

NOAA would issue a proposed rule to the International Fisheries Regulations to enhance its ability to address IUU fishing and forced labor in the seafood supply chain. Among other things, the proposed rule broadens the definition of IUU fishing in the regulations implementing the High Seas Driftnet Fishing Moratorium Protection Act.³¹ It also expands the information that foreign vessels that seek to enter U.S. ports are required to provide.³²

Issuance of the Memorandum raised questions about its possible link to U.S. China policy, since China has a large and active distant water fishing fleet, has been ranked worst in an index of “vulnerability to, prevalence of and response to” IUU fishing, and was identified by NOAA for having vessels that are involved in IUU fishing.³³ A senior administration official emphasized that the Memorandum “is not about any one specific country.”³⁴ That said, the person continued, “The PRC is a leading contributor to IUU fishing worldwide, and it has impeded progress on the development of measures to combat IUU fishing and overfishing in international organizations. And the PRC has a responsibility to uphold these commitments as a flag state and actively monitor and correct the activities of [its] fishing fleet activities in other countries’ waters . . . including preventing its vessels from fishing outside coastal states’ license agreements or without a license to fish at all.”³⁵

INTERNATIONAL ECONOMIC LAW

The United States and Its Partners Struggle to Implement Global Tax Agreement

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On October 8, 2021, President Joseph R. Biden, Jr. praised the announcement that day of the global tax agreement—the “Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy”¹—as a demonstration of

³¹ Implementation of Provisions of the Illegal, Unreported, and Unregulated Fishing Enforcement Act of 2015 and the Ensuring Access to Pacific Fisheries Act, 87 Fed. Reg. 40763, 40772 (July 8, 2022). The proposed rule would add two paragraphs to the definition of IUU fishing in 50 CFR 300.201 and bring the regulation into line with the definition of illegal fishing in Section 3.1.1 of the Food and Agriculture Organization’s *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001), which is also the definition under the Port State Measures Agreement Act and the Maritime SAFE Act. See note 13 *supra*.

³² 87 Fed. Reg. 40776 (proposing to add a new 50 CFR 300.304).

³³ See Poseidon Aquatic Resource Management Limited & the Global Initiative Against Transnational Organized Crime, *The Illegal, Unreported and Unregulated Fishing Index*, at 110 (Dec. 2021); NOAA 2021 Report, *supra* note 13, at 22–23; BRUCE VAUGHN & BEN DOLVEN, CHINA’S ROLE IN THE EXPLOITATION OF GLOBAL FISHERIES: ISSUES FOR CONGRESS, CONG. RES. SERV. R47065 (Apr. 12, 2022), at <https://crsreports.congress.gov/product/pdf/R/R47065>.

³⁴ White House Press Release, Background Press Call on the President’s National Security Memorandum on Illegal, Unreported, and Unregulated Fishing (June 27, 2022), at <https://www.whitehouse.gov/briefing-room/press-briefings/2022/06/27/background-press-call-on-the-presidents-national-security-memorandum-on-illegal-unreported-and-unregulated-fishing>.

³⁵ *Id.*

¹ OECD Press Release, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (Oct. 8, 2021), at <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm> [hereinafter Two-Pillar Solution].

“how American leadership and diplomacy is advancing the economic interests of American working families.”² Its adoption, he continued, would “ensure that profitable corporations pay their fair share, and provide governments with the resources to invest in their workers and economies.”³ Concluding the Two-Pillar Solution, a political agreement, among the now 141 members of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (IF), was an administration priority led by Secretary of the Treasury Janet Yellen.⁴ The difficult task remains of incorporating it into law in each of the 137 jurisdictions (representing about 95 percent of global gross domestic product (GDP)) that have signed on.⁵ The outcome is uncertain, as the Two-Pillar Solution established the “agreed components” of binding rules, not the rules themselves. Legislation has to be drafted and enacted at the national or (in the case of the European Union) regional level to effectuate certain parts of the agreement, and a treaty needs to be negotiated and ratified and existing treaties need to be amended to implement other parts. The Organisation of Economic Co-operation and Development (OECD) has drafted and continues to draft many of the necessary technical legal texts (a multilateral convention, model treaty provisions, model rules, commentaries, and other documents). In the United States, Congress has yet to take up the necessary modifications to the tax code, and in the European Union, Hungary has blocked the unanimity required for the adoption of a Council directive enacting one part of the agreement.⁶ Agreement at the international level has yet to turn into commitment at the domestic level.

A product of years of negotiation at the OECD, the Two-Pillar Solution focuses on two critical challenges in contemporary international tax and pairs them in a package deal: (1) the taxation of digital businesses that are physically located in one country but sell their services in another (Pillar One); and (2) the taxation of multinational enterprises that move their operations to low-tax jurisdictions (Pillar Two).⁷

² White House Press Release, Statement by President Joseph R. Biden, Jr. on the Unprecedented OECD Agreement for a Global Minimum Tax (Oct. 8, 2021), at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/08/statement-by-president-joseph-r-biden-jr-on-the-unprecedented-oecd-agreement-for-a-global-minimum-tax>.

³ *Id.*

⁴ Established in 2016, the IF included developing countries in the OECD/G20 Base Erosion and Profit Shifting Project, discussed in note 7 *infra*. A current list of IF jurisdictions can be found here: <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>.

⁵ The four IF countries that did not join the Two-Pillar Solution were Kenya, Nigeria, Pakistan, and Sri Lanka.

⁶ Proposal for a Council Directive on Ensuring a Global Minimum Level of Taxation for Multinational Groups in the Union (Dec. 22, 2021), available at https://taxation-customs.ec.europa.eu/system/files/2021-12/COM_2021_823_1_EN_ACT_part1_v11.pdf.

⁷ Initiated in 2013, the OECD/G20 Base Erosion and Profit Shifting Project was established to fight tax avoidance by multinationals that use base erosion and profit shifting techniques. Discussions on what would become the Two-Pillar Solution began in earnest in 2018, with the two-pillar approach itself adopted in January 2019. See OECD, Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note (Jan. 23, 2019), available at <https://www.oecd.org/tax/beps/policy-note-beps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf>. The OECD secretariat issued a blueprint for each pillar in October 2020. See OECD, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint, at <https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint-beba0634-en.htm>; OECD, Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint, at <https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-two-blueprint-abb4c3d1-en.htm>. In April 2021, shortly after President Biden took office, the United States made new proposals, which led to an agreement among G7 Finance Ministers and Central Bank Governors that was announced on June 5, 2021. Kate Davidson, *Global Minimum Tax Deal Marked a Win for Yellen. Now She Must Sell It to Congress*, WALL ST. J.

The first challenge arises because nearly all countries have adopted some forms of territorial taxation. Digital companies that operate globally, like Amazon, Apple, Facebook, and Google, do not have a traditional physical presence in most places where they sell their services, and they thus avoid territorial taxes on the incomes from a large portion of their sales. As the sales and profits of these companies have increased, countries where those services are purchased (“market jurisdictions”), including both developing and developed economies (France most prominently), imposed or threatened to impose digital services taxes, arguing that users in their countries play a role in value creation.⁸ The United States, where many tech giants are located, pushed back against such taxes with threats of tariffs against countries that impose them.⁹ This dynamic, which might have led to a trade war, created the impetus for an agreement that would transfer to market jurisdictions the taxing rights to a percentage of the profits of the largest multinational enterprises (MNEs) in exchange for the elimination of digital services taxation on those MNEs in those jurisdictions.

Pillar One of the Two-Pillar Solution does just that. It applies to the approximately one hundred MNEs (“[i]n-scope companies”)¹⁰ “with global turnover above 20 billion euros and profitability [i.e., profits divided by turnover] above 10%.”¹¹ About half of these are U.S. companies.¹² The agreement requires that “25% of [the] residual profit [of these companies,] defined as profit in excess of 10% of revenue [‘routine profits,’] . . . be allocated to market jurisdictions [as a ‘taxing right’].”¹³ This is called “Amount A.” A market jurisdiction qualifies for an Amount A taxing right allocation “when the in-scope MNE derives at least 1 million euros in revenue from that jurisdiction [or 250,000 euros from jurisdictions with GDPs of less than 40 billion euros].”¹⁴ To take an example, if an MNE has €40 billion in sales and €10 billion in profit (and thus is an “in-scope company” since turnover is above €20 billion and profitability is 25 percent), its “routine profit” would be €4 billion (10 percent of €40 billion) and its “residual profit” would be €6 billion (the €10 billion profit less the €4 billion routine profit).¹⁵ Amount A would therefore be €1.5 billion (25 percent of €6 billion), and that

(July 8, 2021), at <https://www.wsj.com/articles/global-minimum-tax-deal-marked-a-win-for-yellen-now-she-must-sell-it-to-congress-11625745615>. The IF achieved consensus on July 1, 2021, and shortly thereafter G20 Finance Ministers and Central Bank Governors gave their blessing as well. The July text was subsequently revised in part, and an implementation plan included. Approval of the text was finalized on October 8, and it was subsequently endorsed by G20 leaders at their Rome summit on October 31. See G20 Rome Leaders’ Declaration, para. 32 (Oct. 31, 2021), available at <http://www.g20.utoronto.ca/2021/G20ROMELEADERSDECLARATION.pdf>.

⁸ Jim Tankersley, *How Tech Taxes Became the World’s Hottest Economic Debate*, N.Y. TIMES (Jan. 23, 2020), at <https://www.nytimes.com/2020/01/23/business/tech-taxes-debate.html>; European Commission, Fair Taxation of the Digital Economy, at https://taxation-customs.ec.europa.eu/fair-taxation-digital-economy_en.

⁹ *Id.*

¹⁰ OECD/G20 Base Erosion and Profit Shifting Project, Addressing the Tax Challenges Arising from the Digitalisation of the Economy 14 (July 2021).

¹¹ Two-Pillar Solution, *supra* note 1, at 1. The agreement applies to all MNEs, regardless of the business they are in, except two sectors are excluded: extractive industries, such as mining, oil, and gas, and regulated financial services. Even so, the agreement will mostly effect MNEs in the pharmaceutical, retail, and technology sectors. The turnover amount is expected to be reduced to €10 billion.

¹² See Kartikeya Singh, *Amount A: The G-20 Is Calling the Tune, and U.S. Multinationals Will Pay the Piper*, TAX NOTES INT’L, at 597, 599 (Aug. 2, 2021).

¹³ Two-Pillar Solution, *supra* note 1, at 2.

¹⁴ *Id.* at 1.

¹⁵ This example is adapted from European Commission, Global Agreement on Corporate Taxation: Frequently Asked Questions (July 10, 2021), at https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_3564.

amount would potentially be taxed by the market jurisdictions in which the MNE derives at least €1 million in revenue. The deal requires the removal of digital services taxes and “other relevant similar measures” and the elimination of double taxation of profit allocated to market jurisdictions.¹⁶ It will also provide MNEs with “mandatory and binding” dispute prevention and resolution mechanisms on “all issues related to Amount A.”¹⁷ Pillar One will be given legal effect through a treaty and domestic law. The treaty is now scheduled for completion during the first half of 2023.¹⁸ Once implemented, it is expected that the “taxing rights on more than USD 125 billion of profit [will be] reallocated to market jurisdictions each year.”¹⁹ According to U.S. officials, “the revenue effect for the United States will be close to neutral—although the United States would relinquish tax entitlement owing to its status as the home country to many of the affected companies, it would also gain new entitlements to tax owing to its enormous consumer market.”²⁰

The second issue arises because companies can move their operations from jurisdiction to jurisdiction in search of lower tax rates. This has become easier and more consequential with the increasing value of intangible assets. Tax competition between countries ensues, as they seek to attract investment, reducing rates and hence government revenue. If a common floor for corporate tax rates were adopted, tax competition would likely be reduced, and greater tax revenue should result.

Pillar Two does that. It sets a minimum effective tax rate of 15 percent for MNEs, including their constituent entities, with €750 million in annual revenue. The rate is enforced through two rules (collectively, the Global anti-Base Erosion Rules (GloBE rules)).²¹ First, if a covered MNE—including any constituent entity—pays less than 15 percent in a jurisdiction, then a top-up tax is imposed on that entity by that jurisdiction so that the effective rate equals 15 percent (the Income Inclusion Rule). Second, if a constituent entity of a covered MNE is located in a jurisdiction where the 15 percent rate is not imposed, the jurisdiction of its parent entity will collect any applicable top-up tax owed by the constituent as a backstop (the Undertaxed Payment Rule).²² Pillar Two’s GloBE rules are to be made operational through

¹⁶ In a side agreement, the United States, Austria, France, Italy, Spain, and the United Kingdom agreed that Austria, France, Italy, Spain, and the United Kingdom would not need to repeal their digital services taxes before Pillar One goes into effect but that they would refund any such taxes paid subsequent to the Two-Pillar Solution, less any tax due under Pillar One. See U.S. Dep’t of Treasury Press Release, Joint Statement from the United States, Austria, France, Italy, Spain, and the United Kingdom, Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 is in Effect (Oct. 21, 2021), at <https://home.treasury.gov/news/press-releases/jy0419>.

¹⁷ Two-Pillar Solution, *supra* note 1, at 2.

¹⁸ OECD, *Progress Report on Amount A of Pillar One*, at 5 (2022), available at <https://www.oecd.org/tax/beps/progress-report-on-amount-a-of-pillar-one-july-2022.pdf>.

¹⁹ OECD Press Release, International Community Strikes a Ground-breaking Tax Deal for the Digital Age, at <https://www.oecd.org/tax/beps/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm>.

²⁰ Ruth Mason, *The Fine Print on the Global Tax Deal*, FOR. AFF. (Nov. 8, 2021), at <https://www.foreignaffairs.com/articles/usa/2021-11-08/fine-print-global-tax-deal>.

²¹ The rules do not apply to government entities, international organizations, non-profit organizations, pension funds, and investment funds.

²² Certain carve-outs apply, including an exclusion for entities when their revenues and profits in a jurisdiction are below a specified minimum. Additionally, a “subject to tax rule” (STTR) will amend existing bilateral tax treaties to establish a minimum 9% rate on interest, royalties, and certain other payments, such that developing countries will obtain a taxing right on the difference between the minimum rate and the tax rate on the payment. The STTR will be implemented through a multilateral treaty and model treaty provisions.

domestic law. The IF approved model rules on December 14, 2021, to assist states with their Pillar Two legislation.²³ If adopted, “the global minimum tax rate of 15% is estimated to generate around USD 150 billion in new tax revenues globally per year.”²⁴ Congress’s Joint Committee on Taxation estimates that the United States would collect \$23.187 billion dollars in revenue in fiscal year 2024 and \$318.687 billion in the ten years ending in fiscal year 2032.²⁵

Assistant Secretary of Tax Policy Lily Batchelder explained the importance of the Two-Pillar Solution for the United States. Pillar One, she emphasized, seeks “to restabilize the [international tax] system in a manner that would be sustainable and will put an end to unilateral, discriminatory measures” like digital services taxes.²⁶ What is more, she noted, “[o]ur companies would also benefit from the increased tax certainty it will create. . . . They will be able to plan for the future and invest their capital based on economic and not tax considerations.”²⁷ Pillar Two, she stressed, reverses the trend of tax competition. It is important, she said, “that owners of capital bear their fair share of the tax burden . . . because it is fair, but also because it will help ensure that our political systems at home and abroad are stable and functioning. It will help ensure we all have the resources we need to make investments that expand opportunities.”²⁸ In testimony to the Senate Finance Committee, Secretary Yellen summarized the deal’s advantages. The agreement, she said, “will stabilize our tax systems, provide resources to invest in security and respond to crises like COVID-19, and ensure corporations fairly share the burden of financing government.”²⁹ President Biden’s proposed 2023 budget legislation sought to implement Pillar Two into U.S. law.³⁰ But opposition from Senate Republicans, who oppose increasing tax rates, and the reluctance of Senator Joe Manchin (D-WV) to move forward at this time, meant that the corporate tax reform that was enacted in August 2022 did not include rules that would align the tax code with the global minimum tax.³¹

²³ See OECD, *Tax Challenges Arising from the Digitalisation of the Economy: Global Anti-Base Erosion Model Rules (Pillar Two)* (2021), at <https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.htm>. A commentary on the model GloBE rules was released on March 14, 2022. See OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two)* (2022), available at <https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two-commentary.pdf>. Work on an Implementation Framework for the GloBE rules is ongoing.

²⁴ OECD, *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, at 5 (Oct. 2021), at <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>.

²⁵ Joint Committee on Taxation, *Estimated Budget Effects of the Revenue Provisions Contained in the President’s Fiscal Year 2023 Budget Proposals 1* (JCX-17-22, July 25, 2022) (estimated revenue generated from the adoption of the “Undertaxed Profit Rules”).

²⁶ U.S. Dep’t of Treasury Press Release, *Remarks by Assistant Secretary for Tax Policy Lily Batchelder at the 2022 Tax Conference Hosted by the Federal Bar Association* (Mar. 3, 2022), at <https://home.treasury.gov/news/press-releases/jy0629>.

²⁷ U.S. Dep’t of Treasury Press Release, *Remarks by Assistant Secretary for Tax Policy Lily Batchelder on Global Corporate Tax at the Hutchins Center at Brookings Institute and the Urban-Brookings Tax Policy Center* (Apr. 15, 2022), at <https://home.treasury.gov/news/press-releases/jy0717>.

²⁸ U.S. Dep’t of Treasury Press Release, *supra* note 26.

²⁹ U.S. Dep’t of Treasury Press Release, *Testimony of Secretary of the Treasury Janet L. Yellen Before the Committee on Finance, U.S. Senate* (June 7, 2022), at <https://home.treasury.gov/news/press-releases/jy0810>.

³⁰ Richard Rubin, *Biden’s Budget Would Reshape His International Tax Plan to Match Global Deal*, WALL ST. J. (Mar. 29, 2022), at <https://www.wsj.com/articles/bidens-budget-would-reshape-his-international-tax-plan-to-match-global-deal-11648546382>.

³¹ Andrew Duehren, Siobhan Hughes & Richard Rubin, *Joe Manchin Reaches Deal with Chuck Schumer on Energy, Healthcare, Tax Package*, WALL ST. J. (July 28, 2022), at <https://www.wsj.com/articles/joe-manchin>

In the European Union, legislation has also faced hurdles. Unanimity is required to approve the proposed directive implementing Pillar Two, but Poland and Hungary balked at agreeing to the measure.³² Eager to push the agreement forward, the EU and the United States sought to convince both states to reverse their opposition. Secretary Yellen visited Poland in mid-May, and on June 1 the EU offered Poland €35.4 billion in loans and grants in COVID-19 recovery aid, apparently as an inducement.³³ By the middle of June, Poland indicated that it was dropping its opposition.³⁴ Hungary, though, continues to dissent. On July 8, the United States notified Hungary that it is terminating the bilateral tax treaty between the two countries, reportedly because the “United States, across administrations, has had long-held concerns with Hungary’s tax system and the Hungary treaty.”³⁵ Hungary is apparently working with congressional Republicans.³⁶ With Hungary’s opposition to the directive firm at the moment, France, Germany, Italy, the Netherlands, and Spain announced in September that they would push forward regardless, either through the EU’s “enhanced cooperation” procedure (which requires nine member states) or by enacting domestic legislation country-by-country.³⁷ Draft legislation is pending in many countries outside of the EU, including Australia, Canada, New Zealand, South Korea, Switzerland, and the United Kingdom.

The United States Launches the Indo-Pacific Economic Framework for Prosperity and the Americas Partnership for Economic Prosperity

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On May 23, 2022, in Tokyo, the United States, together with Australia, Brunei Darussalam, India, Indonesia, Japan, the Republic of Korea, Malaysia, New Zealand, the

reaches-deal-with-chuck-schumer-on-energy-healthcare-package-11658957299. U.S. law establishes a minimum tax rate on the foreign earnings of U.S. MNEs, but the rate is lower than required by Pillar Two (10.5%), and it does not apply on a jurisdiction-by-jurisdiction basis.

³² Other EU member states, including Estonia and Ireland, had reservations about the agreement but negotiated changes before the text became final.

³³ Paul Hannon, *Global Minimum Tax Suffers Fresh Setback as EU Fails to Agree on Implementation*, WALL ST. J. (June 17, 2022), at <https://www.wsj.com/articles/global-minimum-tax-suffers-fresh-setback-as-eu-fails-to-agree-on-implementation-11655469945>.

³⁴ Eur. Comm’n Press Release, *NextGenerationEU: European Commission Endorses Poland’s €35.4 Billion Recovery and Resilience Plan* (June 1, 2022), at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3375; Sam Fleming, *Poland Ready to Drop Objection to Minimum Corporate Tax*, FIN. TIMES (June 15, 2022), at <https://www.ft.com/content/3e387d88-16c4-4c14-9acc-6c1f257e9125>.

³⁵ Richard Rubin & Drew Hinshaw, *U.S. Moves to End Tax Treaty with Hungary*, WALL ST. J. (July 8, 2022), at <https://www.wsj.com/articles/u-s-moves-to-end-tax-treaty-with-hungary-11657311739>; U.S. Dep’t of Treasury Press Release, *United States’ Notification of Termination of 1979 Tax Convention with Hungary* (July 15, 2022), at <https://home.treasury.gov/news/press-releases/jy0872>.

³⁶ Jeff Stein, *GOP Officials Back Hungary’s Resistance to Global Tax Deal, Bucking Biden*, WASH. POST (July 1, 2022), at <https://www.washingtonpost.com/us-policy/2022/07/01/hungary-gop-tax-deal>.

³⁷ Laurence Norman, *France, Germany and Other EU Countries Pledge to Advance Minimum Tax, Despite Hungary Veto*, WALL ST. J. (Sept. 9, 2022), at <https://www.wsj.com/articles/france-germany-and-others-pledge-to-advance-minimum-tax-despite-hungary-veto-11662736518>.