

> The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors.[217]

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jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law."). *See also* Richard B. Lillich, *Two Perspectives on the Barcelona Traction Case*, 65 Am. J. Int'l L. 522, 524 (1971) ("The municipal law of corporations thus became the basis for the Court's fabrication of its international law rule governing shareholder claims.").

[214] *Cf.* F. A. Mann, *The Protection of Shareholders' Interests in the Light of the Barcelona Traction Case*, 67 Am. J. Int'l L. 259, 272–73 (1973) (outlining seven rules deriving from *Barcelona Traction*, one of which is that "[n]o rule of customary international law has as yet come into existence which would confer a right of diplomatic protection on a state merely by reason of the fact that the value of its nationals' shareholdings and thus its own economic resources suffer damage."); John Dugard (Special Rapporteur), *Fourth Rep. on Diplomatic Protection*, Int'l L. Comm'n on Its Fifty-Fifth Session, May 5–June 6 and July 7–Aug. 8, 2003, U.N. Doc. A/CN.4/530, at 28 (Mar. 13, 2003) ("Legal personality is 'not a natural phenomenon but a creature of law.' A legal system may confer personality on whatever object or association it pleases. There is no consistency or uniformity among legal systems in the conferment of legal personality.").

[215] *See* Julian Arato, *The Elastic Corporate Form in International Law*, 62 Va. J. Int'l L. 383, 394 (2022) ("Every corporation is a creature of some domestic law. International law does not entail any robust general law of corporations. It does not provide for incorporation and does not subsidize any uniquely international corporate form. Nor does international law go far toward regulating corporations."); Harri Kalimo & Tim Staal, *"Softness" in International Instruments: The Case of Transnational Corporations*, 42 Syracuse J. Int'l L. & Com. 363, 368–79 (2015) (discussing challenges in governing transnational corporations due to an international hard law void).

[216] *See generally* Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, 2007 I.C.J. 582 (May 24) [hereinafter Diallo].

[217] *Id.* at 36. *See also* Annemarieke Vermeer-Künzli, *Diallo and the Draft Articles: The Application of the Draft Articles on Diplomatic Protection in the Ahmadou Sadio Diallo Case*, 20 Leiden J. Int'l L. 941, 954 (2007) (stating that the ICJ "avoided any pronouncement on the controversial

Whether and to what extent separate legal personality should be respected remains, absent a specialized treaty or regime, to a large degree a matter of national law and policy goals.[218] For this reason, Liebman concluded in 1976 that the U.S.-controlled foreign corporation regime could not be objected to on general international law grounds because "no established principles of international law preclude a State from 'piercing the corporate veil' or from relying on a doctrine of 'constructive receipt' in order to tax its citizens or residents on their share of undistributed foreign source profits earned by a CFC."[219] Setting aside regional regimes that might impose supranational constraints on their members upon their voluntary adherence (such as EU law, when it comes to individual EU countries),[220] no general principle of international law restricts

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question of protection of corporations by the state of nationality of the shareholders . . . ."); Alberto Alvarez-Jiménez, *Minimum Standard of Treatment of Aliens, Fair and Equitable Treatment of Foreign Investors, Customary International Law and the Diallo Case before the International Court of Justice*, 9 J. World Inv. & Trade 51, 70 (2008) (speculating about the result of *Diallo* and stating that "the content and nature of the minimum standard of treatment of aliens is not as such defined in public international law" and that "it is unlikely that, as a result of this case, the fair and equitable treatment standard will end up receiving the official status of customary international law."); Alberto Alvarez-Jiménez, *Foreign Investors, Diplomatic Protection and the International Court of Justice's Decision on Preliminary Objections in the Diallo Case*, 33 N.C.J. Int'l L. & Com. Reg. 437, 443 (2008) ("Determining whether there are general principles of law regarding corporations, and if it appears that there are, defining their content with sufficient precision to make them workable for foreign investors, States, and adjudicators is a daunting task, full of practical obstacles and uncertainty."); Annemarieke Vermeer-Künzli, *The Subject Matters: The ICJ and Human Rights, Rights of Shareholders, and the Diallo Case*, 24 Leiden J. Int'l L. 607, 624 (2011) (stating that *Diallo* confronted the ICJ "with an area of law, the protection of shareholders, that is highly developed in the context of specialized regimes but has not gained a solid anchorage in the rules of general international law.").

[218] *Cf.* Mariana Pargendler, *How Universal is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil*, 58 Colum. J. Transnat'l L. 1, 53–56 (2019) (showing that the corporate form does not have the same defining features across all jurisdictions). Note, in addition, that even when the corporate veil is pierced by judges in a concrete dispute, rather than by elected representatives via statutory law, some authors argue that it is acceptable "if public policy makes [separate personality] undesirable" and "to the extent of avoiding the undesirable effects." Tan Cheng-Han, *Piercing the Separate Personality of the Company: A Matter of Policy?*, 1999 Sing. J. Legal Stud. 531, 531 (1999). *See also* Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 Duke L. J. 748, 774 (1983) ("[T]here is little agreement among scholars on the essential elements of legal personality.").

[219] Liebman, *supra* note 160, at 343.

[220] *See* Case C-196/04, Cadbury Schweppes Overseas v. Comm'rs of Inland Revenue, 2006 E.C.R. 8031, 8053–54 (ruling that the EU internal market's fundamental freedoms, specifically freedom of establishment under EU treaties, preclude a member state from applying CFC rules to a national in respect to income that is low taxed in another member state unless the taxpayer engages in "wholly artificial arrangements"). For an analysis of this case, see generally Gerard T.K. Meussen, *Cadbury Schweppes: The ECJ Significantly Limits the Application of CFC Rules in the Member States*, 47 Eur. Tax'n 13 (2007). However, the situation might change with the recent EU council directive on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups, which prescribes the implementation of the IIR and UTPR by EU member states at the latest by December 31, 2023. Council Directive 8778/22, 2022 O.J. (L 328). *See also* Joachim Englisch, *Non-Harmonized Implementation of a GloBE Minimum Tax: How EU Member States Could Proceed*, 5/6 EC Tax Rev. 207, 219 (arguing, before the directive was released, that unilateral adoption of the IIR and UTPR by EU member states could

sovereign states' prerogative to adopt look-through regimes—or peek through the corporate form—exclusively in situations involving artificiality or abuse.

D. *Comity and the corporation*

In 1991, the economist Ronald Coase was awarded the Nobel prize partially due to his influential article "The Nature of the Firm," which integrates his broader account of the relationship between firms, markets, and the law.[221] One of the reasons Coase's work was considered groundbreaking is that it broke with traditional economic theories that tended to underplay the role of institutions in explaining the formation and operation of companies in the market.[222] Corporate law scholars developed this view further into influential legal theories of the firm, according to which the law is a *sine qua non* for corporations to exist because legal rules are constitutive of the corporate form, corporate rights, and corporate personhood.[223]

"infringe the freedom of establishment as guaranteed by the European Treaties."); Ana Paula Dourado, *Pillar Two from the Perspective of the European Union*, 5 Brit. Tax Rev. 573, 599 (2022) (arguing that "the regime in the Proposal for a Directive on Pillar Two is adequate to ensure compatibility with the TFEU [Treaty on the Functioning of the European Union]."); Werner Haslehner, Editorial, *The Costs of Pillar 2: Legitimacy, Legality, and Lock-In*, 10 Intertax 634, 637 ("At this point, a full reversal is already unrealistic; even significant adjustments may be difficult to achieve, not least because of the adoption of the EU Directive.").

[221] R.H. Coase, *The Nature of the Firm*, *in* The Firm, the Market, and the Law 33, 33–55 (1988). *But see* Sarianna M. Lundan, *The Coevolution of Transnational Corporations and Institutions*, 18 Ind. J. Global Legal Stud. 639, 642–48, 662 (2011) (contrasting traditional economic theories of firms, such as those of Coase as well as of Oliver Williamson, with the transnational corporation, which the author defines as "coordinated systems" that "represent hybrids of some elements of public and private governance."); Gralf-Peter Calliess, *Transnational Corporations Revisited*, 18 Ind. J. Global Legal Stud. 601, 604 (2011) ("From a legal perspective, the concept of the transnational corporation is quite vague because it does not denote a single corporation, but rather an enterprise consisting of multiple corporations or other business entities integrated into a multinational firm.").

[222] For a powerful critique of economic theories of corporations, see David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 Am. Pol. Sci. Rev. 139, 156 (2013) (advancing two main propositions: "(1) that business corporations are governing entities first and foremost, with a subsidiary right to turn their right of government toward the pursuit of private profit; and (2) that corporations are not constituted through private contract, but are government fostered.").

[223] Pargendler, *supra* note 31, at 726 ("It is law, rather than private contracting alone, that endows business entities with strong asset partitioning, enabling the firm to operate as an effective nexus for contracts. It is also law that endows corporations with regulatory partitioning, which is an equally essential, though thus far neglected, attribute of the corporation's role as a nexus for contracts."); David Ciepley, *The Corporation is Always Already Government-Supported, and So is Bankruptcy*, 11 Geo. J.L. & Pub. Pol'y 349, 351 (2013) ("[C]orporations could never be constituted in an economy without government intervention in the market."). *See generally* Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 Yale L. & Pol'y Rev. 265 (1998); Henry Hansmann & Reiner Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387 (2000); Henry Hansmann, Reiner Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 Harv. L. Rev. 1335 (2006); Eric W. Orts, Business Persons: A Legal Theory of the Firm (2013); Simon Deakin et al., *Legal Institutionalism: Capitalism and the Constitutive Role of Law*, 45 J. Comp. Econ. 188 (2017); Michelle Worthington & Peta Spender, *Constructing Legal Personhood: Corporate Law's Legacy*, 30 Griffith L. Rev. 348 (2021).

Being a data giant by definition implies transposing national boundarie. The entire business model of data giants relies on the cooperative functioning of multiple bodies of law—national and international, hard and soft.[224] This makes a data giant a highly complex form of profit-seeking business organization that involves and produces intricate, interconnected economic activities in many nations at once. Ignoring the distinctive legal nature of the data giants, some Globe critics have compared rules like the undertaxed profits rule to an individual being taxed on income pertaining to their siblings or cousins living abroad.

But a data giant, being a group of affiliated companies and operations under common control, is obviously not like a family group at all.[225] Data giants are not bound by the physical world: Their existence stems from a legal fiction or institutional construct supported by a multitude of local laws and international agreements on trade, investment, and commercial activity. Legal conventions are what make it possible for data giants to be formed and to continuously expand, multiply, merge and separate, create and eliminate members, rearranging their activities at will, and, in doing so, spreading their income among low- and high-tax jurisdictions in order to obtain economic gains through means not available to human beings.[226] It is precisely because the data giants are nothing like humans that base erosion and profit shifting has become such an issue for corporate taxation systems, and what ultimately motivated Globe.

To fully grasp what is at stake in the Globe debate requires acknowledging that, in the same way that state institutions play a core role in facilitating domestic economic activity,[227] cross-border regulatory cooperation among

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[224] *Cf.* Larry Cata Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA J. Int'l & Comp. L. 499, 500–17 (2008) (describing the regulatory framework of multinational corporations as traditional public positive law (domestic corporate law, domestic substantive law, international substantive law, and international process or enforcement authority) as well as soft law); Horst Eidenmuller, *The Transnational Law Market, Regulatory Competition, and Transnational Corporations*, 18 Ind. J. Global Legal Stud. 707, 715–25 (2011) (describing transnational corporations as prominent actors operating within a transnational law market formed by company law, contract law, law of dispute resolution, and insolvency law); Mariana Pargendler, *The Rise of International Corporate Law*, 98 Wash. U. L. Rev. 1765, 1765 (2021) (arguing that "corporate law today is not only a product of the invisible hand of the market but also of the soft (and not-so-soft) hands of international organizations and standard setters.").

[225] *Cf.* Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 Ind. L.J. 363, 337 (2004) ("If we start with a contractual explanation for the corporation then we will tend to analogize a company's rights and, more importantly its obligations, to those of a natural person. If we start with the notion that corporations are created by states or by the operation of law, that they are abstract persons, then we will be more likely to find a space at least to talk about what a corporation's obligations should be.").

[226] *Cf.* Martin O'Neill, *Entreprises et conventionnalisme : régulation, impôt et justice sociale*, 10 Raison publique 171, 179, 192 (2009) (arguing that modern corporations are doubly conventional because the existence of both the corporate form and corporate property rights is mediated by and dependent on the tax system).

[227] Cass R. Sunstein, Free Markets and Social Justice 5 (1997) (arguing, from a legal perspective, that laissez-faire is a myth because "[f]ree markets depend for their existence on law."); Ha-Joon Chang, 23 Things They Don't Tell You About Capitalism loc. "Thing 1" (2010) (ebook) (arguing the same from an economist's perspective: "Every market has some rules and boundaries that restrict freedom of choice."); Dani Rodrik, The Globalization Para-

multiple states is essential for income-generating activities to take place beyond national territories.[228] At a domestic level, this observation has led many scholars to refute the conceptual notion of a pre-tax income that would belong to each individual in the absence of state intervention through taxation.[229] When transposed to the international level, the same observation should, even more starkly, negate the viability of individual states claiming exclusive entitlement over a portion of a data giant's profits without taking into account all law-based systems of cooperation on which trade and commerce rely.

The production of cross-border profits indeed hinges on myriad international and domestic legal and physical structures that give global capital access to new markets, enforce private contracts and corporate arrangements, allow currency exchange, establish conditions for labor, facilitate knowhow transfers, and so on.[230] As such, taxable income, asset ownership, limited liability, prop-

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dox: Why Global Markets, States, and Democracy Can't Coexist 22 (2011) (arguing that global markets depend on national states since "*markets are not self-creating, self-regulating, self-stabilizing, or self-legitimizing*."); Joseph E. Stiglitz, The Price of Inequality: How Today's Divided Society Endangers Our Future 66 (2012) (arguing that "[m]arkets are shaped by laws, regulations, and institutions," meaning they "don't exist in a vacuum . . ."); Mariana Mazzucato, The Entrepreneurial State: Debunking Public vs. Private Sector Myths 94–98 (2015) (demonstrating that states are necessary for innovation, as exemplified by Apple's success, which would not have been possible without massive U.S. government spending to develop the Internet).

[228] *See generally* Daniel Berkowitz, Johannes Moenius & Katharina Pistor, *Legal Institutions and International Trade Flows*, 26 Mich J. Int'l L. 163 (2004) (discussing how domestic legal institutions determine how countries participate in and benefit from international trade); David Kennedy, A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy (2016) (discussing how technical international legal rules distribute wealth, status, and opportunity globally); Katharina Pistor, The Code of Capital: How the Law Creates Wealth and Inequality (2019) (arguing that capitalism relies on a legal coding that enriches some over others).

[229] Liam Murphy & Thomas Nagel, The Myth of Ownership: Taxes and Justice, 14–15, 18, 25, 31–37 (2002) (criticizing "everyday libertarianism" for depicting income ownership as independent from the tax system, which leads to a "problem of myopia" that ignores the conventional nature of property rights). *See also* Stephen Holmes & Cass Sunstein, The Cost of Rights: Why Liberty Depends on Taxes 59–76 (1999) (arguing that there is no property without taxation); Ronald Dworkin, Is Democracy Possible Here? Principles for a New Political Debate 125 (2006) (generally agreeing with Murphy and Nagel because "[i]f any component of the political settlement, including the tax component, were different, I would have earned a different salary . . ."); Andrei Marmor, Law in the Age of Pluralism 257 (2007) (generally agreeing with Murphy and Nagel because claims of individual added value to wealth production "cannot make any sense independent of the entire system of norms prevailing in the relevant society."); Samuel Freeman, Liberalism and Distributive Justice 39 (2018) (arguing that claims of individual contribution to wealth production "cannot be settled independent of questions regarding the nature of institutional property relations and of the economic system that is in place, and the justice of these conventional arrangements . . . ."); Liam Murphy, *The Artificial Morality of Private Law: The Persistence of an Illusion*, 70 U. Toronto L.J. 453, 482 (2020) ("My pre-tax income is what I get in a market economy that is structured by an entire set of legal and economic institutions, of which property law and tax law are parts.").

[230] *Cf.* David Kennedy, *Law in Global Political Economy: Now You See It, Now You Don't, in* The Law of Political Economy: Transformation in the Function of Law 127, 147 (Poul F. Kjaer ed., 2020) (highlighting "law's background role in the foundations of political and

erty rights, juridical personality, and all other attributes that give rise to the data giants—and make it possible for them to shift profits around—can only make sense within the combined legal regimes and regulatory frameworks of all states that cooperated to make cross-border investment, production, and consumption possible in the first place.

The implication of these observations, as long recognized by economists specialized in international taxation,[231] is that it is practically impossible to determine, with objective certainty, how much of a multinational's income belongs to each of its constituent entities. As a consequence, it is also not possible to determine *ex ante* and based on abstract notions of general international law or pure economic ownership how much each of the various states implicated by the operations of a data giant deserves to tax as a matter of right. Owing to this impossibility, international tax law and the legal or normative boundaries of asserted tax jurisdiction appear to be destined to bargaining, negotiation, and compromise among sovereign nations.[232]

Conclusion

A vigorous debate has arisen among legal practitioners, scholars, and other commentators regarding the existence and scope of legal prohibitions on the right of countries to tax the data giants. Since most of the world's largest data giants are based or headquartered in the United States, this question comes down to whether the United States has a say in whether and to what extent it must share the profits of its locally grown data giants with other jurisdictions through the mechanism of taxation. When the OECD drafted a tax reform initiative that presented novel possibilities for such redistribution, it is no surprise that novel counterarguments arose in response, especially from practitioners whose client base includes exactly the kind of companies targeted by the reform. Among the arguments offered in opposition to the proposed reforms, some of the most surprising have been loose appeals to general international law. An analysis of these purported barriers to taxation yields few persuasive arguments in either the scholarship on international tax law or the official sources of public international law.

The main takeaway is that neither general international law nor legal or economic theory are capable of objectively delimiting, with scientific preci-

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economic life: in the shape of credit, money, capital, labour, citizenship, sovereignty", which the author sees as the places where "[l]aw's distributional significance is most pronounced . . . .").

[231] Peggy B. Musgrave, *Coordination of Taxes on Capital Income in Developing Countries*, *in* Tax Policy in the Global Economy: Selected Essays of Peggy B. Musgrave 368, 373 (2002) ("The division of profits among jurisdictions in which the multinational firm operates interdependently must have a degree of arbitrariness—indeed, the very concept of 'source' may be without meaning. It is therefore not possible to generate a formula which would assign profits to their true 'source' under these circumstances.").

[232] *Cf.* David R. Davies, Principles of International Double Taxation Relief 4 (1985) ("Because tax treaty negotiations are largely a bargaining process with each side seeking concessions from the other, the final agreement will often represent a number of compromises, and it may be uncertain as to whether a full or sufficient *quid pro quo* is obtained by both sides.").

sion, where the tax jurisdiction of one state ends and that of another begins.[233] As such, whether other countries can tax U.S.-based data giants (a question that can be inverted to ask whether the United States can tax data giants that are based elsewhere in the world) comes down not to a legal question but a political one. The political question is simply whether lawmakers in each affected country are willing to cooperate with each other as they navigate mutually agreeable solutions to shared problems, or instead whether they will choose a path of resistance and obstruction.

This question can only be answered if we first accept that the core subject of inquiry involves profits that can only come into being if most of the world's nations actively facilitate the unique business models of the data giants, most of which originate in the United States. That being so, we submit that understanding why data giants do not pay enough tax requires moving past imprecise claims regarding the legal boundaries of the U.S. or any other state's jurisdiction to tax. Finding legal constraints beyond those imposed by the state itself requires a far more rigorous undertaking than appeals to common tradition can provide. Priority should therefore be given to approaches that try to solve structural, administrative, and distributional problems related to designing a mutually advantageous scheme for taxing the data giants and sharing revenue streams between all the affected countries.

[233] The taxation of individuals by multiple states might require a different analysis, possibly in light of international human rights law. *See* Allison Christians, *Fair Taxation as a Basic Human Right*, 9 Int'l Rev. Const. 211, 222–25 (2009) (arguing that tax sovereignty is limited by internationally recognized rights of human beings). *But see* Tax, Inequality, and Human Rights 9 (Philip Alston & Nikki Reisch, eds., 2019) ("Various tax experts to whom we reached out in preparing the conference on which this book is based were skeptical of the proposition that tax policies and systems have significant implications for human rights policy and practice, let alone that human rights law has relevance for tax law.").