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In this article, Wilcox and Payne explore whether an OECD-led multinational agreement could mitigate the anti-competitive effect of the Biden administration's corporate and international tax proposals, what hurdles must be overcome to achieve that outcome, and the potential ramifications if those proposals are implemented absent an international agreement.

I. Overview

Treasury Secretary Janet Yellen and other high-ranking Treasury officials have said that the Biden administration's corporate and international tax proposals[1] would not have an anti-competitive effect on U.S. multinational enterprises in the global marketplace because they would be adopted concurrently with a multinational agreement that would mitigate the anti-competitive effects:

- At her hearing before the Senate Finance Committee on January 21, Yellen said her intention was to work with the OECD in ways that "stop the race to the bottom on corporate taxation . . . while securing the competitiveness of U.S. companies."[2]
- Treasury Deputy Assistant Secretary for Tax Analysis Kimberly A. Clausing said in testimony on March 23 that "to the extent that foreign countries also adopt strong minimum taxes, that will also reduce any competitiveness worries."[3]
- On April 5 Yellen said, "We can use a global minimum tax to make sure the global economy thrives based on a more level playing field," and "it is important to work with other countries to end the pressures of tax competition and corporate tax base erosion."[4]
- Treasury Deputy Secretary Wally Adeyemo said on April 11 that, to accomplish the goals of U.S. competitiveness and fair taxation, "we know we need to get an international agreement."[5]

This article explores whether an OECD-led multinational agreement could mitigate the anti-competitive effect of the proposals, what hurdles must be overcome to achieve that outcome, and the potential ramifications if the proposals are implemented without such an international agreement. The multinational agreement now being negotiated could be helpful in the effort to maintain U.S. competitiveness; however, policymakers should have significant concerns about whether such an agreement is achievable

[1] The proposals were initially announced by the Biden administration on March 31 in its Made in America Tax Plan, and they have since been explained in more detail in Treasury, "General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals" (May 28, 2021) (the green book).

[2] Yellen testimony before the Finance Committee (Jan. 21, 2021).

[3] Clausing testimony before the Finance Committee (Mar. 23, 2021).

[4] Stephanie Soong Johnston, "Yellen Stresses Global Cooperation on Minimum Corporate Taxation," *Tax Notes Today Federal*, Apr. 6, 2021.

[5] Johnston, "Minimum Tax Deal Critical to U.S. Competitiveness, Adeyemo Says," *Tax Notes Federal*, Apr. 19, 2021, p. 477.

and whether it can be adopted in a manner that maintains the competitiveness of U.S. businesses.

II. Impact if No Global Deal

The Biden administration's proposed U.S. domestic tax rate of 28 percent on U.S.-based business activity is higher than the average foreign country tax rate on comparable business activity conducted in the foreign country (the difference is even greater if one considers U.S. state and local income taxes). While the global corporate tax rate averages between 24 and 26 percent, the rates in Europe average closer to 20 percent.[6]

The proposed global intangible low-taxed income rate of 21 percent on a U.S. MNE's foreign business earnings has no parallel in any foreign countries. Nearly all foreign countries have a territorial system of taxation; that is, they do not tax the active business earnings generated by a foreign MNE outside its home country.[7] The GILTI regime generates U.S. tax revenue to the extent that the GILTI tax is not credited with foreign country taxes on the foreign earnings; conversely, it generates no U.S. tax revenue to the extent that the earnings are taxed by the foreign country. In general, the GILTI regime imposes another layer of tax on U.S. MNEs that earn income in a country with a lower tax rate than the United States. By comparison, foreign MNEs, which do not face that additional layer of tax, may be more competitive than U.S. MNEs in those foreign markets.

In recent years, U.S. MNEs have become increasingly subject to various taxes imposed by foreign countries on digital or other consumer-facing activities that are associated with consumers resident in the foreign country but are not necessarily attributable to a permanent establishment there. Examples are the United Kingdom's diverted profits tax (DPT) and France's digital services tax. Typically, these taxes have been structured as taxes based on gross income, instead of net profits, to operate outside the applicable income tax treaty between the United States and the foreign country. Unfortunately for the U.S. MNE, these taxes are not likely creditable against its GILTI tax and therefore represent a form of double tax on the U.S. MNE's foreign business earnings.[8]

III. Impact if Deal Happens

International negotiations on how to tax companies in the digital age have been ongoing since the base erosion and profit-shifting project began in 2013. After nearly eight years, there is still no consensus on how international tax rules should change. The failure of the BEPS project to reach a consensus led to negotiations among members of the OECD/G-20 inclusive framework.[9] The original goal was to achieve consensus by December 2020. The goal now is to achieve agreement by July. With only a month to go, significant differences among the countries remain.

The pillar 1 and pillar 2 proposals being considered by the inclusive framework (nearly 140 countries) would have no effect on the tax rate imposed by foreign countries on home country business activities of their resident companies. Imposing a 28 percent rate on U.S. business activity — combined with the proposals' repeal of tax incentives for export income (foreign-derived intangible income) — would continue to be anti-competitive when compared with most foreign country rates imposed on similar activities conducted by foreign MNEs.

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[6]Tax Foundation, "Corporate Tax Rates Around the World, 2020," Fiscal Fact No. 735 (Dec. 2020); OECD.Stat, "Statutory Corporate Income Tax Rate," Table II.1 (June 7, 2021). *See also* Mindy Herzfeld, "The Democrats' New Mantra: Tax Harmonization," *Tax Notes Federal*, Mar. 1, 2021, p. 1343 ("The average global statutory corporate rate is somewhere between 24 and 26 percent . . . with Europe having the lowest regional average (approximately 20 percent) and Africa the highest (28.5 percent)."); and Nana Ama Sarfo, "Looking Beyond Pillar 2," *Tax Notes Int'l*, Apr. 19, 2021, p. 289 ("current average global rate falls just shy of 25 percent").

[7]All G-7 countries other than the United States are using a mostly territorial system for active business income. Thornton Matheson, Victoria J. Perry, and Chandara Veung, "Territorial vs. Worldwide Corporate Taxation: Implications for Developing Countries," IMF Working Paper No. 13/205 (Oct. 2013). Other countries with worldwide taxation systems include Chile, Greece, and Mexico. *See also* Daniel Bunn, Kyle Pomerleau, and Sebastian Dueñas, "Anti-Base Erosion Provisions and Territorial Tax Systems in OECD Countries," Tax Foundation (May 2, 2019).

[8]Treasury and the IRS recently issued proposed regulations (REG-101657-20) that would treat DPTs, DSTs, and similar taxes as non-creditable.

[9]The inclusive framework is composed of 139 member countries. It was formed in 2016 to allow countries beyond OECD and G-20 member countries to participate in the development of BEPS-related issues.

Pillar 1 would solidify a formula for both U.S. MNEs and foreign MNEs to be taxed on digital and possibly other consumer-facing activities in non-home country jurisdictions without a PE requirement. The vast majority of tax revenue from automated digital services (ADS) companies presumably would be collected by foreign countries from "FAANG" (Facebook, Apple, Amazon, Netflix, and Google/Alphabet).[10] The extent to which other consumer-facing businesses (CFBs) (for example, pharmaceuticals) would be subject to this tax is still being debated. It is critical for U.S. MNEs that the pillar 1 tax qualify as a creditable tax for U.S. tax purposes. Otherwise, they will be subject to double tax on income from some foreign activities — first by the United States on their GILTI and second by the foreign country on their pillar 1 income.

Pillar 2 would require that countries impose a minimum tax on foreign business earnings of their resident companies (the income inclusion rule (IIR)), similar to GILTI. It also contains an undertaxed payment rule that is similar in concept to the base erosion and antiabuse tax. The purpose of pillar 2 is to prevent base erosion in the home country. The OECD has already determined that implementation of pillar 2 would not result in the United States collecting any new or additional tax revenue.[11] Rather, the main impact of pillar 2 agreement would be to burden foreign MNEs with a minimum home country tax on business activities conducted in low-tax jurisdictions. The Biden administration believes that the anti-competitive effect of its proposals will be minimized if the MNEs of other countries are subject to taxing regimes similar to GILTI and the BEAT.

[10] *See, e.g.*, Dave Strausfeld, "OECD Hopes US Will Now Back Global Tax Accord," *Financial Management*, Feb. 3, 2021; and Jim Tankersley, "Global Talks on Taxing Tech Firms Will Slip Into 2021," *The New York Times*, Oct. 12, 2020.

[11] On October 12, 2020, the OECD secretariat issued an economic impact assessment report estimating that the combined effect of the two pillars would be a 4 percent increase of corporate income tax revenue, or about $100 billion annually across all jurisdictions. OECD, "Tax Challenges Arising From Digitalisation — Economic Impact Assessment" (Oct. 12, 2020). In a February 2021 report to the G-20 ministers, the OECD estimated that global corporate tax revenue from implementation of the two pillars would increase by about $50 billion to $80 billion annually. OECD, "OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors," at 10-13 (Feb. 2021).

The Biden administration is continuing the Trump administration's efforts to negotiate grandfathering protection for GILTI or otherwise having the OECD determine that GILTI is an IIR-compliant regime. It is important that either the current version of GILTI or the proposals' amended version be considered IIR-compliant to prevent U.S. MNEs from being subject to the undertaxed payment rule, among other reasons.

The final component of the global deal would, hopefully, require the repeal of DPTs, DSTs, and similar taxes on non-home country digital companies and other CFBs.

IV. Outstanding Pillar Issues

A. Pillar 1

The two key building blocks of pillar 1 remain uncertain: (1) the scope of companies subject to this tax and (2) the formula for determining the income attributable to a particular non-home country jurisdiction.

Regarding scope, the inclusive framework negotiations began with a focus on ADS companies. More recently, the scope has been expanded to include some non-digital business-to-consumer services of CFBs.

On April 8 Treasury presented its views on pillar 1 to the steering group of the inclusive framework.[12] It stated that there is a "lack of clearly defined policy objectives and principles to distinguish ADS and CFB from the rest of the economy (and from each other)," and that "complexity and subjectivity of proposed rules specific to ADS and CFB raise obstacles to consensus." Treasury recommended that there be quantitative criteria (for example, revenue and profit margin thresholds) for capturing no more than 100 MNEs in pillar 1 without regard to their business sector and focusing "only on those companies that benefit most from global markets, are most intangibles-driven, and are equipped to handle the compliance burden that Pillar One entails." It believes that "a qualitative activity test could lead to many scoping disputes in practice."

[12] *See* Johnston, "U.S. Offers Key to Unlock Scope Issue in Global Tax Reform Talks," *Tax Notes Int'l*, Apr. 12, 2021, p. 147.

Any expansion of pillar 1 obviously would apply not only to U.S. MNEs but also to foreign MNEs. This potential increased taxation of foreign MNEs could make it more challenging to reach a global agreement on pillar 1.

Beyond deciding scope, it is necessary to agree on both a formula for allocating an MNE's global residual profits among market jurisdictions (amount A) and a fixed return for some baseline and marketing functions conducted within the market jurisdiction (amount B). Concerns have been expressed about the complexity and administrability of both amount A and amount B.[13] Regardless of how the formula is resolved, there will undoubtedly be disputes between taxing authorities in treaty countries over the allocation of an MNE's income between the home country and the foreign country. The inclusive framework is recommending that treaties be amended to include new dispute resolution provisions for pillar 1 issues.

B. Pillar 2

The two key building blocks of pillar 2 seem further along in negotiations than the pillar 1 items, yet they remain uncertain: (1) the base of income on which the minimum tax is imposed and (2) the tax rate. Many foreign countries have expressed that either they will not agree to pillar 2 without agreement on pillar 1, and vice versa.

Reaching agreement on a common tax base is critical to the success of pillar 2. The Biden administration's proposed changes to GILTI illustrate the challenges of arriving at a common base because some features of the proposal materially deviate from the state of the pillar 2 negotiations. The Biden proposal includes the full repeal of the GILTI provision's qualified business asset investment, which exempts a minimum amount of foreign-sourced income from GILTI based on the amount of tangible assets the company holds in the foreign market. In contrast, the pillar 2 negotiations not only include an exemption analogous to QBAI but also would expand the exemption to include labor as well as tangible assets in the foreign market.[14]

The use of an income inclusion approach for GILTI, together with restrictive foreign tax credit rules, causes a further disparity between the GILTI tax and pillar 2 tax. The combination of a 20 percent haircut on the GILTI FTC, the inability to carry forward excess FTCs, and the expense allocation regime often generates residual U.S. tax that exceeds the contemplated GILTI tax rate of 10.5 percent.[15] The pillar 2 tax, on the other hand, is designed as a top-up tax equal to the excess of the home country's minimum tax rate and the effective tax rate paid in the low-tax jurisdiction in which business activities are conducted. The top-up tax is far more likely than GILTI to result in an overall effective tax rate equal to the agreed minimum rate.

Thus, even if a global agreement on a minimum tax rate is reached, a U.S. company subject to GILTI would face a higher tax liability than a foreign company subject to the current outline of the pillar 2 regime. That is, the GILTI and pillar 2 regimes could have significantly different impacts on competitiveness despite having equivalent tax rates.

The Biden administration's proposed 21 percent U.S. tax rate on GILTI is likely well above what the other members of the inclusive framework have been contemplating for a global minimum tax rate. Treasury proposed a global minimum tax rate of at least 15 percent as its opening position in the OECD negotiations,[16] and on June 5 the G-7 finance ministers agreed to support that proposal.[17] It would be quite surprising, however, if Ireland agreed to conform

[13] Joint Committee on Taxation, "U.S. International Tax Policy: Overview and Analysis," JCX-16R-21, at 31-32 (Apr. 19, 2021).

[14] OECD, "Tax Challenges Arising From Digitalisation — Report on Pillar Two Blueprint" (Oct. 14, 2020).

[15] *See* JCX-16R-21, *supra* note 13, at 59-61 (the JCT estimated that, based on a review of the taxes paid for 2018 by 81 large C corporations, the average foreign tax rate on GILTI was at least 10.4 percent, with an implied U.S. residual tax rate on GILTI of 5.5 percent, for an overall tax rate of 16 percent on GILTI).

[16] Johnston, "U.S. Opens With 15 Percent Minimum Tax Rate in OECD Reform Talks," *Tax Notes Federal*, May 24, 2021, p. 1281.

[17] Alan Rappeport, "Finance Leaders Reach Global Tax Deal Aimed at Ending Profit Shifting," *The New York Times*, June 5, 2021.

its local tax rate (now 12.5 percent) or adopt a new global minimum tax at 21 percent.[18]

V. Will DPTs and DSTs Go Away?

Several foreign countries (including Australia, France, India, Italy, Spain, and the United Kingdom) have enacted, or are close to enacting, a DPT or DST. Some foreign countries have cited the delay in arriving at a global deal as justification for implementing unilateral tax measures that largely tax U.S. MNEs.[19] U.S. taxpayers have criticized these unilateral measures as being unfair to U.S. companies and inconsistent with an honest effort to secure a global deal because they "ultimately detracts from ongoing OECD/G-20 inclusive framework efforts to address the tax challenges arising from the digitalization of the global economy."[20] Further, the Biden administration has affirmed that unilateral DSTs "discriminate against U.S. digital companies."[21]

The European Commission, after failing to implement an EU-driven DST in 2018 and 2019, is drafting a new proposal for digital taxes, which is scheduled to take effect by 2023.[22] Concerns have been raised that the commission will pursue this new DST even if a global tax deal is reached.[23]

Separately, a group of developing countries (including Argentina and India) in April, acting through a U.N. committee, agreed that the U.N. model tax convention should include a DST. That effort was fueled by the group's concern that the Biden administration's proposal to limit the number of pillar 1 companies would not bring sufficient tax revenue to developing countries.[24]

While it may be contemplated within the inclusive framework that foreign countries will withdraw their DPTs, DSTs, and similar taxes as part of a global tax deal, there is neither a commitment nor a timeline for them to do so.[25] U.S. policymakers should be aware of the pressures that foreign countries face when deciding whether to relinquish their unilateral measures in exchange for a global agreement. The OECD's most recent economic impact statement shows that an agreement on both pillar 1 and pillar 2 would increase global corporate tax receipts by between $50 billion to $80 billion.[26] Although the OECD has not published country-specific estimates, it found that most of the additional revenue would accrue to developing countries. In contrast, the U.S. government has estimated that unilateral measures imposed by several countries have significantly increased their tax revenue collected from U.S. MNEs.[27]

VI. Will All Countries Agree?

In an increasingly globalized economy, ensuring that a global deal can minimize any anti-competitive impact of the proposals means, ideally, that all major countries are part of the deal. China has not supported the global tax deal, and it is not clear that it will actually sign on to any deal.[28] India has similarly signaled that it may

[18] Irish Finance Minister Paschal Donohoe has asked the OECD not to go above 12.5 percent on the minimum tax rate, while the Biden administration will no doubt urge other countries to support a rate higher than 12.5 percent. *See* "Speech by Minister for Finance, Paschal Donohoe TD, to Virtual Seminar on International Taxation With the Department of Finance" (Apr. 21, 2021); and Isabel Gottlieb and Hamza Ali, "U.S. Digital Tax Pitch Expected to Help Shape Global Talks," *Bloomberg Daily Tax Report*, April 21, 2021.

[19] Herzfeld, "The Democrats' New Mantra," *supra* note 6.

[20] Information Technology Industry Council, "EU Should Recommit to Multilateral Approach to Taxation of the Digitalising Economy" (Apr. 13, 2021).

[21] Office of the U.S. Trade Representative, "USTR Announces Next Steps of Section 301 Digital Services Taxes Investigations" (Mar. 26, 2021). *See also* Treasury, "Presentation to the Steering Group of the Inclusive Framework" (Apr. 8, 2021) ("Stabilizing the architecture requires, among other steps, addressing the proliferation of unilateral measures that gave rise to Pillar One.").

[22] Johnston, "EU Tax Chief Confident of Reaching Global Tax Deal," *Tax Notes Int'l*, Apr. 19, 2021, p. 372; and Johnston and Kiarra M. Strocko, "Global Tax Reform Deal Must Respect Irish Rate, Donohoe Says," *Tax Notes Int'l*, Apr. 26, 2021, p. 521.

[23] Jean Comte and Johnston, "European Commission Contemplates Mid-July for Digital Levy Proposal," *Tax Notes Int'l*, May 10, 2021, p. 808; Bjarke Smith-Meyer, "Few Tech Giants Hit by U.S. Global Tax Plan: European Commission Official," *Politico*, Apr. 15, 2021; and U.S. Chamber of Commerce, "Comments Concerning the European Commission Consultation on a Proposed Digital Levy" (Apr. 12, 2021).

[24] Jonathan Wheatley and Emma Agyemang, "Biden's Global Tax Plan Could Leave Developing Nations 'Next to Nothing,'" *Financial Times*, May 11, 2021; and Herzfeld, "Treasury Proposes a Tax on U.S. Innovation," *Tax Notes Federal*, May 3, 2021, p. 698.

[25] Herzfeld, "Resetting Expectations for a Digital Deal Under the Biden Administration," *Tax Notes Federal*, Feb. 1, 2021, p. 690.

[26] OECD, "Economic Impact Assessment," *supra* note 11; and "OECD Secretary-General Tax Report," *supra* note 11, at 10-13.

[27] Office of the U.S. Trade Representative, *supra* note 21.

[28] Herzfeld, "The Democrats' New Mantra," *supra* note 6. The China International Tax Center/International Fiscal Association China Branch has said that pillar 2 "aims too high" and is a "hypocrisy" that would require "serious carve-outs." Herzfeld, "Resetting Expectations," *supra* note 25. *See also* Yue "Daisy" Dai, "China's Surprising Silence on Digital Taxation," *Tax Notes Int'l*, June 24, 2019, p. 1301.

not abide by any global agreement.[29] Key Irish government officials have expressed concern about increasing the pillar 2 tax rate above 12.5 percent.[30] And EU officials are skeptical about Treasury's proposed changes to pillar 1.[31]

If major trading partners like China, India, or any EU members are not part of the global deal, it will obviously be more difficult to minimize the anti-competitive effect of the proposals. The ability of source countries to impose an undertaxed payment rule on payments from a source-country entity to an entity based in a non-IIR jurisdiction is intended to act as an incentive for the non-IIR jurisdiction to override the source country's undertaxed payment rule with its own minimum tax. However, without an agreement by the non-IIR jurisdiction to change any applicable treaty with the source country, it is questionable whether this incentive would really exist.

VII. When Is the Deal Binding?

A. U.S. Law Changes

At least in the United States, the pillar 1 taxation of foreign MNEs on a portion of their residual profits without regard to physical presence cannot be implemented without making significant changes to the tax code. It is not enough to address these new taxing rights in a treaty, which is approved only by the Senate. Moreover, treaties do not source taxing rights; rather, they limit the application of the countries' taxing rights that are sourced in their local laws.

The pillar 1 proposal would subject foreign MNEs to U.S. tax to an extent well beyond the reach of the IRC rules. This would require that Congress carve out a special exception from the effectively connected income regime for foreign MNEs that meet the various quantitative (or qualitative) thresholds for scope and nexus. It also would be necessary to revise the IRC rules on FTCs so that pillar 1 taxes imposed by a foreign country are creditable against the U.S. tax liability of a U.S. MNE.[32] Whether additional changes to the IRC are necessary to implement pillar 2 will depend on the extent to which the GILTI regime is grandfathered or otherwise determined to be IIR-compliant, and on whether the Biden administration will feel compelled in any event to align its version of GILTI to the pillar 2 version.

B. Foreign Law Changes

Foreign countries likely will need to change their local tax laws to incorporate pillar 1 for the same reasons as the United States. That is, they lack the ability to tax U.S. and other non-home country MNEs on activities that extend beyond a PE. Many foreign countries have enacted DPTs, DSTs, or similar taxes to force taxation of those activities on a basis other than income tax. However, to replace those unilateral measures and have a pillar 1 income tax that will be creditable by U.S. MNEs and covered by U.S. income tax treaties, the foreign countries will need to change their local laws to reflect pillar 1 taxation. Ideally, the necessary changes would be directionally similar to the pillar 1 changes the United States makes to the IRC.

As for pillar 2, nearly all foreign countries (if not all) would need to make significant changes to their local laws. Foreign countries with territorial tax systems have little to no history of taxing offshore business earnings in the home country. Many foreign countries have more complex tax systems that include controlled foreign corporation provisions that resemble the subpart F provisions in the IRC. However, those CFC regimes generally impose home country tax only on passive, nonbusiness earnings.[33]

C. Treaty Ratification

U.S. income tax treaties permit the treaty partner to tax a U.S. company on its net business profits attributable to a PE in the foreign country and, in turn, permit the United States to tax a treaty country company on its net business profits

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[29] Arup Roychoudhury, "India Unlikely to Go Along With US' Global Minimum Tax Proposal," Moneycontrol.com, Apr. 8, 2021.

[30] Agyemang and Laura Noonan, "Dublin Aims to Defend Low Tax Rate as US Pushes for Reform," *Financial Times*, Apr. 21, 2021.

[31] Smith-Meyer, *supra* note 23.

[32] Treasury and the IRS recently issued proposed regulations (REG-101657-20) that would not permit pillar 1 taxes to be creditable against GILTI taxes.

[33] Tax Foundation, "CFC Rules Around the World," Fiscal Fact No. 659 (June 2019).

attributable to a PE in the United States. Without changes to those provisions, the pillar 1 tax would be in violation of all U.S. income tax treaties. Thus, just like the changes that must be made to the IRC, the treaties will require a new provision that permits each country to tax the net business profits generated by a company based in the other country, if the company meets the various quantitative (or qualitative) thresholds for scope and nexus under the taxing country's laws. As noted earlier, new dispute resolution provisions are needed to help resolve pillar 1 issues between treaty countries. The inclusive framework has recommended that participants in any agreement make these various changes to their tax treaties.

The IIR and undertaxed payment rule taxes in pillar 2, standing alone, do not necessarily require revisions to U.S. income treaties before they are implemented by the various foreign countries in the inclusive framework. This is because those taxes are a tax imposed by a particular country on a resident of that same country. The United States did not seek changes to its treaties when it enacted GILTI and the BEAT. Treaties typically address the abilities and limitations of one country to tax the income of a resident of the other country.

Nevertheless, the two other components of pillar 2 — the switchover rule and the "subject to tax" rule — most certainly require treaty changes, and it is desirable in any event for treaties to coordinate the application of all four components. Further, as a practical matter, the pillar 2 taxes imposed by a foreign country may not be implemented through local law changes until the pillar 1 taxes have been implemented by other foreign countries and the United States through both local law and treaty changes. This is because many foreign countries have expressed their reluctance to support pillar 2 unless there is also an agreement on pillar 1.

The process by which U.S. income tax treaties would be revised is still being discussed.[34] The original BEPS project was implemented through the use of a multilateral instrument. This MLI was intended to facilitate the implementation of BEPS in treaties by automatically modifying the application of treaties between countries that sign the MLI. Most of the 60 or so countries with which the United States has a bilateral income treaty have signed the BEPS MLI. The United States, however, still has not signed the BEPS MLI for the original BEPS project, reportedly because it believes that "U.S. domestic tax provisions, as well as its negotiating position for a number of years, already limit treaty shopping and abuse."[35] The use of an MLI for pillar 1 and pillar 2 raises different concerns than the BEPS MLI. If not signed by the United States, it will be necessary to amend each individual U.S. treaty with a foreign country that agrees to the global deal.

Article II, section 2, clause 2 of the U.S. Constitution requires that affirmative votes from at least two-thirds of the Senate be obtained before a treaty can have the force of law. The Senate is now split 50-50 between Democratic and Republican members. Thus, even if every senator from a single party voted to ratify a treaty, at least 17 senators from the other party would also have to vote to ratify.

The use of an MLI could become critical to the success of a global tax deal. It would, of course, be considerably easier if Senate ratification was required only once, as opposed to multiple times, for amendments to each individual treaty affected by the global deal.

VIII. What Could Go Wrong?

The failure of the Senate to ratify the MLI or individual treaty amendments would affect the tax exposure of U.S. MNEs in the 60 countries with which the United States has tax treaties. Note, however, that another 70 or so inclusive framework countries without U.S. treaties could proceed to impose pillar 1 taxes on U.S. MNEs once the global deal is reached and the necessary changes are made to foreign country law. Note also that a foreign subsidiary of a U.S. MNE could be subject to both pillar 1 and pillar 2 taxes if that

[34] OECD, "Tax Challenges Arising From Digitalisation — Report on Pillar 1 Blueprint," at para. 837 (Oct. 14, 2020), takes the position that pillar 1 could be implemented with a multilateral instrument, as opposed to requiring amendments to each bilateral treaty. While there is a view that pillar 2 can be implemented without amendments to existing treaties (OECD, "Report on Pillar Two Blueprint," *supra* note 14, at paras. 681-691), others take a contrary view. In any event, if pillar 2 is linked to pillar 1 as expected, it seems likely that both pillars would be covered by the MLI.

[35] Rebecca M. Kysar, "Unraveling the Tax Treaty," 104 *Minn. L. Rev.* 1755, 1765 (Apr. 2020).

subsidiary's home country and the source country have signed the MLI, without regard to U.S. ratification.

A. Domestic Law Conflicts

Most experts agree that Congress can enact a statute that has the effect of overriding a treaty as long as Congress expresses its intent to do so.[36] Specifically, the statute controls if it is both "last in time" and Congress indicates its intent.

However, even if Congress made it clear that U.S. statutory changes necessary to implement pillar 1 and pillar 2 are to have priority over existing treaties, Treasury and the IRS could be in a precarious position if another country were to challenge the new U.S. law as being inconsistent with an existing U.S. treaty obligation. For example, it is not difficult to imagine a country supporting a challenge by a resident company that a tax liability imposed by the IRS is inconsistent with an existing U.S. treaty obligation and therefore not permitted. As noted, China has signaled its opposition to the current OECD proposal. If China were not part of the global deal, it could direct a Chinese company to refuse to pay a pillar 1 tax to the United States on grounds it is illegal under the China-U.S. income tax treaty. One can envisage how the Chinese government would try to leverage the rhetoric around the United States "not living up to its treaty obligations."

A more likely scenario is that Congress enacts statutory changes necessary to implement pillar 1 and pillar 2 but directs that the U.S. law changes be kept in abeyance until the relevant provisions of the treaties are modified. In that scenario, it could be decades before political alignment is reached on whether the treaties should be amended, leaving U.S. MNEs at a heightened risk of remaining uncompetitive. In the meantime, the foreign country parties to the global tax deal may have made their own local law changes and ratifications to an MLI (or amendments to individual treaties with other foreign countries). That would give rise to two other possibilities regarding differences between a foreign country's law changes and the provisions of an existing bilateral income tax treaty between the United States and that particular country.

B. Foreign Law Conflicts

It is certainly possible that a foreign country would respect the existing U.S. treaty and not impose pillar 1 taxes on U.S. MNEs until the United States ratifies the MLI (or amendments to the existing U.S. treaty with the foreign country). However, the risk to the U.S. MNE is that the foreign country nevertheless continues to apply its DPT or DST to the U.S. MNE, assuming it has those types of taxes in place and has not withdrawn them in connection with the global deal. In that case, the U.S. MNE could continue to suffer double taxation of its foreign business earnings.

A less likely possibility is that a foreign country would take the position that the statutory changes it made to implement the global tax deal take precedence over its tax treaty obligations. The U.S. MNE could refuse to pay the pillar 1 tax on grounds that it is illegal under the existing U.S. treaty with the foreign country and then seek help from the U.S. competent authority in a mutual agreement procedure negotiation. Alternatively, an MNE might decide not to complain about paying the pillar 1 taxes imposed by the foreign country, notwithstanding the conflict with the existing U.S. treaty, particularly if (1) the foreign country has withdrawn its DPT or DST and is imposing pillar 1 taxes on the MNE in lieu of those other taxes, and (2) the U.S. MNE is able to credit the pillar 1 taxes against its GILTI tax. One issue, however, is whether the U.S. MNE would have to challenge the pillar 1 tax through the MAP process to claim an FTC because of the

[36] *Cf.* section 7852(d)(1) (neither the IRC nor a treaty has preference over the other simply by virtue of being a statute or a treaty). There is, however, an ongoing debate among tax practitioners and academics whether it is necessary for there to be some expression of an intent to override treaties in the legislative history or whether intent is just presumed to exist by the mere fact of the conflict between the statute and the treaty. For example, there is a debate whether the BEAT overrides treaties. H. David Rosenbloom says no because Congress was silent about the BEAT's interaction with treaties, whereas Reuven S. Avi-Yonah says yes because intent is not required. *Cf.* Rosenblum and Fadi Shaheen, "The TCJA and the Treaties," *Tax Notes Int'l*, Sept. 9, 2019, p. 1057; and Avi-Yonah and Bret Wells, "The BEAT and Treaty Overrides: A Brief Response to Rosenbloom and Shaheen," *Tax Notes Int'l*, Oct. 22, 2018, p. 383.

"compulsory payment" requirement under U.S. tax law.[37]

Regardless of the path taken by Congress, Treasury, and the foreign countries, U.S. MNEs will experience significant risks of double taxation and administrative uncertainty until the Senate modifies the bilateral treaties through either an MLI or individual treaty amendments.

IX. Conclusion

The Biden administration's attempt to mitigate the anti-competitive effect of its corporate and international tax proposals by relying on a global agreement suffers from three major flaws. First, the mitigation has a limited focus. It seeks to force a home country tax on foreign MNEs that conduct business in jurisdictions with a lower tax rate than the home country. The goal is simply to burden foreign MNEs with worldwide tax and anti-base-erosion rules that are similar to those being imposed on U.S. MNEs under our GILTI and BEAT regimes. The anti-competitive effect of U.S. MNEs being subject to GILTI tax while foreign MNEs have no counterpart to GILTI tax could undoubtedly be mitigated if foreign MNEs became subject to a similar minimum tax at a similar rate. However, the achievement of that goal does not address at all the anti-competitive effect of having a U.S. tax rate imposed on U.S. MNEs' export income — combined with the proposals' repeal of FDII — that is significantly higher than the average foreign tax rate now imposed on similar activities conducted by foreign MNEs.

Second, the achievement of this limited "tax parity" goal will require a massive level of legislative and treaty revisions that are largely beyond the control of the Biden administration. Nearly 140 countries in the inclusive framework, including the United States, must make radical changes to their tax laws to incorporate the pillar 1 and pillar 2 taxes. Under even the most ambitious timeline, agreement on the level of detail required for all inclusive framework countries to fully implement harmonized rules in their national laws and treaties will not be agreed on until well into 2022 at the earliest. Further, U.S. tax treaties with more than 60 countries must be revised to authorize the pillar 1 tax, and they most likely will also need revision to reflect and coordinate the pillar 2 tax. That might be done through a single MLI, or it might require revisions to every individual treaty. Either way, the changes will require the approval of at least two-thirds of the Senate before they have any binding legal effect.

Finally, the elephant in the room cannot be ignored: Many countries may not sign up for a global tax deal with the other members of the inclusive framework. At this time, there appears to be little chance that China and India — the second- and fifth-largest economies in the world — will do so. Thus, the United States runs the risk that any global agreement would not only exclude some key sectors of the U.S. economy but also largely exempt significant trading partners. It is quite possible that any global agreement is so patchwork in nature that its ability to mitigate any anti-competitive impact is minimal. This would leave U.S. companies at a significant competitive disadvantage relative to foreign MNEs, including potentially against such a strategic competitor as China. ■

[37] Reg. section 1.901-2(e)(5).