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Queen's Gambit 2.0 the International Tax Edition: What if Someday the Whole Game Changed?

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THE INTERNATIONAL TAX EDITION:
WHAT IF SOMEDAY THE WHOLE GAME CHANGED?

by

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I. INTRODUCTION

The Queen's Gambit, a miniseries streaming on Netflix,[1] follows the life of a troubled chess prodigy, Elizabeth "Beth" Harmon, who often used an opening move called the Queen's Gambit in chess tournaments.[2] Long before the popular miniseries, the Queen's Gambit in the world of chess refers to an aggressive opening move by chess players.[3] Gambit is defined as a chess opening where a player risks the loss of one or more pawns or pieces to obtain a tactical advantage in position on the chessboard.[4] "The objective of the queen's gambit is to temporarily sacrifice a pawn to gain control of the center of the board."[5] The countermoves or defenses against the Queen's Gambit are to accept, decline or play various defenses. During the course of the miniseries, Beth is often seen visualizing the chess board in her mind and both playing alternative offensive moves as well as anticipating her opponents' possible countermoves and defenses. This visualization enables Beth to anticipate her opponents' moves and ultimately defeat them in actual gameplay (sometimes multiple opponents within a matter

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of minutes). Thus, the key to Beth's success in these matches is her ability to anticipate and plan strategies that not only respond to her opponent but eventually outwit them.

And so goes the world of global tax planning, where multinational entities ("MNEs") appear to be one step or "play" ahead of the tax jurisdictions in their visualization of global tax planning while tax jurisdictions have responded defensively to these strategies. As reported by the news, the public's interest in chess has once again exploded because of the popularity of the miniseries.[6] Similarly, the global interest in base erosion profit shifting, and more specifically, taxing digital giants has grown to a fever pitch in recent years as governments struggle to raise much needed tax revenue. Nations have alleged that certain technology companies have not paid their "fair share" of taxes and have done so by implementing aggressive tax strategies or opening moves. Similar to a chess player's response to the Queen's Gambit, the players in the Organisation for Economic Co-operation and Development ("OECD") and G20 Inclusive Framework[7] have argued over whether to accept the status quo, decline or play defensively. Amidst competing interests during negotiations, countries have made concessions to obtain an advantage or remove roadblocks toward a multilateral global tax landscape.[8] According to taxing authorities, U.S. MNEs have been able to avoid tax on profits (now often referred to as "stateless income") through tax planning strategies in jurisdictions where they had a substantial economic presence with no corresponding tax nexus under existing international tax rules (i.e., "scale without mass"). As a result of the digital economy and countries' growing need for tax revenue, nations have clamored and now have agreed in the OECD's Pillar One to significant changes in the fundamental principles of the international tax system. However, finalizing Pillar One globally and domestically may prove challenging as it requires continued multilateral cooperation and domestic legislative approval, which begs the question as to whether countries can move forward from an overarching agreement and implementation plan to actual compliance, administration and collection.

The remainder of this article proceeds as follows: Part II provides background regarding the digital economy (which sparked the movement toward international tax reform). Part III explains the existing international tax principles of nexus and the allocation of profits. Part IV discusses digital services taxes and the U.S.'s response. Part V navigates through the key provisions of Pillar One and compares the Blueprint and OECD Statement versions. Part VI discusses the impact of Pillar One on U.S. tax policy. Lastly, Part VII concludes.

II. DIGITAL ECONOMY: A NEW BOARD AND A NEW SET OF MOVES

Jurisdictions across the world are competing for what pieces? Same pieces, with evolving rules and strategies. The digital economy is defined as "that part of economic output derived solely or primarily from digital technologies with a business model based on digital goods or services."[9] Generally speaking, the digital economy can include a variety of daily activities or transactions that are interconnected by technology such as computers, smart phones or other devices.[10] The OECD identified the following key attributes of the digital economy and its resulting business models that are germane to international tax policy — that is, mobility of intangible assets; users and business functions; reliance on data, particularly, "big data;" network effects (which occur when users' decisions directly affect other users' received benefits); multi-sided business models (i.e., multiple groups interact via an intermediary); monopoly or oligopoly of certain business models; and volatility because of easier entry into the markets and rapidly changing technology.[11] In recent years, a number of jurisdictions have focused on the taxation of certain digital activities and markets, which has led to contentious debates between countries who seek and/or have imposed taxes on digitalized businesses and those that seek to forestall such efforts.

What Are These New Pieces: Common Characteristics of Digitalized Businesses

Traditional brick and mortar stores and face-to-face communication or interactions have given way to digital technology. Most consumers choose the convenience of digital platforms to socialize, share personal news and information and/or shop for items ranging from necessities to luxury items and everything in between. Consumers can make purchases and complete transactions all from the comfort of their homes and have products delivered directly to their doorstep within a matter of hours or a few days. Because of the advances in information and communication technology, digitalized companies can operate different lines of business and reach a significantly broader scale of consumers (than a traditional brick and mortar) all the while surmounting vast global distances to complete transactions.[12] As a result of digital technology, companies have developed digitalized business models in support of these digital markets.

Digitalization has intensified the capacity of MNEs in various industries to locate segments of their production process in different countries across the globe while expanding its access to consumers worldwide.[13] As a result, MNEs have significantly broadened their commercial reach and global customer base via remote technology irrespective of the end users' locale or the MNE's physical headquarters.[14] Neither time nor distance can impede a digital transaction, and, thus, digitalized businesses can achieve "operational scale without local mass"—that is, digitalized businesses can significantly impact the economic life of a jurisdiction without or with limited physical presence in a country.[15] Digitalized businesses have the following key characteristics in common:[16]

Reliance on Intangible Assets:

Digitalized MNEs rely on intangible assets (primarily, intellectual property that the MNE owns or leases from a third party), which play an important role in their firm value and output growth.[17] With emphasis on intellectual property assets, MNEs use software and algorithms to support vital functions of their business models such as platforms and websites.[18] Accordingly, whether the MNE controls or manages its intangible assets significantly impacts the tax jurisdiction of its profits.[19]

Data and User Participation:

Digital companies have increasingly used data collection and analysis to develop their product offerings and services.[20] Data use, collection and analysis is central to a digital MNE's business model and a key component of its decision-making process.[21] MNEs that analyze comprehensive datasets from their global customer base for key insights into consumer needs, operations, product development and marketing activities could potentially translate this information into real dollars and profitability.[22] For example, digitalized businesses can concentrate certain online advertisements to specific user groups through data collection and analytics.[23]

Digitalized businesses have increasingly used data from user participation to forecast customer demands and market trends. In general, user participation is categorized as either active or passive. In passive user participation, the company collects the users' data on their preferences and behaviors without direct activity on the part of the users to enter information, e.g., cookies, which continue to collect browsing activity even if the user has exited the company's platform.[24] In active user participation, the users' intentional action creates the data, which is restricted by the information the user chooses to share.[25] For example, a user bookmarks a page, rates a product, uploads photos or videos ("user-generated content"), posts reviews, adds friends, creates communities and engages in networking online (socially or professionally).[26] Users may actively transfer their information for goods and/or services in return, e.g., email services or digital entertainment.[27] User-generated content such as reviews aids other platform users in the selection of goods or services and helps build the trust level in the platform and brand itself.[28] Active participation forms the basis of social networks as users add friends, attract other users, form communities and network, and thus, enables the platform's data to grow exponentially and results in increased profitability.[29]

New Pieces, New Rules: The Focus on Selected Markets in the Digital Economy

In recent years, a number of jurisdictions have cited certain user-based, digital activities and markets from which MNEs derived revenue in these countries in deciding to either propose or pass legislation to tax the revenue. The business revenue models of such markets include online advertising, intermediation services, multi-sided marketplaces and data transfer services.[30] Online advertising targets and delivers marketing messages to consumers via the internet.[31] For example, search results or webpages include advertising; a digital platform provides free or discounted content to users in return for viewing advertisements; advertising is provided via mobile devices depending on the user's locale or other factors; and social media websites grow their online community and then generate revenue from this audience through advertising.[32] Meanwhile, data transfer services collect user behavior data for sale or resale primarily for advertising purposes or customized market research such as data brokers and data analytics companies.[33]

Online intermediation services allow users to sell services or communicate with other users on their digital platforms for a fee.[34] Examples include financial services such as brokerages, consulting services, travel agencies, business to business services that act as online intermediaries for web hosting, payment processing, platform access, and social networking and dating websites.[35] Online marketplaces are multi-sided platforms where users can sell tangible goods and/or services for a fee.[36] For example, users purchase or rent digital content such as e-books, videos, apps, music, games. Online retailers sell tangible goods or virtual items; online gaming; subscription fees for digital content such as news, video-streaming, music and software services such as anti-virus software, data storage, customer service, and the license of online content and technology such as publications, journals, cloud-based systems, software, algorithms and artificial intelligence systems.[37]

Specifically, the OECD has identified two digital business categories that have been of particular interest to market jurisdictions for international tax purposes—automated digital services and consumer-facing businesses. Automated digital service businesses provide digital services on a standardized basis to a large customer base or users in multiple jurisdictions throughout the world remotely with minimal or no physical presence.[38] Examples of such business models include "online search engines; social media platforms; online intermediation platforms…; digital content streaming; online gaming; cloud computing services; and online advertising services."[39] Therefore, certain MNEs can generate significant revenue in an automated and standardized basis (not only from sales, but also through the monetization of data) by harnessing customer and user interactions, users' contributions of data and content, and network effects.[40]

Consumer-facing businesses generate their revenue from the sale of consumer products and services to individuals for personal use (i.e., not professional or commercial purposes).[41] Consumer-facing business models include businesses that generate revenue from selling goods and services directly to customers or indirectly to customers via third party resellers or intermediaries, and licensing rights of trademarked consumer goods or a consumer brand. Examples of consumer-facing businesses include "personal computing products (e.g., software, home appliances, mobile phones); clothes, toiletries, cosmetics, luxury goods; branded foods and refreshments; franchise models…; and automobiles."[42] A number of countries have focused on these user-based activities between their residents and large U.S. technology companies as a source of potential and much needed tax revenue.

III. PRESENT LAW — NEXUS AND ALLOCATION OF PROFITS: TOO MANY PLAYERS COMPETING FOR THE SAME PRIZE

International tax law has developed widely accepted principles, which countries have, until recently, followed when conflicts arose between jurisdictions on the issue of taxing authority.[43] Domestic tax law, treaties and other international law instruments govern the tax treatment of cross-border transactions. However, many of these authoritative sources (and their underlying principles) were drafted well before the digital economy of today during a time when cross-border transactions were labor intensive and involved only tangible assets.[44] In general, current international tax law attaches a taxing right to the locale where an MNE derives profits from a physical presence within the jurisdiction.[45] Businesses today, however, have the technological capability to sustain and actively participate in the economy of multiple market jurisdictions (i.e., jurisdictions where the consumers are located rather than the supply or production side) without an actual local physical presence.[46] Inherent from these technological advances, digitalization has challenged two fundamental principles in the taxation of cross-border transactions, i.e., the traditional notions of nexus and profit allocation based on the arm's length principle.

Nexus

Nexus is used to determine whether a country has jurisdiction to tax a non-resident entity. A tax jurisdiction may impose tax on MNEs who have sufficient nexus, or connection, with the country. Nexus can be based on the MNE's nationality (a connection between the MNE and the country), or can be territorial (a connection between the relevant conduct and the country, i.e., the country where the conduct subject to tax occurs).[47] Most tax treaties provide that the country of residence has the exclusive right to tax an MNE's business profits unless the MNE has nexus—carries on a business—through a *permanent establishment* in another jurisdiction (source country).[48] In general, nexus is established if the MNE has a level of physical presence in the tax jurisdiction via a "fixed place of business" or the actions of a "dependent agent."[49] For example, an entity that manufactures or maintains retail stores or runs material operations such as distribution, inventory management and marketing (brick and mortar) in a foreign country has a permanent establishment therein.[50] However, a

U.S. company that exports goods to a country abroad and does not otherwise engage in activities within that foreign country is not subject to tax—that is, the company has no permanent establishment to give rise to an imposition of tax on its profits.[51] Likewise, the actions of a foreign MNE that merely exports goods to a country and does not otherwise manufacture or distribute these goods via a local facility should not give rise to nexus in that country.[52] Thus, under current law, nexus attributes taxing rights to the country where an MNE physically conducts its income-producing activity. As such, the current definition of nexus does not necessarily capture the income generated by MNEs through digital activities.[53]

Allocation of Profits

If a jurisdiction establishes nexus, then sourcing rules must be applied using the "arm's length principle"[54] to determine the amount of an MNE's income allocated to that country for tax purposes. A country determines the amount of source-based taxes on its share of the MNE's profits subject to taxation by where the MNE conducts its activities or where its property is located.[55] A tax jurisdiction applies the arm's length principle to the business profits of a resident taxpayer or business profits attributable to a non-resident taxpayer's permanent establishment by analyzing the factors of relevant transactions that materially contribute to the MNE's profits (e.g., MNE's functions, assets and risks).[56] For U.S. tax purposes, whether income is U.S. source or foreign source is ascertained by several factors including the payor or recipient's nationality and the location of the entity's assets or activities that produce the income.[57] For example, U.S. tax law provides that effectively connected income from an MNE's physical presence or assets used in the United States is subject to U.S. tax.[58] MNEs with nexus in multiple jurisdictions must determine the amount of income allocated, and therefore, subject to tax on a country by country basis.

Residence-based taxes include income taxes based on a person's citizenship, nationality or residence.[59] Until recently, countries resolved conflicts over tax jurisdiction that could result in double taxation through bilateral tax treaties or legislation, which allowed MNEs to claim foreign tax credits for taxes paid to another jurisdiction.[60] In response to the digital economy, a growing number of countries have argued that destination should serve as the basis to determine the appropriate market jurisdiction with taxing rights to certain income.[61] MNEs are no longer limited by physical boundaries and can reach their consumers or provide services in countries where the end user resides. Specifically, taxing rights for cross-border activities in the digital age should be allocated among jurisdictions based on where the economic activities and value creation occur rather than physical presence.[62]

Direct Tax Issues

The OECD has identified key tax policy issues in direct taxation arising from the digital economy including nexus, data and characterization. First, digital technologies have enabled MNEs to access consumers and provide goods and services with relative ease anywhere and at any time in the world. Digital technology has significantly changed the way MNEs perform activities such as market research, marketing and advertising, and customer support by improving the performance of remote activities; increasing the speed of information collection, processing and analysis in cross-border activities; and capitalizing on access to innumerable consumers without the limitation of physical boundaries.[63] MNEs no longer require a local physical presence or personnel to engage in transactions with customers and generate profit in multiple jurisdictions.[64]

Moreover, business models that promote continuing interactions with customers, e.g., websites that enable customers to rate and review products or services, creates network effects that can exponentially increase consumer traffic and the value of the website.[65] A "participative networked platform" where users provide their own content, e.g., Facebook, YouTube, TikTok, increases value in a cyclical fashion as new users join or existing users add more content, which subsequently attracts more users leading to even more content.[66] In light of the prevalence and astronomical growth in technology among businesses that formerly relied on brick and mortar locations, nations have questioned whether the current nexus rules (in tax treaties and domestic tax laws of nonresident entities) should be redefined to reflect the impact of digitalization—little to no physical presence, more valuable intellectual property, increased network effects between customers—and help alleviate the revenue strain experienced by governments worldwide.[67]

Second, digital technology functions without physical boundaries, and, as such, it has allowed businesses to collect, extract and analyze consumer data at unprecedented levels. MNEs, which more often than not operate as multi-sided business models[68] in today's digital economy, can collect user data proactively (i.e., the business requests or requires consumers or users to furnish their information) or reactively (i.e., the consumers or users control the nature and amount of information they submit to the business).[69] MNEs can then sell the user data or use the collected data to add significant value to their operations by customizing offerings, developing products and services and targeting advertisements that align with the data, analyzing results in real-time, streamlining the decision-making process.[70] However, the advantages are not without issues as a number of countries have passed data privacy and protection laws to protect consumers' private data while challenges abound in tracing the data source and allocating profits for tax purposes.[71] As a result, nations have questioned the current nexus rules, valuation and income characterization as these pertain to data—that is, whether an MNE's data collection creates nexus in a jurisdiction where it has no physical presence; how to attribute value to data that MNEs generate through digital goods and services (in essence, a byproduct of digital transactions); and how to characterize an MNE's supply of data for tax purposes.[72]

Finally, the new business revenue models[73] have raised issues about the characterization of certain payments for digital products or delivery of services[74] under tax treaties and domestic law.[75] Specifically, whether jurisdictions characterize these payments as royalties, technical service fees or business profits[76] substantially impacts the treatment for tax purposes. For example, under current international tax law, a jurisdiction imposes taxes on business profits that are attributable to a permanent establishment within the country whereas royalties may be subject to a withholding tax in the payor's country.[77] Accordingly, nations have questioned whether the existing character of income rules, which may produce different tax results for essentially similar transactions, sufficiently captures the reverberating tax effects of the digital economy. The character of income has significant implications not only for purposes of determining the tax treatment of such income but also the allocation of taxing rights between multiple jurisdictions, and of course, nexus.[78] With growing sentiment among nations that certain technology companies must pay their "fair share" of taxes and mounting pressure for government agencies to raise revenue, certain countries declined to wait while nations deliberate and negotiate a consensus, and instead, opted to proceed with self-help measures in the form of digital services taxes.

IV. DIGITAL SERVICES TAXES: PLAYERS DECLINE THE STATUS QUO

Certain countries have taken unilateral measures and imposed a digital services tax on MNEs in certain sectors of the digital economy. Countries have argued in frustration over the global right to tax the profits of MNEs who reach "operational scale without local mass" in their jurisdictions and assert that revenue should be reallocated to the jurisdictions where their customers reside for tax purposes. Countries further argue that because their residents increase the value of the MNEs' business models by contributing content and reviews, purchasing goods and more, these countries have the right to impose digital services tax on certain MNEs.[79] Indeed, some countries have proposed, announced or implemented digital services taxes on the gross revenue of MNEs who reach a requisite level of activity within each country's jurisdiction albeit via digital technology to warrant the countries' assertion of the tax.[80] However, these unilateral measures may impair the international tax regime by their emphasis on non-income taxes, which are not creditable nor subject to tax treaties.[81] Meanwhile, other countries contend that DSTs undermine existing international tax policy and target a disparate number of MNEs who have digital transactions and/or online activities with businesses or consumers in other countries without physical presence therein.[82] Specifically, the U.S. argues that digital services taxes disproportionately target large U.S. technology MNEs (i.e., GAFA), and consequently, impacts U.S. commerce.[83]

For example, the Office of the U.S. Trade Representative ("USTR") investigated the following countries that have adopted a digital services tax ranging from 2% to 10% and generally based on minimum revenue thresholds from digital activities for covered services such as online intermediary or advertising services, online marketplaces, digital interface services and social media: Austria, France, India, Italy, Spain, Turkey, United Kingdom.[84] The following countries are considering a DST: Brazil (1 to 5%), Canada (3%), Czech Republic (7%) and the European Union (3%).[85] As countries grapple with the effects of the pandemic, more countries will certainly look to the digital economy as a source of untapped revenue. In an effort to cease current and prevent future unilateral tax measures that could lead to double taxation, potential animosity and retaliatory responses between jurisdictions, the OECD has developed a "unified approach" under Pillar One to address issues concerning nexus and the allocation of taxing rights. A significant part of this agreement requires jurisdictions to remove all digital services taxes and other relevant similar measures on "all companies" (suggesting not only the companies that are in-scope).[86] Moreover, the jurisdictions must pledge that they will not introduce such unilateral measures in the future.[87] Interestingly, although the United States at the federal level has vehemently opposed digital services taxes as targeting U.S. technology companies, certain states within the union are considering imposing a digital tax on companies (e.g., digital advertising, social media advertising, sale of consumer data), which in and of itself can raise a whole host of legal, administrative and economic issues if not properly designed.[88]

V. OECD PILLAR ONE: MANY PLAYERS UNITE AND COLLABORATE FOR THE GOOD OF THE GAME

On October 12, 2020, the OECD issued its Report on the Blueprint of Pillar One[89] as part of its continued effort in BEPS Action 1[90] to modernize international tax to better align with the changing business models of today's digital economy.[91] As a result of the advances in digital technology, business models have emerged that leverage this technology and enable MNEs to actively participate and generate profits in market jurisdictions without an actual local physical presence.[92] In light of digitalization's resounding impact on the world's economy, a key purpose of Pillar One is to provide a framework toward global agreement in adapting the existing rules of nexus and profit allocation in favor of expanding the taxing rights of market jurisdictions.[93] In essence, Pillar One proposes a paradigm shift from existing fundamental international tax principles to a new taxing right that redefines nexus rules and gives *market* jurisdictions the right to tax an allocated portion of profits generated by in-scope companies. Pillar One consists of three primary elements—that is, Amount A,[94] Amount B,[95] and dispute prevention and resolution mechanisms[96] to bolster tax certainty. Generally speaking, Amount A is the allocated portion of the in-scope MNE's global profit apportioned to the market jurisdiction that exceeds a routine return of baseline activities for marketing and distribution (Amount B).

On July 1, 2021, the OECD/G20 Inclusive Framework reached a historic agreement toward finalizing Pillar One's broad architecture and released its Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy.[97] On October 8, 2021, the Inclusive Framework issued a revised statement, which includes a detailed implementation plan of this agreement.[98] As of November 4, 2021, 137 member countries have agreed to key components of Pillar One and further call for a Multilateral Convention through which countries will implement Amount A.[99] A consensus between most of the Inclusive Framework members is a monumental step toward international tax reform, and was likely no small feat given the varying interests, sense of fairness and political objectives of each country. International tax inherently depends on multilateral cooperation between countries, and the OECD has been pivotal in the establishment of the Inclusive Framework and ongoing negotiations for international tax reform.[100] The OECD anticipates that a Multilateral Convention (through which Amount A is implemented along with changes in domestic law as needed to effectuate the new taxing rights[101]) will be opened for signature in 2022 and Amount A will come into effect in 2023.[102] To provide insight and a deeper understanding of the recent evolution of Pillar One toward a consensus-based solution, the following subsection discusses and compares Amount A's key transformative elements (scope, nexus, reallocation of income, revenue sourcing) of (1) the proposals under the Pillar One Blueprint to (2) the agreement reached (and implicitly the concessions made) in the OECD's Statement on a Two-Pillar Solution for the new taxing right. The remaining subsections then briefly discuss Amount B, Tax Certainty, Implementation and Timeframe. While the OECD statement builds and resolves key issues in the Blueprint proposals, it also highlights significant differences that further underscores the magnitude of this agreement between most of the Inclusive Framework members.

Amount A

Scope:

Amount A pertains to the new taxing right that *market* jurisdictions can impose on the deemed residual profit of an MNE group (or segment, as applicable).[103] This new taxing right is an "overlay" to current nexus rules and profit allocation.[104] To determine Amount A, a formula is applied to allocate a share of an MNE's deemed residual profits to respective market jurisdictions who under Pillar One's new nexus rules have the right to tax the allocation. Importantly, the new taxing right applies only to MNE groups within the defined scope of Amount A. The Pillar One Blueprint used activity tests (in-scope activities) and threshold tests to determine scope, whereas the OECD Statement shifts away from determining scope by activity and instead bases scope on the profitability of the MNEs.

Pillar One Blueprint: Activity Tests — In-scope activities are divided into two categories, i.e., automated digital services and consumer-facing businesses.[105] The purpose (and tax policy objective) of the activity tests is to capture the income of MNEs who participate in the economy of a market jurisdiction remotely in a "sustained and significant manner" including targeted marketing, collection and use of data without a commensurate taxable presence (i.e., local physical presence) under present law.[106]

Automated digital services are generally defined as services that are automated (after set-up, the service requires minimal human involvement by the service provider) *and* digital (via the internet or electronic network).[107] Moreover, Pillar One provides a positive list of automated digital services and a negative list of **non**-automated digital services (therefore, excluded) for clarification.[108] If an activity does not qualify for either list, then the conditions under the general definition is applied.[109] It is important to note that although a service may not be considered an automated digital service under the activity test pursuant to Pillar One's definition, the service may still be in-scope as a consumer-facing business [110]

Consumer-facing businesses are generally defined as businesses that produce revenue from the sale of goods and services of a type commonly sold to consumers, including indirect sales through intermediaries (such as businesses that operate via brokers, third party distributors or other intermediaries) as well as through franchising and licensing.[111] Furthermore, a consumer-facing business is an MNE that (1) owns the consumer product or service and holds the rights to the connected intangible asset including franchisors and licensors or (2) a retailer or contractual party of the consumer.[112] Consumer-facing businesses do not include third party MNEs with no customer relationship, e.g., manufacturers, wholesalers and distributors.[113] The Blueprint provided that certain industries are excluded (out of scope) from Amount A such as certain natural resources; certain financial services; construction, sale and leasing of residential property; and international air and shipping businesses.[114]

Threshold Tests — The Pillar One Blueprint includes two threshold tests, i.e., the global revenue test and de minimis foreign in-scope test.[115] An MNE is in-scope of Amount A only if its consolidated revenue and its foreign in-scope revenue (in other words, the MNE's in-scope revenue earned outside of its domestic market) exceeds certain thresholds. The gross revenue test permits exclusion of "smaller" MNEs from Amount A whose annual consolidated revenue as reported on the MNE's consolidated financial statements is below the threshold and thereby hones in on the largest MNEs with residual profit for reallocation.[116]

The de minimis foreign in-scope test applies to MNEs that surpass the gross revenue threshold, but have only minimal foreign-source revenue that is in-scope.[117] First, an MNE determines whether the total amount of its in-scope revenue from automated digital services and consumer facing business activities exceeds the threshold under this test.[118] MNEs who earn less than the threshold are exempt.[119] Second, the MNE determines whether this in-scope revenue above the threshold amount is derived from foreign in-scope activities — that is, outside the MNE's domestic or home market.[120] Accordingly, the purpose of the de minimis test is to exclude MNEs with a small amount of foreign in-scope revenue because the profits reallocated under Amount A to market jurisdictions would be negligible.[121] In other words, this test excludes an MNE whose revenue is primarily from its domestic market from the scope under Amount A.[122] The Blueprint also provided that certain industries are carved-out[123] and excluded from the reach of Pillar One such as construction, extractives, financial services, international airline and shipping, and sale and leasing of residential property.[124]

Understandably, many jurisdictions were put off by the complexity of the proposed scope rules in the Blueprint, including segmentation by business lines or geography,[125] and recognized the difficulty of defining in-scope automated digital services and consumer-facing businesses. Furthermore, the U.S. criticized these proposals as discriminatory toward U.S. multinational technology companies, which the U.S. views as the direct targets of these measures.

***Two-Pillar Solution Statement*:** Threshold for Large Companies and Profitability — The OECD Statement issued on October 8, 2021 provides the Inclusive Framework's agreement toward seismic changes in global tax policy and fundamental international tax principles (i.e., nexus based on a physical presence establishing the right to tax) that have prevailed over the last one hundred years. The OECD Statement describes a phased approach whereby MNEs with global turnover exceeding twenty billion euros and a profit-to-revenue ratio (i.e., profit before tax divided by revenue on a book basis) greater than ten percent calculated via an "averaging mechanism" are considered in-scope companies.[126] Depending on the successful implementation of Amount A (including dispute prevention and resolution mechanisms), the global threshold is then expected to be reduced to ten billion euros after a relevant review period,[127] thus substantially increasing the number of in-scope companies.

The OECD Statement indicates a drastic shift away from determining scope by types of businesses that are seemingly industry specific (automated digital services or consumer-facing) to instead focusing on profitability and size.[128] Simply put, the "largest and most profitable" MNEs should pay their share of taxes in the jurisdictions where the MNEs sell their goods or services regardless of actual physical presence in the market jurisdiction, industry classification or business model. Certain businesses derive a significant amount of their profits from intangible assets, which do not require a physical presence in market jurisdictions to generate these profits. Accordingly, Amount A should enable market jurisdictions to tax the profits of in-scope businesses. In stark contrast to the Blueprint, the Statement carves-out only extractive industries (i.e., natural resources) and *regulated* financial services as exclusions from Amount A.[129] Commentators have reported that approximately one hundred companies are in-scope under this "largest and most profitable" standard.[130] This change in methodology is based on a proposal put forth by the Biden Administration[131] to limit the scope to the "largest and most profitable" companies irrespective of their activities. The U.S. also sought to minimize the exclusions from Amount A. In recent years, the U.S. has vigorously argued that previous proposals (regarding automated digital services and consumer-facing businesses) and digital services taxes discriminate against U.S. MNEs—in particular, the behemoth U.S. technology companies of Amazon, Alphabet, Apple, Facebook and Microsoft.

Segmentation — Segmentation (i.e., identifying and segmenting in-scope businesses) was a key open issue[132] during the Blueprint stage and contributed to the potential complexity of the proposal. The Statement, however, indicates that segmentation will occur only in "exceptional circumstances" and if a segment itself meets the revenue and profitability scope thresholds[133] based on the segments disclosed in the MNE's financial statements.[134] In other words, an MNE that does not meet the revenue and profitability thresholds on a consolidated basis may, nonetheless, be subject to Pillar One if a segment itself exceeds the thresholds. The OECD found that MNEs operate digital and non-digital business lines and therefore, segmentation is required to determine the profit associated with the digital business lines. Pursuant to U.S. Generally Accepted Accounting Principles ("GAAP"), publicly traded companies are required to report a segment that accounts for ten percent of their total revenue, total profits or total assets.[135] International Financial Reporting Standards ("IFRS") follows similar reporting rules for segments.[136]

Nexus:

The special nexus rule to determine the market jurisdictions' new taxing right under Pillar One is a significant departure from existing law based on physical presence. The sole purpose of the new nexus rules is to determine a market jurisdiction's taxing right to an allocation of Amount A.[137] The new nexus rules are a standalone provision and do not alter nexus for other tax or non-tax purposes—that is, jurisdictions cannot use the new nexus rules to establish nexus for any other taxes, non-tax purposes or customs duties.[138] The new nexus rules are based on indicators to evaluate whether an in-scope MNE has a significant and sustained engagement with market jurisdictions such that a portion of the group's profits should be reallocated to such countries under Amount A.[139]

Pillar One Blueprint: The proposed nexus rules contained in the Blueprint distinguished between nexus for automated digital services and nexus for consumer-facing businesses. The Blueprint determines nexus for automated digital services solely by applying a market revenue threshold to the MNE group's in-scope revenue (e.g., revenue in excess of EUR X million per year).[140] Because the very nature of automated digital services enables MNEs to provide these services remotely to a market jurisdiction in a significant and sustained manner without a physical presence, the Blueprint provides that only the revenue threshold test should be required to determine nexus for automated digital services.[141] In contrast, the Blueprint places a higher nexus standard for consumer-facing businesses because their ability to engage remotely in market jurisdictions is less evident.[142] The Blueprint determines nexus for consumer-facing businesses by applying a market revenue threshold to the MNE group's in-scope revenue (e.g., revenue in excess of EUR X million per year) *and* a "plus factor" beyond market revenue in a jurisdiction to determine nexus.[143] The Blueprint identifies examples of plus factors such as a subsidiary or permanent establishment that carries out activities related to in-scope sales in the market jurisdiction.[144] Moreover, if an MNE group segments its business lines to determine Amount A, then nexus is determined at the segment level.[145]

Amount A — Quantum — The Blueprint describes a complex three-step formula (that does **not** apply the arms-length principle) to calculate the Amount A quantum, which can be applied either through a profit-based approach (e.g., Amount A tax base as an absolute profit of EUR 10 million) or a profit-margin approach (Amount A tax base as profit before tax to revenue of 15%).[146] Step 1 is a profitability threshold based on a profit before tax to revenue ratio, which is intended to isolate the residual profit subject to reallocation. Step 2 is a reallocation percentage used to identify the allocable tax base, i.e., a fixed percentage share of residual profit (actual profits less the profitability threshold) allocated to the market jurisdictions. Lastly, Step 3 employs an allocation key based on locally sourced in-scope revenue to distribute the allocable tax base among the market jurisdictions with nexus.[147] The Amount A tax base is calculated using profit before tax from the MNE group's consolidated financial statements prepared under IFRS or GAAP that produce equal or comparable outcomes to IFRS.[148] The following simplified formula of Amount A from the OECD provides insight into its calculation under the Blueprint and OECD Statement as well.[149]

Tax Revenue Change in Jurisdiction A equals:

A		B		C		D		E		F
Global residual profit in-scope	x	Reallo-cation %	x	(Jurisdiction A Share of destination based sales	x	Tax rate applied by Jurisdic-tion A on received profit	-	Share of residual profit in Jurisdic-tion A	x	Rate of) double tax relief in Jurisdic-tion A

Amounts C and D pertain to the tax revenue a country receives because of the reallocation of residual profit, whereas E and F pertain to the tax revenue a country loses in the reallocation.[150]

***Two-Pillar Solution Statement*:** For the purpose of determining nexus, the OECD Statement pivots from the Blueprint's distinction between automated digital services and consumer-facing businesses (e.g., plus factors) to only a threshold test based on the sales of an MNE within the market jurisdiction.[151] The Statement provides a new special purpose nexus—that is, a market jurisdiction is deemed to have taxable presence — nexus — when an in-scope MNE derives at least EUR 1 million in revenue from that market jurisdiction.[152] In other words, a market jurisdiction can impose tax on an in-scope nonresident company if it meets the EUR 1 million threshold. Therefore, a portion of the MNE's residual profit (Amount A) will be allocated to that market jurisdiction. This new special nexus that relies on consumer activities in market jurisdictions is a drastic departure from traditional international tax rules for nexus based on physical presence. For smaller jurisdictions with gross domestic product lower than EUR 40 billion, this threshold is lowered to EUR 250,000 in revenue.[153] This lower revenue threshold supports the argument that smaller economies may require different thresholds. The special purpose nexus applies solely to decide whether a market jurisdiction is entitled to the Amount A allocation and cannot otherwise establish nexus for other tax purposes.[154]

Amount A — Quantum — Once nexus is established for an in-scope MNE, the quantum of Amount A allocated to market jurisdictions (that possess the special nexus) is twenty-five percent of residual profits, and therefore, effectively places a floor on Amount A.[155] The Statement defines residual profit as profit in excess of ten percent of the MNE's revenue (on a total or segmented basis) based on financial accounting income.[156] Furthermore, Amount A will be allocated to market jurisdictions via a "revenue-based allocation key."[157] It is important to note that an MNE group's financial statements with a limited number of book-to-tax adjustments will be a key determinant of scope and applying Amount A.[158] Either the exemption method or the credit method will be used to provide relief from double taxation of profits allocated to a market jurisdiction under Amount A.[159] Otherwise, two jurisdictions (residence jurisdiction under existing tax rules and market jurisdiction via the new taxing right) could subject one taxpayer to tax on the same income in Amount A.[160] Where an in-scope MNE already has residual profits taxed in a market jurisdiction, a safe harbor mechanism will cap the Amount A quantum allocated to the market jurisdiction.[161]

Revenue Sourcing:

The revenue sourcing rules determine which specific market jurisdiction the revenue is derived from for purposes of applying scope, nexus and the Amount A allocations. The sourcing rules attempt to balance the need for accuracy with the in-scope MNEs ability to comply without significant compliance costs.

Pillar One Blueprint: The Blueprint provides detailed revenue sourcing rules that distinguish in treatment between automated digital services and consumer-facing businesses. These two broad categories are then further differentiated between business models and ultimately by revenue streams. The specific sourcing principles for each in-scope activity is supplemented by a hierarchy of indicators that the MNE can use to locate the source jurisdiction,[162] e.g., geolocation, IP address, viewer's billing address and mobile country code of viewer's phone number.[163] The Blueprint also provides guidance for documentation that the MNEs maintain information at the systemic level data via a robust internal control framework (not a record of all data points for every transaction's indicators).[164] The MNE's approach to revenue sourcing and its supporting documentation is subject to review by tax administrations.[165]

Two-Pillar Solution Statement: In contrast to the Blueprint's sourcing rules based on automated digital services and consumer-facing businesses (indicators and hierarchy of methods), the OECD Statement provides that revenue will be sourced to the end market jurisdictions — that is, the location where the end users use or consume the goods or services.[166] Detailed source rules will be developed for categories of transactions to facilitate this broad principle.[167] During this challenging time of increased competition for tax revenue, these sourcing rules may become a point of contention between tax authorities as each vies for a larger piece of the pie. Moreover, the in-scope MNEs must use a "reliable method" to apply the sourcing rules based on each MNE's own facts and circumstances.[168]

Amount B

Amount B would apply to MNEs with existing traditional nexus (i.e., physical presence, thereby, excluded from the new taxing right under Amount A) in the market jurisdiction.[169] The purpose of Amount B is to standardize intercompany pricing of related party distributors that perform "baseline marketing and distribution activities" in the market jurisdiction.[170] The distributors perform such activities in a manner that is consistent with the arms-length principle.[171] The framework of Amount B would assign a fixed return for certain baseline distribution and marketing functions.[172] In other words, Amount B is an allocation based on the arms-length principle to in-country marketing and distribution activities. The OECD Statement provides that the application of Amount B will be simplified and streamlined and sets a different timetable from Amount A — that is, the end of 2022 — to finalize this technical work.[173]

Tax Certainty

Dispute prevention and resolution mechanisms (mandatory and binding in nature) will be available to in-scope MNEs for issues pertaining to Amount A such as transfer pricing and business profits disputes.[174] Disputes about whether an issue relates to Amount A will be resolved through mandatory and binding arbitration without delaying the substantive dispute process.[175] Although the dispute resolution mechanism is generally mandatory, certain developing countries can instead *elect* this binding dispute resolution mechanism only for issues related to Amount A.[176]

Implementation and Timeframe

The Inclusive Framework released an implementation plan that describes the work required to implement Pillar One.[177] The Inclusive Framework will develop a Multilateral Convention and its Explanatory Statement, which provides a multilateral framework of rules to calculate and allocate Amount A and eliminate double taxation and the processes for administration, exchange of information, and mandatory and binding dispute prevention and resolution.[178] Lastly, the OECD Statement puts forth an aggressive timetable by any standards to implement Pillar One. Critics argue that Pillar One does not accomplish enough for developing countries, does not ensure tax certainty for MNEs and remains overly complex.[179] Although the OECD issued an implementation plan of the Inclusive Framework's agreement on October 8, 2021, anticipates the text of the Multilateral Convention and its Explanatory Statement in 2022, and Amount A's taking effect in 2023, there is still considerable work to flesh out the particulars of Pillar One's framework.[180] Both sides — taxing jurisdictions and MNEs — must grapple with the complexity and impact of Pillar One's resulting changes in domestic tax law and multilateral agreements including the additional costs associated with implementation, compliance, administration and collection.

VI. U.S. TAX POLICY: WHO MAKES THE RULES NOW, AND WHAT IF NO ONE AGREES?

Digital technology and the corresponding success of U.S.-based technology companies have strained U.S. relations with other developed nations that have failed to capitalize on their own technology industry and where the digital economy remains largely untapped.[181] Pillar One can be detrimental to the U.S.'s business interests and tax base because the U.S. is the resident country of the largest technology companies in the world and allows a foreign tax credit. [182] Accordingly, the U.S. (under the prior administration) had originally proposed to the Inclusive Framework an elective safe harbor that would enable MNEs to opt-in for purposes of Pillar One to protect the U.S.'s taxing rights as MNEs' residence country.[183] However, this safe harbor, unsurprisingly, was met with much resistance from other countries.[184] In April 2021, the U.S. under the new administration reversed course from the safe harbor proposal and instead put forth a new proposal for "comprehensive scoping."[185] As proposed by the U.S. Treasury Department to the Inclusive Framework, comprehensive scoping would be based on a revenue threshold and profit margins such that only the "largest and most profitable" MNEs are in-scope under Pillar One irrespective of industry or business model, and therefore, would not solely target U.S.-based digital giants.[186] The purpose of comprehensive scoping would be to ensure that MNEs with the most profit, intangible assets and inclination to shift profits from high-tax to low- or no-tax jurisdictions are in-scope for purposes of Pillar One.[187] Ultimately, as discussed above, the Inclusive Framework appears to have adopted this concept of comprehensive scoping as well as commitment to binding dispute prevention and resolution mechanisms.[188] Although the Biden Administration submitted proposals to the Inclusive Framework that moved Pillar One forward beyond the safe harbor impasse, the Biden Administration's revenue proposals did not address legislative implementation of Pillar One from a domestic tax perspective.[189]

A key element of the U.S.'s ongoing discussions with the Inclusive Framework is the removal of certain countries' unilateral measures that have resulted in heightened trade tensions, particularly the digital services taxes, which the U.S.

views as directly targeted against U.S. technology companies and spurred by the all too obvious political impetus of jurisdictions to increase their tax revenues.[190] The USTR concluded its investigations of digital services taxes in certain countries (i.e., Austria, France, India, Italy, Spain, Turkey and the United Kingdom) and determined that these digital services taxes are "unreasonable or discriminatory and burdens or restricts U.S. commerce."[191] The USTR initially planned to impose a tariff of twenty-five percent on the products of these countries by November 29, 2021.[192] Pursuant to the Inclusive Framework's agreement in Pillar One, the USTR has since terminated actions from its investigations of Austria, France, India, Italy, Spain, Turkey and United Kingdom based on each country's commitment to remove its DSTs.[193] However, the USTR will continue to monitor the removal of DSTs, implementation of the Two-Pillar Solution and associated measures.[194]

The OECD estimates that approximately $100 billion of profit could be reallocated to market jurisdictions pursuant to the new taxing right of Pillar One.[195] As a result, the OECD projects a modest increase in global tax revenues, and more specifically, it estimates that low, middle and high income economies on average will acquire revenue gains,[196] whereas "investment hubs"[197] will forego tax revenues.[198] United States Treasury Secretary Janet Yellen has indicated that Pillar One will be "largely revenue neutral" for the United States because the U.S. "will be on both the receiving and giving end of the proposed profit reallocations."[199] A commentator, however, estimates that Pillar One will cost the U.S. $10.3 billion in revenue per year (i.e., revenue gain of $12.6 billion less $22.9 billion from credit offsets).[200] Another commentator argued that Pillar One's scope requirements (largest and most profitable companies) will "disproportionately impact" U.S. MNEs as well as the U.S. Treasury because these MNEs will pay less to the Internal Revenue Service and more to foreign governments.[201] According to a policy brief from the Oxford Centre for Business Taxation, commentators suggest that Pillar One will impact only seventy-eight of the five hundred largest companies globally.[202] Furthermore, they estimate that the total reallocation for Amount A is $87 billion[203] from these companies, and of which, U.S.-based companies will generate approximately $56 billion; technology companies will generate approximately $39 billion of the total; and the five largest U.S. technology companies (i.e., Alphabet, Apple, Facebook, Intel and Microsoft) will generate approximately $28 billion of the total.[204] Nonetheless, the scope rules described in the OECD Statement will subject more European companies and more businesses across sectors to tax than the Blueprint version.[205]

At the time of writing, Pillar One's implementation may prove challenging in the U.S. Congress as certain members have expressed opposition to its policies, and thus, creates political uncertainty.[206] Because Pillar One will impact existing bilateral treaties, commentators have argued that its implementation will require Congressional support of the Inclusive Framework's Multilateral Convention and potentially a new international tax treaty by Senate ratification (two-thirds majority vote).[207] U.S. Treasury Secretary Yellen has indicated that the current administration is contemplating "alternative means to modify existing bilateral treaties" and Pillar One's new taxing right should generate bipartisan support because it replaces DSTs.[208] Consequently, the U.S. still finds itself in a precarious balancing act as it joins the OECD's efforts to reform international tax via a paradigm shift that aligns with today's digital economy meanwhile resolutely protecting the sizable tax base generated by U.S.-based digital giants.[209]

VII. CONCLUSION

At the time the international tax framework was established a century ago, no one envisioned the technological capabilities of present day (the drafters certainly did not anticipate Facebook, TikTok, YouTube, Instagram and so forth) along with the vast opportunities afforded to businesses as a result. The digital economy has raised a number of issues and challenges in the area of international tax. Because the digital economy relies heavily on intangible assets, the collection and use of data (particularly, personal data), user-generated content and participation, and multi-sided business models, the fundamental international tax concepts of source and residence and/or the character of income are more challenging to apply and increase the risks of base erosion and profit shifting.[210] The OECD and G20 have grappled in more recent years with the fundamental questions the digital economy has raised in terms of source and residence, nexus, and the characterization of income (formerly, widely accepted principles) for international tax purposes. Meanwhile, certain countries have acted unilaterally to impose digital services taxes under mounting pressure to raise tax revenue and a growing sentiment that certain MNEs pay nations their "fair share" of taxes.[211]

The OECD Statement puts forth an aggressive timetable by any standards to implement Pillar One. Pillar One, in essence, proposes drastic departures (a new taxing right, new nexus and reallocation of profits to *market* jurisdictions) from traditional international tax principles toward a much needed evolution of the international framework. Although the OECD provided an implementation plan of this agreement on October 8, 2021 (anticipates a Multilateral Convention in 2022 and effective date in 2023), there is still considerable work to flesh out the particulars of Pillar One's framework, which will reallocate much needed income to market jurisdictions while impacting a relatively small quantity of MNEs. Both sides — taxing jurisdictions and MNEs — must grapple with the complexity and impact of Pillar One's resulting changes in domestic tax law and multilateral agreements including the additional costs associated with compliance, administration and collection. Although the agreement between most members of the Inclusive Framework is a monumental accomplishment, there is still considerable work that remains (including negotiations with the remaining holdout countries) and continued multilateral cooperation required before the "perfect play" manifested in the new taxing right, new nexus and tax allocation rules take effect and enable tax jurisdictions to reap the benefits around the globe.

[1] The miniseries is based on the novel, *The Queen's Gambit*, by Walter Tevis originally published in 1983. *Netflix Orders Limited Series The Queen's Gambit From Scott Frank* (Press release), NETFLIX MEDIA CENTER (Mar. 19, 2019), https://about.netflix.com/en/news/netflix-orders-limited-series-the-queens-gambit-from-scott-frank.

[2] Wikipedia, *The Queen's Gambit (miniseries)*, *at* https://en.wikipedia.org/wiki/The_Queen%27s_Gambit_(miniseries) (last visited December 30, 2021); Judy Berman, *Netflix's Marvelous The Queen's Gambit Is the Kind of Prestige Drama TV Doesn't Make Anymore*, TIME (Oct. 20, 2020), https://time.com/5901699/queens-gambit-review-netflix/.

[3] Wikipedia, *Queen's Gambit*, *at* https://en.wikipedia.org/wiki/Queen%27s_Gambit (last visited December 30, 2021); The Chess Website, *Queens Gambit*, *at* https://www.thechesswebsite.com/queens-gambit/ (last visited December 30, 2021).

[4] Wikipedia, *Gambit*, at https://en.wikipedia.org/wiki/Gambit (last visited December 30, 2021).

[5] The Chess Website, *Queens Gambit*, *at* https://www.thechesswebsite.com/queens-gambit/ (last visited December 30, 2021). Specifically, the opening moves begin with 1. d4 d5, 2. c4.

[6] Kent Babb, *The Pandemic Sparked Interest in Chess. "The Queen's Gambit" Made It Explode*, THE WASHINGTON POST (Nov. 27, 2020), https://www.washingtonpost.com/sports/2020/11/27/queen-gambit-chess-interest/.

[7] The OECD/G20 Inclusive Framework is comprised of approximately 141 countries that have committed to monitoring and peer reviewing the implementation of minimum standards and setting standards required to address tax avoidance from base erosion and profit and shifting. *See* Members of the OECD/G20 Inclusive Framework on BEPS (Updated Nov. 2021) *at* https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf.

[8] For example, the U.S. recently reversed its position on Pillar One as an elective safe harbor and instead agreed to scope based on the "largest and most profitable" countries in exchange for the removal of unilateral measures such as the digital services tax. *See* Part VI, *infra* (U.S. Tax Policy: Who Makes the Rules Now, and What If No One Agrees?).

[9] UNCTAD, *Digital Economy Report 2019* (Sept. 4, 2019), https://unctad.org/webflyer/digital-economy-report-2019.

[10] LOWRY, SEAN, CONGRESSIONAL RESEARCH SERV., R45532, DIGITAL SERVICES TAXES (DSTS): POLICY AND ECONOMIC ANALYSIS (2019), at Pg. 1.

[11] OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report* (Sept. 16, 2014), at 64–74, 143, https://www.oecd.org/ctp/addressing-the-tax-challenges-of-the-digital-economy-9789264218789-en.htm [hereinafter OECD, *Action 1 - 2015 Final Report*].

[12] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 142.

[13] OECD, *Tax Challenges Arising from Digitalization—Interim Report 2018* (Mar. 16, 2018), at 24, 51–52, https://www.oecd.org/ctp/tax-challenges-arising-from-digitalisation-interim-report-9789264293083-en.htm [hereinafter OECD, *Interim Report 2018*].

[14] *Id.*

[15] *Id.*

[16] *Id*.

[17] OECD, *Interim Report 2018*, *supra* note 13, at 24, 52–53.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*
[23] *Id.*
[24] OECD, *Interim Report 2018*, *supra* note 13, at 24, 52–53.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] LOWRY, *supra* note 10, at 1.
[31] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 58.
[32] *Id.* at 64.
[33] LOWRY, *supra* note 10, at 1; OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 64.
[34] LOWRY, *supra* note 10, at 1.
[35] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 64.
[36] LOWRY, *supra* note 10, at 1.
[37] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 64.
[38] OECD, *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy* (Jan. 29-30, 2020), at 10, https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps.htm [hereinafter OECD, *OECD/G20 Statement on BEPS*].
[39] OECD, *OECD/G20 Statement on BEPS*, *supra* note 38, at 10.
[40] OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS* (Oct. 14, 2020), at 19, https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint-beba0634-en.htm [hereinafter OECD, *Report on Pillar One Blueprint*].
[41] OECD, *OECD/G20 Statement on BEPS*, *supra* note 38, at 10.
[42] *Id.*
[43] Joint Committee on Taxation, *Present Law and Selected Policy Issues in the U.S. Taxation of Cross-Border Income*, JCX-51-15, Mar. 16, 2015, at 2.
[44] OECD, *Interim Report 2018*, *supra* note 13, at 167.
[45] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 19.
[46] *Id*.
[47] Joint Committee on Taxation, *U.S. International Tax Policy: Overview and Analysis*, JCX-16R-21, Apr. 19, 2021, at 2 [hereinafter JCX-16R-21].
[48] OECD, *Interim Report 2018*, *supra* note 13, at 168. *See also* Itai Grinberg, *The New International Tax Diplomacy*, 104 GEO. L.J. 1137 (2016), at 1187–1189.
[49] OECD, *Interim Report 2018*, *supra* note 13, at 168.

[50] JANE G. GRAVELLE & DONALD J. MARPLES, CONGRESSIONAL RESEARCH SERV., R45186, ISSUES IN INTERNATIONAL CORPORATE TAXATION: THE 2017 REVISION (P.L. 115-97) (2021), at 6; OECD, *Interim Report 2018*, *supra* note 13, at 168.
[51] GRAVELLE & MARPLES, *supra* note 50, at 6.
[52] OECD, *Interim Report 2018*, *supra* note 13, at 168.
[53] LOWRY, *supra* note 10, at 2.
[54] For a discussion of the arm's-length principle and its decline, *see* Itai Grinberg, *International Taxation in an Era of Digital Disruption: Analyzing the Current Debate*, TAXES (Mar. 2019), at 88–91.
[55] JCX-16R-21, *supra* note 47, at 2.
[56] OECD, *Interim Report 2018*, *supra* note 13, at 168.
[57] I.R.C. §§ 861–865.
[58] JCX-16R-21, *supra* note 47, at 2.
[59] *Id*.
[60] JCX-16R-21, *supra* note 47, at 3.
[61] *Id*.
[62] *Id*.; OECD, *Interim Report 2018*, *supra* note 13, at 167, 169.
[63] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 100.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 99.
[68] *See* Part II, *supra* (New Pieces, New Rules: The Focus on Selected Markets in the Digital Economy).
[69] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 102.
[70] *Id.*
[71] *Id.* at 103.
[72] *Id.* at 99.
[73] *See* Part II, *supra* (New Pieces, New Rules: The Focus on Selected Markets in the Digital Economy).
[74] E.g., commercial equipment, industrial equipment or scientific equipment rentals, cloud-computing payments.
[75] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 99.
[76] *Id.* at 104.
[77] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 106.
[78] *Id.* at 106.
[79] LOWRY, *supra* note 10, at 1.
[80] SCHWARZENBERG, ANDRES B., CONGRESSIONAL RESEARCH SERV., IF11564, SECTION 301 INVESTIGATIONS: FOREIGN DIGITAL SERVICES TAXES (DSTS) (Mar. 1, 2021), at 1.

[81] Reuven S. Avi-Yonah, *A Positive Dialectic: BEPS and the United States*, 114 AJIL UNBOUND 255 (2020), at 258.
[82] SCHWARZENBERG, *supra* note 80, at 1.
[83] *Id.*
[84] *Id*. at 2; *see also* KPMG TAXATION OF THE DIGITALIZED ECONOMY, DEVELOPMENTS SUMMARY, *at* https://tax.kpmg.us/content/dam/tax/en/pdfs/2021/digitalized-economy-taxation-developments-summary.pdf (last visited December 30, 2021).
[85] SCHWARZENBERG, *supra* note 80, at 2.
[86] OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (Oct. 8, 2021), at 3, 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 OECD, *Two-Pillar Solution Statement*].
[87] *Id* at 3, 7.
[88] *See* Jared Walczak, *States Consider Digital Taxes Amidst Conflicting Rationales*, TAX FOUNDATION (May 10, 2021), https://taxfoundation.org/state-digital-taxes/; Ruth Mason and Darien Shanske, *INSIGHT: The Time Has Come for State Digital Taxes*, BLOOMBERG TAX (May 29, 2020), https://news.bloombergtax.com/daily-tax-report-state/insight-the-time-has-come-for-state-digital-taxes-55.
[89] Pillar One is part of the OECD's two-pillar approach to address tax challenges arising from the digital economy. Pillar One focuses on the allocation of taxing rights (in particular, nexus and profit allocation). Pillar Two focuses on a global minimum tax to address issues of base erosion profit shifting where countries have not exercised their taxing right or imposed a low-level of taxation. OECD, *OECD/G20 Statement on BEPS*, *supra* note 38, at 27.
[90] OECD, *Action 1 - 2015 Final Report*, *supra* note 11. For more background on the OECD's work including the Task Force on the Digital Economy, *see* Lilian V. Faulhaber, *Taxing Tech: The Future of Digital Taxation*, 39 VA. TAX REV. 145 (2019); Yariv Brauner, *Thinking Like a Source State in a Digital Economy*, 18 PITT. TAX REV. 225 (2021), at 234–238.
[91] OECD, *Report on Pillar One Blueprint*, *supra* note 40.
[92] *Id.* at 8.
[93] *Id.*
[94] *Id*. at 19–133.
[95] *Id*. at 155–164.
[96] *Id*. at 168–197.
[97] OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (Jul.1, 2021), at 1, https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-

address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.htm.

[98] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 1.

[99] *Id.*

[100] Allison Christians, *BEPS and the New International Tax Order*, 2016 B.Y.U. L. REV. 1603 (2016), at 1609, 1644.

[101] The Task Force on the Digital Economy is expected to develop model rules for domestic law in early 2022. OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 7.

[102] *Id.* at 3, 6.

[103] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 11.

[104] *Id.* at 12.

[105] *See* Part II, *supra* (New Pieces, New Rules: The Focus on Selected Markets in the Digital Economy).

[106] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 20, 22.

[107] *Id.* at 20.

[108] The positive list, which are per se automated digital services includes online advertising services; sale or other alienation of user data; online search engines; social media platforms; online intermediation platforms; digital content services; online gaming; standardized online teaching services; and cloud computing services. While the negative list of non-automated digital services includes customized professional services; customized online teaching services; online sale of goods and services other than automated digital service; revenue from the sale of a physical goods irrespective of network connectivity; and services providing access to the Internet or another electronic network. *Id.*

[109] *Id*.

[110] *Id*.

[111] *Id*. at 21.

[112] *Id*.

[113] *Id*.

[114] *Id*. at 22.

[115] *Id*. at 58.

[116] *Id*.

[117] *Id*. at 59.

[118] *Id*. at 60.

[119] *Id*.

[120] *Id*.

[121] *Id*.

[122] *Id*.

[123] The Inclusive Framework members discussed which industries should be excluded based on the nature, regulation, and existing special tax regimes of the specific industry.
[124] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 47.
[125] The Blueprint provides the following segmentation framework: (1) MNE groups determine their revenue between automated digital services, consumer-facing businesses and out of scope activities; (2) if revenue is less than a certain threshold, then the MNE group calculates that tax base of Amount A on a group basis; and (3) any remaining MNE groups would then apply "segmentation hallmarks" to determine if they must segment by business line or geography. *Id.* at 106–110.
[126] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 1.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] David. D. Stewart & Stephanie Soong Johnston, *The Biden and Wyden Tax Plans*, TAX NOTES TALK (Apr. 21, 2021), https://www.taxnotes.com/tax-notes-talk/podcast/biden-and-wyden-tax-plans/4v9q2; David Morse, *OECD Tax Negotiations Offer Chance for New Approach*, BLOOMBERG TAX (May 21, 2021), https://news.bloomberglaw.com/daily-tax-report/oecd-tax-negotiations-offer-chance-for-new-approach. Economists have found that approximately one-third to one-half of the largest and most profitable companies are U.S. headquartered businesses. Daniel Bunn, *Treasury's Latest Pillar 1 Proposal: A Strategy to Split the Riches or Give Away the Store?*, TAX FOUNDATION (Apr. 14, 2021), https://taxfoundation.org/treasury-pillar-1-proposal/. Presumably, these companies will include "GAFA," if not on a consolidated basis then by segmentation under Pillar One.
[131] Stewart & Johnston, *The Biden and Wyden Tax Plans*, *supra* note 130.
[132] Specifically, questions were raised as to how Pillar One should apply to profitable segments such as Amazon's cloud business. David. D. Stewart and Stephanie Soong Johnston, *The Beginning of the End? An Update on the OECD Tax Reform Plan*, TAX NOTES TALK (Jul. 27, 2021), https://www.taxnotes.com/tax-notes-talk/podcast/beginning-end-update-oecd-tax-reform-plan/76x6s.
[133] *See* Part V, *supra* (Two-Pillar Solution Statement: Threshold for Large Companies and Profitability).
[134] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 2.
[135] FASB ASC 280-10-50-12.
[136] IFRS 8, ⁋ 13.
[137] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 64.
[138] *Id.* at 65.

[139] *Id.*
[140] *Id.* at 64.
[141] *Id.*
[142] *Id.* at 64–67.
[143] *Id.*
[144] *Id.* at 66–67.
[145] *Id.* at 65.
[146] *Id.* at 120.
[147] *Id.*
[148] *Id.* at 98.
[149] OECD, *Tax Challenges Arising from Digitalisation – Economic Impact Assessment: Inclusive Framework on BEPS* (Oct. 12, 2020), at 29, https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-economic-impact-assessment-0e3cc2d4-en.htm [hereinafter OECD, *Economic Impact Assessment*].
[150] *Id.* at 29.
[151] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 1.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.* at 2.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 148.
[161] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 2.
[162] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 71, 81–93.
[163] *Id.* at 73.
[164] *Id.* at 71.
[165] *Id.* at 94–95.
[166] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 2
[167] *Id.*
[168] *Id.*
[169] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 155.
[170] *Id*.
[171] *Id*.
[172] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 156–163.
[173] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 3.
[174] *Id*. at 2.
[175] *Id*.
[176] *Id*.

[177] *Id.* at 6.
[178] *Id*.
[179] Stewart & Johnston, *An Update on the OECD Tax Reform Plan*, *supra* note 132.
[180] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 3, 6.
[181] Brauner, *supra* note 90, at 238–239.
[182] Avi-Yonah, *supra* note 81, at 258.
[183] Stewart & Johnston, *An Update on the OECD Tax Reform Plan*, *supra* note 132.
[184] *Id.*
[185] Stewart & Johnston, *The Biden and Wyden Tax Plans*, *supra* note 130; Morse, *OECD Tax Negotiations*, *supra* note 130.
[186] *Id.*
[187] Stewart & Johnston, *The Biden and Wyden Tax Plans*, *supra* note 130.
[188] *See* Part V, *supra* (OECD Pillar 1, Scope, Two-Pillar Solution Statement).
[189] *See* Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals* (May 2021) available at https://home.treasury.gov/policy-issues/tax-policy/revenue-proposals.
[190] SCHWARZENBERG, *supra* note 80, at 1.
[191] Office of the United States Trade Representative, *Notice of Action in the Section 301 Investigation of Austria's Digital Services Tax* (Jun. 7, 2021), *Notice of Action in the Section 301 Investigation of India's Digital Services Tax* (Jun. 7, 2021), *Notice of Action in the Section 301 Investigation of Italy's Digital Services Tax* (Jun. 7, 2021), *Notice of Action in the Section 301 Investigation of Spain's Digital Services Tax* (Jun. 7, 2021), *Notice of Action in the Section 301 Investigation of Turkey's Digital Services Tax* (Jun. 7, 2021), *Notice of Action in the Section 301 Investigation of the United Kingdom's Digital Services Tax* (Jun. 7, 2021) available at https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes.
[192] *Id.*; Office of the United States Trade Representative, *Notice of Modification of Section 301 Action: Investigation of France's Digital Services Tax* (Jan. 12, 2021), https://ustr.gov/sites/default/files/enforcement/301Investigations/Notice_of_Modification_France_DST_January_2021.pdf.
[193] Office of the United States Trade Representative, *Termination of Actions in the Section 301 Digital Services Tax Investigations of Austria, France, Italy, Spain, and the United Kingdom and Further Monitoring* (Nov. 18, 2021), *Termination of Action in the Section 301 Digital Services Tax Investigation of Turkey and Further Monitoring* (Nov. 24, 2021), *Termination of Action in the Section 301 Digital Services Tax Investigation*

of India and Further Monitoring (Nov. 26, 2021) available at https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes.

[194] *Id.*

[195] OECD, *Economic Impact Assessment, supra* note 149, at 10.

[196] *Id.*

[197] Defined as countries with total inward foreign direct investment position greater than 150% gross domestic product. OECD, *Economic Impact Assessment, supra* note 149, at 18.

[198] *Id.* at 10.

[199] Colin Wilhelm, *Yellen Says Global Tax Plan 'Largely' Revenue Neutral for U.S.*, BLOOMBERG TAX (Jun. 8, 2021), https://news.bloombergtax.com/daily-tax-report/yellen-says-global-tax-plan-largely-revenue-neutral-for-u-s; Stephanie Soong Johnston, *U.S. Pillar 1 Tax Pitch Is Largely Revenue Neutral, Yellen Says*, TAX NOTES TODAY (Jun. 14, 2021), https://www.taxnotes.com/tax-notes-federal/politics-taxation/us-pillar-1-tax-pitch-largely-revenue-neutral-yellen-says/2021/06/14/76l86.

[200] Robert Goulder, *The Price of Tax Reform: Pillar 1 Reduced to the Back of a Napkin*, TAX NOTES (Jul. 1, 2021), https://www.taxnotes.com/featured-analysis/cost-change-pillar-1-reduced-back-napkin/2021/07/01/76qdb.

[201] Bunn, *Treasury's Latest Pillar 1 Proposal, supra* note 130.

[202] Martin Simmler & Michael P. Devereux, *Who will pay Amount A?*, OXFORD CENTRE FOR BUSINESS TAXATION (Jul. 5, 2021), https://oxfordtax.sbs.ox.ac.uk/article/who-will-pay-amount-a.

[203] This amount assumes that the quantum of Amount A allocated to market jurisdictions is twenty percent (from the twenty to thirty percent range) of residual profits. *Id*. For a discussion of Amount A, *see* Part V, *infra* (OECD Pillar 1, Nexus, Amount A — Quantum, Two-Pillar Solution Statement).

[204] Simmler & Devereux, *supra* note 202.

[205] Ruth Mason, *The 2021 Compromise,* 172 TAX NOTES FED. 569 (2021).

[206] William Horobin, *Global Minimum Tax Nears Reality as OECD Sets Model Rule,* BLOOMBERG BUSINESS TAXES (Dec. 20, 2021), https://www.bloomberg.com/news/articles/2021-12-20/global-minimum-tax-nears-reality-as-oecd-sets-out-model-rules.

[207] David Lauder & Doina Chiacu, *Yellen Confident U.S. Congress will Pass Minimum Global Corporate Tax* (Oct. 10, 2021), https://www.reuters.com/business/finance/us-treasurys-yellen-confident-congress-will-pass-global-minimum-tax-2021-10-10/; *see also* David. D. Stewart & Stephanie Soong Johnston, *The End is Nigh: An Update on the OECD Reform Plan*, TAX NOTES TALK (Oct. 19, 2021),

https://www.taxnotes.com/opinions/interview-end-nigh-update-oecd-tax-reform-plan/2021/10/19/7bclt.

[208] *Id*.

[209] Brauner, *supra* note 90, at 238–244.

[210] Joint Committee on Taxation, *Background, Summary, and Implications of the OECD/G20 Base Erosion and Profit Shifting Project*, JCX-139-15, Nov. 30, 2015, at 11.

[211] LOWRY, *supra* note 10, at 1.