

THE DISPROPORTIONATE BURDEN OF  
INTERNATIONAL TAXATION ON U.S. DIGITALLY  
BASED ENTITIES

*By: Katherine Dyer\**

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## I. INTRODUCTION

The Organization for Economic Co-operation and Development (“OECD”) has proposed a Two-Pillar Plan that, *if* implemented, will fundamentally transform the existing global tax structure. The long-standing taxation principle that a company’s operations dictate where it is subject to tax has disappeared.<sup>1</sup> Instead, Pillar One gives foreign countries the authority to tax a U.S. company based on consumer presence alone.<sup>2</sup> Due to the disproportionate number of U.S. companies falling within the scope of Pillar One compared to foreign countries, Pillar One effectively makes the U.S. less competitive.<sup>3</sup> As such, Pillar One opens the door to increasing controversy with tax authorities and harms the U.S. economy.<sup>4</sup> Under Pillar Two, U.S. multinational enterprises (“MNEs”) will pay a global minimum tax rate of at least 15% of their profits regardless of where the company earns them.<sup>5</sup> The OECD’s Two-Pillar Plan (“Plan”) adversely affects U.S. digital MNEs by 1) basing its global tax framework on digital presence rather than operational presence and 2) imposing a global minimum tax rate on profits regardless of where the profits are earned. Consequently, the Plan significantly increases U.S. digital MNEs’ tax liabilities.

This paper argues that the OECD’s proposed Plan is a one-way street. At the behest of the current administration and the OECD, U.S. MNEs risk the ability to remain competitive in the global marketplace in exchange for pleasing foreign governments. Successful U.S. digital MNEs must pay the price in significantly higher taxes based on consumer presence.

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1. Daniel Bunn, *OECD Pillar 1 Amount A: Risks and the Potential for Disputes*, TAX FOUND. (May 10, 2021), <https://taxfoundation.org/oeed-pillar-1-amount-a/>. Under current law, “a U.S. company with foreign operations in France,” for example, would pay “some corporate taxes in both the U.S. and in France,” even though there may be “dozens of other countries” where it has sales but no operations. *Id.* The new proposal “split[s] up the company’s profits into one portion.” *Id.* Thus, countries would tax the company where it “has its headquarters and operations and [tax] another portion . . . where the company has its sales.” *Id.*

2. *Id.*

3. See Letter from All. for Competitive Tax’n, to Janet L. Yellen, Sec’y, Dep’t of Treasury 1–2 (Aug. 13, 2021), [https://www.actontaxreform.com/media/buogdbzo/act-letter-to-treasury-on-if-statement-on-2-pillar-solution\\_20210813.pdf](https://www.actontaxreform.com/media/buogdbzo/act-letter-to-treasury-on-if-statement-on-2-pillar-solution_20210813.pdf) “U.S. companies would account for over 60% of the income reallocated under Amount A of Pillar One . . . and the U.S. company share of the income reallocated under Pillar One would be six times greater than China’s share, even though Chinese companies outnumber U.S. companies in the 2021 Global Fortune 500 by 135 to 122.” *Id.*

4. *Id.* at 3.

5. Abhishek Goel, *Global Minimum Tax—A Turning Point for Corporate Taxation?*, BLOOMBERG TAX (June 21, 2021), [https://www.bloomberglaw.com/product/tax/bloomberg-taxnews/daily-tax-report/X94HS7FS000000?bna\\_news\\_filter=daily-tax-report#jcite](https://www.bloomberglaw.com/product/tax/bloomberg-taxnews/daily-tax-report/X94HS7FS000000?bna_news_filter=daily-tax-report#jcite). “For example, if a country with a global minimum tax rate of 25% is home to a company that earned profits overseas that were taxed at 15%, it would be entitled to bring the company into compliance with the minimum tax by charging it an additional 10%.” *Id.*

The first part of this paper discusses the OECD's proposals released over the years. It also sheds light on how the Plan attempts to move away from the 2017 Tax Cuts and Jobs Act ("TCJA").

The second part of this paper focuses on how the OECD's outcome conflicts with taxing the digital economy by disregarding 1) the arm's length principle under Pillar One and 2) current law under Pillar Two. It also analyzes how and to what extent foreign countries have responded to taxing U.S. MNEs while the OECD attempts to finalize its Plan. Additionally, it provides an outlook on how the Plan increases the tax liabilities and costs for U.S. MNEs.

The third part of this paper emphasizes the current administration's lack of transparency and its failure to provide details regarding how the Plan's implementation will affect U.S. businesses and the economy. It will discuss the proposed change in law, Congress's role in the Plan, and how and why Congress must step in.

The final part of this paper will offer a solution to the OECD's proposed Plan. Suppose the current Plan passes through Congress. In that case, the OECD and the current administration must provide more certainty to U.S. MNEs and the American public that the U.S. can and will remain globally competitive. However, if the OECD cannot receive the support it needs to implement the current Plan, this paper offers a solution in place of the OECD's Two-Pillar Plan.

## II. WHAT DOES THE OECD PROPOSE?

In 2013, the OECD, commissioned by the G-20 Finance Ministers,<sup>6</sup> published its action plan on base erosion and profit shifting ("BEPS").<sup>7</sup> BEPS relates to arrangements that shift profits away from the jurisdictions where the activities creating those profits take place.<sup>8</sup> The growing digitalization of the economy led to the creation of the BEPS project.<sup>9</sup> While many would agree that BEPS harms foreign governments and needs a solution, taxing digital MNEs without any foreign operations presents a series of complications. Nonetheless, the OECD is concerned with taxing these "digital giants."

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6. *What is the G20?* ORG. FOR ECON. COOP. AND DEV., <https://www.oecd.org/g20/about/> (last visited Mar. 20, 2023)(explaining that the G-20, an international forum consisting of 19 countries and the European Union, represents the world's major developed and emerging economies).

7. Org. for Econ. Coop. and Dev. [OECD], *Action Plan on Base Erosion and Profit Shifting*, at 11 (July 19, 2013), <https://www.oecd.org/ctp/BEPSActionPlan.pdf> [hereinafter *OECD Action Plan*].

8. *Id.* at 10 (explaining that some U.S. MNEs shift profits to low taxing jurisdictions in developing countries with little to no taxation).

9. Karl A. Frieden & Barbara M. Angus, *Convergence and Divergence of Global and U.S. Tax Policies*, 101 TAX NOTES STATE 937, 937-38 (2021).

The OECD's publication in 2013 included 15 action items with proposed timing and methodology.<sup>10</sup> Action item one addresses the tax challenges of the digital economy.<sup>11</sup> In October 2015, the OECD published an Action One final report, which focused on three main policy challenges raised by the digital economy.<sup>12</sup> These challenges include nexus, data, and characterization.<sup>13</sup>

Before 2017, the United States operated a worldwide tax system.<sup>14</sup> However, in 2017, Congress passed the TCJA, and the U.S. moved to a territorial system.<sup>15</sup> The territorial system excluded MNEs' earnings in foreign countries from its domestic tax base.<sup>16</sup> In 2017, the TCJA addressed the issue of profit shifting in three main ways.<sup>17</sup> It cut the corporate tax rate from 35% to 21%,<sup>18</sup> which reduced the incentive for U.S. MNEs to take advantage of tax arbitrages.<sup>19</sup> The TCJA also implemented the Global Intangible Low-Taxed Income ("GILTI") policy to reduce U.S. MNEs' shifting profits abroad.<sup>20</sup> It created a 10.5%

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10. See *OECD Action Plan*, *supra* note 7, at 13-25.

11. *Id.* at 14.

12. Org. for Econ. Coop. and Dev. [OECD], *OECD/G20 Base Erosion and Profit Shifting Project, Addressing the Tax Challenges of the Digital Economy, Action 1: 2015 Final Report*, at 99 (Oct. 5, 2015), [https://www.oecd-ilibrary.org/taxation/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report\\_9789264241046-en](https://www.oecd-ilibrary.org/taxation/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report_9789264241046-en) [hereinafter *OECD 2015 Final Report*].

13. *Id.* at 99, ¶ 248. Nexus covers the "reduced need to have a physical presence to carry on business in a foreign country, which raises the question of whether the current rules to determine nexus within a jurisdiction for tax purposes are appropriate." *Id.* The data policy challenge concerns the "permitted use of companies in the digital economy to gather user information across borders, which raises the question of how to attribute value created from the generation of data through digital products and services." *Id.* The characterization policy challenge revolves around "developing new digital products, such as cloud computing, as a means of delivering services and thus creating uncertainties concerning the proper characterization of payment made in the context of new business models." *Id.*

14. See *Worldwide Tax System*, TAX FOUND., <https://taxfoundation.org/tax-basics/worldwide-taxation/> (last visited Mar. 20, 2023) (explaining that when the U.S. operated a worldwide tax system, U.S. corporations paid U.S. corporate income taxes on all of its worldwide earnings, but received a credit for the foreign corporate taxes it paid).

15. *Id.* When the new territorial tax system was enacted as part of the TCJA, it excluded "foreign-earned income from domestic taxation" but still included passive income, including foreign-earned capital gains. *Id.*

16. See *Territorial Tax System*, TAX FOUND., <https://taxfoundation.org/tax-basics/territorial-taxation/> (last visited Mar. 20, 2023) (ensuring that profits are only taxed in the foreign country in which they are earned).

17. Cody Kallen, *International Tax Proposals and Profit Shifting*, TAX FOUND. (Aug. 25, 2021), <https://taxfoundation.org/international-tax-proposals-profit-shifting/>.

18. *Id.*

19. Sarah Li Cain, *Tax Arbitrage*, INVESTING ANSWERS (Apr. 13, 2021), <https://investinganswers.com/dictionary/t/tax-arbitrage> (noting that tax arbitrage is a strategy where corporations profit by legally paying the least amount of taxes).

20. See *Global Intangible Low Tax Income (GILTI)*, TAX FOUND., <https://taxfoundation.org/tax-basics/global-intangible-low-tax-income-gilti/> (last visited Mar. 20, 2023) (explaining that GILTI is a minimum tax targeted at foreign earnings from intangible assets).

surtax<sup>21</sup> on excess earnings from intangible assets in controlled foreign corporations (“CFCs”).<sup>22</sup> Lastly, the TCJA created the Foreign Derived Intangible Income (“FDII”) deduction, which provided a 13.125% tax rate for income booked in the U.S.<sup>23</sup>

In 2018, the U.S. Supreme Court ruled on a state case involving digital taxation. While not necessarily a BEPS driver influencing the OECD, the Supreme Court ruled in favor of South Dakota enacting legislation conferring nexus for sales tax purposes upon remote sellers.<sup>24</sup> The Supreme Court’s holding in *Wayfair* shifted its prior view by ruling that physical presence is not a requirement for taxation purposes.<sup>25</sup> While this was a state tax case, it exemplifies another branch of the federal government recognizing the evolution of digital services in the 21<sup>st</sup> century.

In December 2020, the OECD released its inclusive framework on BEPS with a report on Pillar One Blueprint.<sup>26</sup> Pillar One’s critical elements consist of three components: 1) a new taxing right for market jurisdictions<sup>27</sup> over a share of residual profit calculated at an MNE group level, which accounts for Amount A; 2) a fixed return for certain baseline marketing and distribution activities taking place physically in a market jurisdiction, which accounts for Amount B; and 3) a process to improve tax certainty through effective dispute prevention and resolution mechanisms.<sup>28</sup>

Amount A, a building block of Pillar One, includes scope, revenue sourcing, profit allocation, nexus, tax base determination, and

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21. See *Surtax*, TAX FOUND., <https://taxfoundation.org/tax-basics/surtax/> (last visited Mar. 20, 2023)(defining surtax as an additional tax levied on top of an already existing business or individual tax).

22. Michelle P. Scott, *Global Intangible Taxed Income (GILTI)*, INVESTOPEDIA, <https://www.investopedia.com/global-intangible-low-taxed-income-gilti-definition-5097113> (Feb. 24, 2022)(“GILTI is income earned abroad by [. . .] CFCs, [which are] controlled subsidiaries of U.S. corporations . . . The tax on GILTI is intended to discourage moving intangible assets and related profits to countries with tax rates below the 21% U.S. corporate rate.”).

23. See *Foreign Derived Intangible Income (FDII)*, TAX FOUND., <https://taxfoundation.org/tax-basics/foreign-derived-intangible-income-fdii/> (last visited Mar. 20, 2023). FDII is income derived from “a company’s legally protected, non-physical assets,” which was adopted “to provide a lower tax rate to incentivize companies from avoiding tax where companies held their assets.” *Id.* This “changed incentives for tax avoidance where companies held their assets and served to increase businesses’ incentives to bring and keep assets and the associated profits in the United States.” *Id.*

24. *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2093, 2099 (2018).

25. *Id.* at 2092.

26. Org. for Econ. Coop. and Dev. [OECD], *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, at 3-4 (Oct. 14, 2020) [hereinafter *OECD 2020 Report on Pillar One Blueprint*].

27. Daniel Bowie et al., *The OECD’s Digital Taxation Proposal: A Contradiction of the Original BEPS Project?*, BLOOMBERG TAX (Nov. 13, 2020), [https://www.bloomberglaw.com/product/tax/bloombergtaxnews/transfer-pricing/X9V61JKS000000?bna\\_news\\_filter=transfer-pricing#jcite](https://www.bloomberglaw.com/product/tax/bloombergtaxnews/transfer-pricing/X9V61JKS000000?bna_news_filter=transfer-pricing#jcite) (defining a market jurisdiction as one where a MNE group either sells or solicits its products or services or collects data or contributions from its users).

28. *OECD 2020 Report on Pillar One Blueprint*, *supra* note 26, at 11-14.

elimination of double taxation.<sup>29</sup> The new taxing rights within the scope of Pillar One include Automated Digital Services (“ADS”).<sup>30</sup> In an attempt to provide certainty to MNEs and tax administration, the OECD set forth a test to determine if an activity falls into an ADS.<sup>31</sup> Because an activity that is automated and digital qualifies as an ADS business,<sup>32</sup> the scope of the OECD’s test is overly broad and imposes more tax liabilities on digital MNEs. The OECD’s Pillar One approach intends to rewrite nexus by allocating the profits of large digital MNEs by expanding the taxing rights of market jurisdictions.

### III. WHY DID THE OECD PROPOSE SUCH A PLAN?

The significant global profits earned by digital services companies—including Google, Amazon, Apple, Facebook, and Microsoft—heightened the eagerness among tax authorities to find new sources of revenue.<sup>33</sup> Additionally, the public believes U.S. digital MNEs are not paying their ‘fair share’ of taxes on revenues generated in countries where consumers reside.<sup>34</sup> These concerns led the OECD to propose a Plan to tax the “digital giants.”<sup>35</sup> Digital services companies, like Google, have expressed “hope that the OECD’s global tax overhaul [will not] increase uncertainty and disputes with national authorities.”<sup>36</sup> However, the proposed Plan will undoubtedly increase uncertainty if global consensus cannot be achieved.

Because tax certainty, administrability, and tax relief are essential for U.S. businesses, the Information Technology Industry Council (“ITI”) is pushing the Biden administration to boost U.S. competitiveness by promoting U.S. economic growth in an international tax setting.<sup>37</sup> Notably, “[t]he ITI’s members include Amazon, Google, Meta, and Microsoft.”<sup>38</sup> In February 2022, the ITI published an action plan, which

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29. *Id.*

30. *Id.*

31. *Id.* at 19–20, ¶ 25. The OECD created a positive and negative list. *Id.* If the activity is on the positive list, it qualifies as an ADS business and is subject to taxation. *Id.*

32. *Id.* at 20, ¶ 25. If an activity qualifies as an ADS business, it falls within the scope of Pillar One’s taxing rights. *Id.*

33. Lorraine Eden & Oliver Treidler, *INSIGHT: Taxing the Digital Economy – Pillar One is Not BEPS 2 (Part 1)*, BLOOMBERG TAX (Nov. 8, 2019), <https://news.bloombergtax.com/daily-tax-report/insight-taxing-the-digital-economy-pillar-one-is-not-beps-2-part-1>.

34. *Id.*

35. *Id.*

36. Isabel Gottlieb, *Companies Want Tax Certainty From OECD Plan, Google Exec Says*, BLOOMBERG L. (Aug. 19, 2021), [https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report-international/XF0BCQVC000000?bna\\_news\\_filter=daily-tax-report-international#jcite](https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report-international/XF0BCQVC000000?bna_news_filter=daily-tax-report-international#jcite).

37. Stephanie Soong Johnston, *Tech Group Urges U.S. Competitiveness Amid Global Tax Deal*, TAX NOTES INT’L (Feb. 11, 2022), <https://www.taxnotes.com/tax-notes-today-federal/digital-economy/tech-group-urges-us-competitiveness-amid-global-tax-deal/2022/02/11/7d5zf>.

38. *Id.*

encouraged U.S. lawmakers to promote U.S. economic growth and global tax leadership.<sup>39</sup> The ITI's action letter included 14 time-sensitive policy areas, urging the Biden-Harris administration and the 117th Congress to boost U.S. competitiveness.<sup>40</sup> Clearly, digital MNEs have expressed further concerns since August 2021.<sup>41</sup>

The U.S. is a leader in developing digital technologies that support the U.S. economy.<sup>42</sup> Accordingly, policymakers must prioritize market openness in the context of multilateral global engagements.<sup>43</sup> As an initial matter, the ITI urges Congress to pass the United States Innovation and Competition Act of 2021 ("USICA").<sup>44</sup> The USICA is a piece of legislation that aims to facilitate U.S. technological growth and counter China's global influence.<sup>45</sup> The ITI also encourages the administration to drive discussion of trade and policy matters to preserve the digital economy and enable transparent, compatible, non-discriminatory approaches to digital policy at the global level.<sup>46</sup>

Most importantly, the ITI raises concerns about the OECD's Two-Pillar Plan.<sup>47</sup> As more governments participate in the OECD/G-20 Inclusive Framework, "the Biden-Harris Administration should prioritize administrability, certainty, and double taxation relief as negotiators look to finalize design elements of Pillar One and administrative guidance and the implementation framework for Pillar Two."<sup>48</sup> The OECD and current administration must remove the discriminatory, unilateral digital services taxes ("DSTs") because they contribute to the fragmentation of the global tax system.<sup>49</sup> Several foreign tax authorities have enacted or proposed DSTs and other unilateral measures, which tax MNEs based on where the digital consumer resides.<sup>50</sup>

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39. *Technology's Role in Driving U.S. Competitiveness: ITI's Action Plan for 2022*, INFO. TECH. INDUS. COUNCIL, at 2 (Feb. 2022), <https://www.itic.org/documents/general/ITIActionPlanfor2022Final.pdf>

40. *Id.* at 4.

41. *Id.* at 2.

42. *Id.* at 2, 5.

43. *Id.* at 5. The policymakers should prohibit data localization, expand market access for digitally-enabled services, and "foster compatible, non-discriminatory approaches to data governance and the regulation of new technologies in different jurisdictions." *Id.*

44. *Id.*

45. Tom Lee & Juan Londoño, *The United States Innovation and Competition Act (USICA): A Primer*, AM. ACTION F. (June 9, 2021), <https://www.americanactionforum.org/insight/the-united-states-innovation-and-competition-act-usica-a-primer/> (noting that the expenditures within the USICA are necessary to "propel American growth in the 21<sup>st</sup> century and out-compete China.>").

46. *Technology's Role in Driving U.S. Competitiveness: ITI's Action Plan for 2022*, *supra* note 39, at 5-6.

47. *Id.* at 9.

48. *Id.*

49. *Id.*

50. See Eden & Treidler, *supra* note 33.

As uncertainty lingers, there is no doubt that many organizations and U.S. MNEs are continuing to voice concerns. A U.S. Treasury spokeswoman stated that “the agreement should put an end to tax and trade disputes” with Europe “and stop unilateral measures to pave the way for implementation of the agreement.”<sup>51</sup> However, this “agreement” has already failed as foreign countries refuse to remove unilateral measures until the OECD implements the broader global tax deal.<sup>52</sup> The Italian finance minister stated that “it has been established that the taxes would be removed when a worldwide solution would be implemented. . . [so] unilateral taxes [are expected] to be removed by 2024.”<sup>53</sup> The U.S. Treasury and the Italian finance minister’s statements conflict regarding the removal of unilateral measures, thus contributing to the uncertainty that many organizations, Senators, law firms, and individuals have criticized.

#### *A. The Consequences of Increasing Foreign Taxes on U.S. Digital MNEs*

The proposed Plan would substantially increase the amount of foreign taxes imposed on the digital service activities of U.S. MNEs.<sup>54</sup> Under Pillar One, the OECD allocates U.S. MNEs’ consolidated profits to markets where sales arise (“Market Jurisdictions”).<sup>55</sup> Currently, the scope of Pillar One will apply to MNEs with global revenues over EUR 20 billion and pretax profit margins over 10%.<sup>56</sup> For MNEs falling within the scope of Pillar One, the OECD awards market jurisdictions the right to tax 20% to 30% of MNE profits exceeding a 10% margin.<sup>57</sup> Foreign

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51. Richard Rubin, *U.S., European Nations Claim Progress on Path to Removing Digital Taxes*, WALL ST. J. (Oct. 14, 2021), <https://www.wsj.com/articles/u-s-european-nations-claim-progress-on-path-to-removing-digital-taxes-11634244167?page=1>.

52. *Id.* (“The U.S. has urged quick removal of the taxes, but European countries have resisted.”).

53. *Id.* Until the U.S. can implement its broader global tax agreement, some countries refuse to repeal its DST. *Id.* France, for example, will not remove its digital tax until the new deal is in force. *Id.*

54. CODY KALLEN, TAX FOUND., NO. 761, EFFECTS OF PROPOSED INTERNATIONAL TAX CHANGES ON U.S. MULTINATIONALS 1 (2021).

55. *Tax Policy Alert: 130 countries agree on a new international corporate tax framework*, PRICEWATERHOUSECOOPERS (July 2, 2021), <https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-130-countries-agree-on-a-new-intl-corporate-tax-framework.pdf> (explaining that market jurisdictions will receive a formulaic share of U.S. MNE profits regardless of where the businesses’ physical activities are located).

56. *Id.* (“[D]ecreasing to EUR 10 billion after 7 + 1 years from implementation if a year-long review establishes that the new system was successfully implemented in the first seven years . . . and [achieved] a satisfactory level of tax certainty.”).

57. *Id.*



governments would share the tax of 20% of MNEs' earnings above the 10% profit margin threshold.<sup>58</sup>

When the OECD published yet another update on the BEPS issue, it established a system by which a foreign jurisdiction has the authority to tax the largest and most profitable digital MNEs.<sup>59</sup> Foreign jurisdictions with customers and users of the digital platform have a right to tax 25% of the MNEs' residual profit.<sup>60</sup> In sum, the OECD reallocates those profits to jurisdictions based on consumer presence.<sup>61</sup>

To put the significant tax increase into perspective, the proposal would increase U.S. MNEs' tax liabilities by \$104 billion in 2022 and \$1.2 trillion over ten years.<sup>62</sup> The tax burden on foreign operations of U.S. MNEs would increase by more than \$714 billion over the next decade.<sup>63</sup>

Pillar Two supplements the source-based territorial tax approach with a top-up tax imposed on foreign income.<sup>64</sup> Under current law, GILTI imposes a minimum tax of 10.5%, but President Biden wants to double the rate to 21%.<sup>65</sup> While the House of Representatives Ways and Means Committee has passed an overseas minimum tax rate of 16.5%, the Senate Finance Committee was "looking at a number slightly higher than 16.5 percent."<sup>66</sup> However, during the October 2021 meeting, the G-20 agreed on a global minimum tax rate of 15% for large businesses.<sup>67</sup> Nonetheless, the global minimum tax rate will impact U.S. MNEs because it is significantly higher than the current 10.5% under GILTI.

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58. Richard Rubin et al., *A G-7 Deal on a Global Minimum Tax for Companies Faces Hurdles*, WALL ST. J. (June 6, 2021), [https://www.wsj.com/articles/a-g-7-deal-on-a-global-minimum-tax-for-companies-faces-hurdles-11623016756?mod=article\\_inline](https://www.wsj.com/articles/a-g-7-deal-on-a-global-minimum-tax-for-companies-faces-hurdles-11623016756?mod=article_inline).

59. Org. for Econ. Coop. and Dev. [OECD], *OECD/G20 Base Erosion and Profit Shifting Project, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, at 14 (Oct. 8, 2021) [hereinafter *2021 OECD Two-Pillar Solution*], <https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>

60. *Id.*

61. *Id.*

62. KALLEN, *supra* note 54, at 1 (increasing from 81% and 72% relative to current tax liabilities).

63. *Id.* (The surtax imposed on U.S. MNEs is above and beyond the taxes levied by foreign governments. These high taxes alone on "U.S. ownership of foreign activities" put U.S. MNEs "at a competitive disadvantage relative to foreign corporations, perhaps forcing U.S. firms to sell their foreign subsidiaries.").

64. Frieden & Angus, *supra* note 9, at 938. "[T]he source-based territorial tax approach" is used "by most of the world's major economies." *Id.* The 'top-up' tax "imposed on foreign income at an agreed minimum rate of 15% could allow for "nations [to] counter low tax rates applied by other countries on income earned in those countries by imposing an immediate additional tax on that income to yield a combined tax at the agreed minimum rate." *Id.*

65. KALLEN, *supra* note 54, at 2.

66. David Lawder, *U.S. Treasury's Yellen seeking October agreement on global minimum corporate tax*, REUTERS (Sept. 29, 2021), <https://www.reuters.com/business/us-treasurys-yellen-seeking-october-political-agreement-global-minimum-tax-2021-09-28/>.

67. Paul Hannon, *G-20 Backs Tax Overhaul that Makes Rich Countries Big Winners*, WALL ST. J. (Oct. 30, 2021), [https://www.wsj.com/articles/g-20-to-back-tax-overhaul-that-makes-rich-countries-big-winners-11635586202?mod=Searchresults\\_pos1&page=1](https://www.wsj.com/articles/g-20-to-back-tax-overhaul-that-makes-rich-countries-big-winners-11635586202?mod=Searchresults_pos1&page=1).

As of November 2021, there are 140 inclusive framework members from different countries.<sup>68</sup> The 140 countries on board for the OECD's Two-Pillar Plan include 24% of North America, Latin America, and the Caribbean; 21% of countries comprising Western Europe; 21% of countries comprising Eastern Europe and Central Asia; 19% of countries in Africa; and 15% of countries in Asia-Pacific.<sup>69</sup>

While the global minimum tax rate imposed on U.S. MNEs will not go into effect until the end of 2023, Australia expects to finalize guidance on a new rule soon.<sup>70</sup> Although Australia agreed to the global minimum tax rate of 15%, the Australian Tax Office has emphasized that “a minimum tax like GILTI has no equivalent in Australia.”<sup>71</sup> U.S. MNEs have already paid the minimum tax on foreign incomes in Australia, which increases the possibility that U.S. MNEs (that do business in Australia) face double taxation.<sup>72</sup> Australia's change could be significant, but there would be recourse for U.S. MNEs to challenge it in Australian courts.<sup>73</sup>

Additionally, the House Democrats' Plan would increase the tax rate on FDII from 13.125% to 20.7%.<sup>74</sup> Although the Plan aims to eliminate incentives to offshore investments and reduce profit shifting, the outcome would significantly and unfairly burden U.S. MNEs.<sup>75</sup>

The OECD's BEPS project fails to address tax avoidance—the core issue of BEPS. First, the OECD's outcome for the BEPS project conflicts with the digital economy by disregarding the arm's length principle in Pillar One.<sup>76</sup> Amount A is “not dependent on physical presence” and is “determined using a formulaic approach,” which is inconsistent with the arm's length principle because it contradicts current law and requires a rewriting of the tax code.<sup>77</sup> Furthermore, Amounts B and C do not create new taxing rights, but generally rely on physical presence and the arm's length principle.<sup>78</sup> The profits assigned to market jurisdictions where U.S. MNEs have consumers but no physical presence conflict with the

68. 2021 OECD Two-Pillar Solution, *supra* note 59, at 14.

69. *Id.* at 12.

70. Michael Rapoport, *Australia's Stance on U.S. Minimum Tax May Hike Company Costs*, BLOOMBERG TAX (Oct. 26, 2021), [https://www.bloomberglaw.com/product/tax/bloomberg-taxnews/daily-tax-report-international/XCQHPV6K000000?bna\\_news\\_filter=daily-tax-report-international#jcite](https://www.bloomberglaw.com/product/tax/bloomberg-taxnews/daily-tax-report-international/XCQHPV6K000000?bna_news_filter=daily-tax-report-international#jcite).

71. *Id.*

72. *Id.*

73. *Id.*

74. Michael Rapoport & Isabel Gottlieb, *House Democrats' International Tax Plan More Modest in Aim*, BLOOMBERG TAX (Sept. 13, 2021), <https://news.bloombergtax.com/daily-tax-report-international/house-democrats-international-tax-plan-more-modest-in-aim>.

75. KALLEN, *supra* note 54, at 2, 14.

76. Daniel Bowie et al., *supra* note 27.

77. *Id.* The formulaic approach under Amount A is applied as a residual share of profit to market jurisdictions after accounting for Amounts B and C. *Id.*

78. *Id.*

OECD's emphasis that there must be substance to create value.<sup>79</sup> The OECD has emphasized value creation and that U.S. MNEs with little or no economic substance should not be earning profits.<sup>80</sup> But under Pillar One, a non-existent U.S. MNE with no substance in a jurisdiction somehow recognizes profit in that jurisdiction.<sup>81</sup>

Second, Pillar Two conflicts with GILTI by calculating a company's effective tax rate in each country rather than globally.<sup>82</sup> Although Democrats have been trying to bring GILTI closer in line to the Biden-Harris agenda, it is uncertain if the legislation will pass.<sup>83</sup> Some Democrats refuse to support the bill,<sup>84</sup> leaving the OECD to strategize on how it will implement its Two-Pillar Plan.<sup>85</sup>

*B. In an Effort to Seek Uniform Global Consensus, The OECD Puts the U.S. Last*

Foreign nations continue to threaten to impose large unilateral DSTs.<sup>86</sup> These threats prompted the OECD to propose Pillar One to achieve a uniform consensus on taxing digital entities.<sup>87</sup>

Under Pillar One, foreign countries will *supposedly* drop their unilateral DSTs to participate in the OECD's new tax framework.<sup>88</sup> However, the OECD's progress in implementing its Two-Pillar approach has been slow,<sup>89</sup> as it must determine when and how the U.S. government will respond to DSTs.<sup>90</sup> Meanwhile, foreign governments have contemplated implementing DSTs or working together to tax digital MNEs.<sup>91</sup>

To assess the current implementation of foreign enacted DSTs, the Office of the U.S. Trade Representative ("USTR") conducted a Section 301 investigation into France's three percent DST in 2019.<sup>92</sup> The USTR

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79. *Id.*

80. *Id.*

81. *Id.*

82. Isabel Gottlieb & Hamza Ali, *Multinationals Get First Look at 15% Minimum Tax Rules (1)*, BLOOMBERG TAX (Dec. 20, 2021), <https://www.bloomberglaw.com/product/tax/bloomberg-taxnews/daily-tax-report-international/>.

83. *Id.*

84. *Id.* See Sen. Joe Manchin (D-W. Va.) saying he would not support the bill. *Id.*

85. *Id.*

86. David Morse, *Congress Must Confront Europe's Punitive Targeting of U.S. Digital Firms*, BLOOMBERG TAX (Sept. 17, 2021), [https://www.bloomberglaw.com/product/tax/bloomberg-taxnews/tax-insights-and-commentary/X6OOG018000000?bna\\_news\\_filter=tax-insights-and-commentary#jcite](https://www.bloomberglaw.com/product/tax/bloomberg-taxnews/tax-insights-and-commentary/X6OOG018000000?bna_news_filter=tax-insights-and-commentary#jcite).

87. Eden & Treidler, *supra* note 33.

88. Morse, *supra* note 86.

89. ANDRES B. SCHWARZENBERG, CONG. RSCH. SERV., IF11564, SECTION 301 INVESTIGATIONS: FOREIGN DIGITAL SERVICES TAXES (DSTs) 2 (2021).

90. Eden & Treidler, *supra* note 33.

91. *Id.*

92. SCHWARZENBERG, *supra* note 89, at 1.

concluded that France's DST discriminates against major U.S. digital companies.<sup>93</sup> Despite this finding, the USTR agreed to hold off on any action since France postponed its DST collection.<sup>94</sup> France decided to give the OECD more time to negotiate and finalize its Plan.<sup>95</sup> When the OECD missed the deadline in October 2020, France announced that it would resume DST collection.<sup>96</sup> Currently, Turkey, Austria, Zimbabwe, France, Italy, Tunisia, Spain, the U.K., Kenya, Nepal, and Sierra Leone have enacted DSTs.<sup>97</sup> Belgium, Croatia, Mexico, Poland, the Czech Republic, Brazil, Canada, and Slovakia have proposed DSTs.<sup>98</sup>

In June 2020, the USTR launched new Section 301 investigations into DSTs adopted or proposed by several foreign countries.<sup>99</sup> The DSTs adopted by Austria, India, Italy, Spain, Turkey, and the U.K. discriminated against U.S. digital companies, created inconsistency with the principles of international taxation, and imposed a burden or restriction on U.S. commerce.<sup>100</sup> Despite these findings, the USTR announced that "it was not taking any specific actions" but "would continue to evaluate all available options and address the matter in subsequent Section 301 proceedings."<sup>101</sup>

While more countries have since joined the Inclusive Framework, 136 countries agreed on the Plan when the G-20 met in October 2021.<sup>102</sup> However, some countries are still holding out, including Nigeria, Kenya, Pakistan, and Sri Lanka.<sup>103</sup> Those countries argue that the minimum tax rate agreed upon at 15% is too low to give them the additional revenues they need.<sup>104</sup> *Tax Notes* chief correspondent, Stephanie Soong Johnston, thinks the reason why Kenya and Nigeria did not join is that Kenya imposes a DST, and Nigeria "has a significant economic presence

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93. *Id.* "Relief from Unfair Trade Practices" is referred to as "Section 301." *Id.* "It grants the USTR a range of responsibilities and authorities to impose trade sanctions on foreign countries that violate U.S. trade agreements or engage in acts that are unjustifiable, unreasonable, or discriminatory and burden U.S. commerce." *Id.*

94. *Id.* at 2.

95. See Stephanie Soong Johnston, *Yellen Presses France on Digital Tax Withdrawal Compromise*, TAX NOTES INT'L (Sept. 27, 2021).

96. *Id.*

97. See *Digital Service Taxes and Other Unilateral Measures Roadmap*, BLOOMBERG TAX, <https://www.bloomberglaw.com/product/tax/document/> (Oct. 14, 2022).

98. See *id.*

99. SCHWARZENBERG, *supra* note 89, at 2.

100. *Id.*

101. *Id.*

102. See Paul Hannon, *G-20 Backs Tax Overhaul that Makes Rich Countries Big Winners*, WALL ST. J., (Oct. 30, 2021), [https://www.wsj.com/articles/g-20-to-back-tax-overhaul-that-makes-rich-countries-big-winners-11635586202?mod=Searchresults\\_pos1&page=1](https://www.wsj.com/articles/g-20-to-back-tax-overhaul-that-makes-rich-countries-big-winners-11635586202?mod=Searchresults_pos1&page=1). (using inclusive framework and OECD interchangeably); see also, 2021 *OECD Two-Pillar Solution*, *supra* note 59, at 12.

103. Hannon, *supra* note 102.

104. *Id.*

provision in its tax laws.”<sup>105</sup> Hence, they can hang on to raising more revenue from digital activity.<sup>106</sup>

Some countries, including those that have signed on to the Plan, have vocalized concerns.<sup>107</sup> For example, the Finance Minister of Argentina, a member of the G-20, recently stated, “[t]his deal is a bad deal, but what’s worse is nothing. So we have to sign up for this.”<sup>108</sup>

If the implementation of Pillar One fails, DSTs will continue to proliferate.<sup>109</sup> In the absence of a global consensus on taxing the digital economy, foreign countries will continue to do what they want for taxation purposes until the OECD can conclusively implement its Plan. Moreover, the OECD announced that European countries are allowed to retain, for now, the DSTs on technology companies like Facebook and Amazon.<sup>110</sup> Countries will still have DSTs until the OECD’s Plan becomes official.<sup>111</sup> While officials at a recent treasury briefing stated they were talking to countries that currently implement DSTs to find a compromise, they failed to clarify or elaborate on the issue.<sup>112</sup> Not only are some countries refusing to sign on to the OECD’s Two-Pillar Plan, but those that have agreed have expressed concerns.

While the OECD’s key objective was to eliminate discriminatory foreign DSTs, which received broad bipartisan support, concerns grew when the administration shifted to its domestic agenda.<sup>113</sup> Republican tax writers in Congress have been vocal that the Biden administration and the Treasury have not been forthcoming about the implementation of the Plan.<sup>114</sup> For example, fourteen senators expressed their concerns in a letter to Secretary Janet Yellen at the end of December 2021.<sup>115</sup> Because the administration has not provided the details necessary to

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105. Tax Notes Staff, *The End Is Nigh: An Update on the OECD Tax Reform Plan*, FORBES (Oct. 19, 2021), <https://www.forbes.com/sites/taxnotes/2021/10/19/the-end-is-nigh-an-update-on-the-oecd-tax-reform-plan/?sh=3e4ffcac1634>. (transcribing a *Tax Notes Talk* podcast interview between *Tax Notes* chief correspondent Stephanie Soong Johnston and host, David D. Stewart).

106. *Id.*

107. *Id.*

108. *Id.*

109. See OECD releases *Blueprints on Pillar One and Pillar Two, Updated Economic Analysis*, PRICEWATERHOUSECOOPERS (Oct. 13, 2020), <https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-oecd-releases-blueprints-on-p1-and-p2-updated-economic-analysis.pdf>.

110. Christopher Condon, *G-20 Heads Endorse Global Tax Accord, Capping Years of Talks (1)*, BLOOMBERG L. (Oct. 30, 2021), <https://www.bloomberglaw.com/product/blaw/bloomberg-lawnews/bloomberg-law-news/>.

111. See Tax Notes Staff, *supra* note 105.

112. *Id.* (Officials did not make a public statement about trying to phase out DSTs).

113. Letter from U.S. Senate Comm. on Fin., to Janet L. Yellen, Sec’y, *Dep’t of the Treasury* (Dec. 22, 2021)[hereinafter *2021 Comm. on Fin. Letter*], [https://www.finance.senate.gov/imo/media/doc/republican\\_letter\\_to\\_treasury\\_oecd.pdf](https://www.finance.senate.gov/imo/media/doc/republican_letter_to_treasury_oecd.pdf).

114. Tax Notes Staff, *supra* note 105.

115. *2021 Comm. on Fin. Letter, supra* note 113 (senators asked for greater transparency with prompt answers to their questions).

evaluate the agreement, these senators want the U.S. to remain globally competitive,<sup>116</sup> as does the rest of the United States. Such a rush to reach a political agreement rather than engage with Congress may ultimately put U.S. businesses at risk.<sup>117</sup> These senators do not think 2023 is an achievable date because all countries must achieve consensus, the administration agreed to allow existing DSTs, and Pillar One's timeline requires implementation by the end of December 2023.<sup>118</sup> Additionally, senators asked Secretary Yellen to provide answers surrounding the proposals to evaluate the effects of this agreement on American workers and businesses.<sup>119</sup> Senators asked Secretary Yellen for the estimated number of U.S. companies that would be in the scope of Pillar One, the amount of profit that would be reallocated between the U.S. and foreign countries (including the breakdown of estimates country by country), and the estimates for net revenue impact of Pillar One to the U.S.<sup>120</sup> Senators asked whether it was the "[t]reasury's position that treaty action will not be necessary to implement Pillar One."<sup>121</sup>

Furthermore, senators asked the question burning in so many minds: "If Pillar One is not implemented by December 31, 2023, will U.S. companies have any recourse for DSTs collected between now and that date? Will other countries be free to enact DSTs at that time?"<sup>122</sup> Lastly, the letter inquired about the OECD's plans to hold public consultation with stakeholders, including Congress and the U.S. business community, before the OECD finalizes its design and implementation plans.<sup>123</sup> The senators have legitimate concerns, and without a response from the Treasury, U.S. MNEs should be worried.

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116. *Id.* ". . . Pillar Two does not require other countries to adopt a global minimum tax," so "foreign competitors, like China," may not enact and implement global minimum tax "on the same terms as agreed to at the OECD." *Id.* Specifically, these Senators asked, "[w]hat, if any, commitment has China made regarding its timing for implementation of a 15 percent global minimum tax? Have any of the other 135 countries joining the agreement provided you with a commitment regarding implementation?" *Id.*

117. *Id.*

118. *Id.* According to the Senators, the uniform consensus combined with the number of open issues remaining make the implementation deadline unrealistic. *Id.*

119. *Id.* Senators pressed Secretary Yellen for the commitment to provide the Joint Committee on Taxation ("JCT") with this information, so it may provide an independent and confidential analysis. *Id.*

120. *Id.* Senators asked for clarification on the proposed plan for Pillar One implementation on the Treasury's proposed approach for implementation including, the expected treaty actions, domestic legislation, and changes to competent authority agreements. *Id.*

121. *Id.* (pleading for a detailed analysis regarding the dispute resolution and how it could be established through means other than the formal treaty approval process).

122. *Id.* (awaiting their request for a prompt response from Secretary Yellen).

123. *Id.* ("What efforts is the Treasury Department taking to ensure meaningful public consultation takes place?").

*C. The OECD's Two-Pillar Plan Will Change and Effect the Law*

The Internal Revenue Service and Treasury had already attempted to change the Internal Revenue Code when it released Proposed Treas. Reg Section 1.901-2 in response to the proliferation of unilateral DSTs enacted or proposed by foreign countries.<sup>124</sup> The proposed rule attempted to change the law by requiring the addition of a jurisdictional nexus to the income tax definition under Sections 901 and 903 of the Code.<sup>125</sup> Under the proposed rule, foreign tax law would provide a sufficient nexus between the foreign country and the taxpayer's activities in the foreign country.<sup>126</sup> The result gives rise to taxable income for the foreign tax to be creditable against U.S. tax.<sup>127</sup>

To qualify as income tax, the tax must conform with the Code for allocating profits between associated enterprises, allocating business profits of non-residents to taxable presence in the foreign country, and taxing cross-border incomes based on the source.<sup>128</sup> Many law firms and businesses have criticized this rule as inconsistent with foreign tax credit principles because it is clear that Congress did not intend a jurisdictional nexus requirement for the foreign tax to be creditable.<sup>129</sup> This jurisdictional nexus requirement "might not dissuade the adoption of novel taxes and result more in harming U.S. taxpayers with business in foreign countries as it could raise several double taxation issues."<sup>130</sup> The requirement also does not anticipate current proposals on taxing the digital economy.<sup>131</sup>

Currently, tax reform calculates GILTI on a global basis.<sup>132</sup> The current administration would require country-by-country reporting, which requires U.S. MNEs to calculate profits and tax payments in each foreign jurisdiction separately.<sup>133</sup> The OECD has focused on whether other countries could treat America's GILTI as equivalent to the global minimum tax rate.<sup>134</sup> While the latest OECD deal offers to treat GILTI as equivalent, it also specifies that the minimum tax is designed and

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124. Nathalie Nguyen, *Foreign Tax Credit Proposed Jurisdictional Nexus Requirement: An International Tax Perspective*, BLOOMBERG TAX (Sept. 2, 2021), [https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report/XF7QK20000000?bna\\_news\\_filter=daily-tax-report#jcite](https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report/XF7QK20000000?bna_news_filter=daily-tax-report#jcite).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. Nguyen, *supra* note 124.

130. *Id.*

131. *Id.*

132. The Editorial Board, *Yellen's Global Tax Railroad*, WALL ST. J. (Oct. 21, 2021), [https://www.wsj.com/articles/yellens-global-tax-railroad-11634755541?mod=Searchresults\\_pos14&page=1](https://www.wsj.com/articles/yellens-global-tax-railroad-11634755541?mod=Searchresults_pos14&page=1).

133. *Id.*

134. *Id.*

applied on a jurisdictional basis.<sup>135</sup> As a result, Congress must agree to the Plan if it wants America's GILTI tax to count.<sup>136</sup> Thus, if Congress does not adopt the administration's country-by-country rule and the OECD implements its global pact, U.S. MNEs will be subject to high taxation abroad.<sup>137</sup>

Because each country will need to implement this Two-Pillar agreement into its domestic tax law, Congress must step in.<sup>138</sup> The OECD anticipates bilateral and multilateral treaties to enforce the new rules, so Secretary Yellen must "corral sixty-seven Senators" to back the OECD's tax plan as a treaty.<sup>139</sup> The Treasury is looking into circumventing the treaty process through a congressional-executive agreement, and such an agreement would preserve the elements of a treaty in U.S. law.<sup>140</sup> Reconciliation is a way to get around support from both chambers.<sup>141</sup> OECD's Pillar One includes a dispute-resolution mechanism, which allows U.S. MNEs a formal method for contesting tax demands.<sup>142</sup> Because the mechanism does not weigh directly on revenue, Senate rules could bar it from a reconciliation bill.<sup>143</sup> But U.S. companies would lose the legal certainty that is "supposed to be the only benefit for them in this deal."<sup>144</sup>

Both Democrats and Republicans have expressed their distaste for DSTs, which Pillar One aims to eliminate. Foreign governments are likely to expect Secretary Yellen to show she can deliver a permanent tax deal.<sup>145</sup> If Secretary Yellen does not deliver a proper treaty, foreign governments may not repeal their unilateral DSTs.<sup>146</sup>

If the OECD's Two-Pillar Approach were to be implemented by the United States and other jurisdictions, there would be significant impacts on U.S. businesses competing in the global marketplace.<sup>147</sup> The implementation of this Plan will allow the IRS to take a larger tax slice

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135. *Id.*

136. *Id.*

137. *Id.*

138. The Editorial Board, *Dodging the Constitution for a Global Tax*, WALL ST. J. (Oct. 22, 2021), <https://www.wsj.com/articles/dodging-the-constitution-for-a-global-tax-treasury-secretary-janet-yellen-congress-11634928441?page=1>.

139. *Id.*

140. *Id.* (explaining that support from both chambers is required, "including a filibuster-proof sixty Senate votes.").

141. *Id.* (emphasizing that reconciliation "would allow Democrats to pass the revenue-related parts of Pillar One with fifty Senate votes plus the Vice President.").

142. *Id.*

143. The Editorial Board, *supra* note 138.

144. *Id.*

145. *Id.*

146. *Id.*

147. See Jason Oxman & Brian Mannix, *Big Tech and the Global Minimum Corporate Tax Deal*, WALL ST. J. (July 15, 2021, 10:22 AM), [https://www.wsj.com/articles/global-minimum-corporate-tax-deal-big-tech-digital-11626297147?mod=Searchresults\\_pos8&page=1](https://www.wsj.com/articles/global-minimum-corporate-tax-deal-big-tech-digital-11626297147?mod=Searchresults_pos8&page=1).



out of the U.S. economy in exchange for allowing foreign governments to take a portion of America's economy.<sup>148</sup>

#### IV. THE SOLUTION

Unfortunately, the U.S. administration has compromised the Two-Pillar Plan by allowing DSTs to remain in place. The U.S. should not agree to this Plan until all countries with unilateral DSTs repeal them. The consequence of implementing the OECD's approach before all countries repeal DSTs could result in double taxation for U.S. MNEs. Because the Plan's goal is to eliminate DSTs, the OECD has two options.

First, the OECD could try to revive the Plan by increasing the probability of passing through Congress. To do this, the U.S. Treasury, the current administration, and the OECD would need to get on board to implement the removal of foreign-enacted DSTs. The OECD should issue a new publication that provides for the immediate removal of all unilateral DSTs. Furthermore, the current Plan requires transparency. To provide clarity, the OECD needs to conduct and publish a thorough analysis on the effects the Plan will have on U.S. digital MNEs, all large MNEs falling within the scope of Amount A under Pillar One and the U.S. economy. An analysis would provide American businesses with the tools they need to weigh the risks effectively. Lastly, the OECD should correct its timeline for implementation or ensure implementation will occur by the end of 2023.

If the OECD cannot revive its Plan by making appropriate measures and steps to ensure Congress and the American people that this Plan is in the best interest of all, the OECD should go back to the drawing board and create a new plan. The new plan should include strict guidance on the prompt removal of DSTs. The new plan should mandate that when countries join the global agreement, they must, at that moment, remove all unilateral, discriminatory DSTs. If the OECD fails to meet their timeline and deliver the global agreement, foreign countries should have the option to re-enact all paused DSTs. While the new plan's goal should still be to eliminate BEPS and DSTs, it should also ensure that it will not jeopardize U.S. digital MNEs and the U.S. economy. The new plan should produce a thorough analysis of the effects and risks on U.S. digital MNEs. It must be transparent, engaging, receive bipartisan support on both Pillars, and ensure U.S. MNEs remain competitive in the global marketplace. Furthermore, instead of deviating from the arm's length principle, the new plan should conform with the long-standing arm's length principle. The Plan should be a bargained-for exchange, not a one-way street.

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148. *Id.*